Opinions of the Supreme Court of Texas

Fiscal Year 2009

(September 1, 2008-August 31, 2009)

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FISCAL YEAR 2009 OPINIONS

(SEPTEMBER 1, 2008 – AUGUST 31, 2009)

IN THE SUPREME COURT OF TEXAS

NO. 04-0575

COLUMBIA MEDICAL CENTER OF LAS COLINAS, INC. D/B/A LAS COLINAS MEDICAL CENTER, PETITIONER,

v.

ATHENA HOGUE, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ROBERT HOGUE, JR., DECEASED, CHRISTOPHER HOGUE, AND ROBERT HOGUE, III, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued April 12, 2005

JUSTICE WAINWRIGHT, joined by JUSTICE HECHT and JUSTICE BRISTER, dissenting from the denial of Petitioner's Motion to Clarify the Mandate.

This Court's opinion reversed the trial court's judgment for loss of inheritance damages and affirmed the jury's award of exemplary damages. 271 S.W.3d 238, 257. No other damages were challenged in the appeal. After the mandate issued, Petitioner Columbia Medical Center tendered the amount for damages affirmed in our opinion and judgment along with post-judgment interest accrued, but the Hogues, Respondents, refused the tender. The Hogues did not dispute that the damages for loss of inheritance were not recoverable as compensatory damages, but they took the position that, notwithstanding the Court's decision, the inheritance damages should be included in

the statutory calculation of the maximum amount of punitive damages awardable. Columbia Medical filed a motion to clarify the mandate. Today, the Court declines to resolve this dispute.

Due to the variety of factual scenarios and the complexity of the law, the answer to many legal questions is a close call. Here, there is only one answer to the legal issue, and the Court's denial of the motion to clarify should not be read as a rejection of Columbia Medical's position. When the Court reverses a portion of economic damages that form the basis of the cap on punitive damages, it is elementary that the cap must be recalculated and reduced to account for the change. It is also elementary that a reduction in compensatory damages on appeal requires, for example, the parties to recalculate the apportionment of damages among defendants, to reconsider settlement credits, and to recalculate post-judgment interest. We should not need to expend time on such matters, but when necessary, we should answer the question and settle the dispute. Because denying the motion to clarify will likely embroil the parties in further litigation, when this Court has jurisdiction to put an end to the dispute easily,[1] I respectfully dissent from the denial of the motion to clarify.

Our original opinion, issued August 29, 2008, reversed $306,393 awarded as damages to the Hogues for loss of inheritance and affirmed the award of exemplary damages, capped by section 41.008 of the Texas Civil Practice and Remedies Code. 271 S.W.3d at 255, 257. The other amounts

[1] Columbia Medical's motion is properly before us. Texas Rule of Appellate Procedure 18.7 provides authority for this Court to recall or modify its mandate. TEX. R. APP. P. 18.7; *see also O'Neil v. Mack Trucks, Inc.*, 551 S.W.2d 32, 32–33 (Tex. 1997) (recalling the mandate to correct an error related to the remand of the case). Likewise, the motion is timely. Texas Rule of Appellate Procedure 19.4 notes that "the expiration of the appellate court's term does not affect the court's plenary power or its jurisdiction over a case that is pending when the court's term expires." TEX. R. APP. P. 19.4. The Court denied Columbia Medical's motion for rehearing on January 16, 2009. Because the motion for rehearing remained pending in 2009, this case was pending during this Court's 2009 term, and it has jurisdiction over the motion.

awarded as actual damages were not changed. We held that the evidence submitted to the jury was legally insufficient to support an award of damages for loss of inheritance. *Id.* at 255. However, the loss of inheritance damages had been included as economic damages in the trial court's judgment to calculate the maximum amount of punitive damages that could be awarded under the applicable statutory cap. *See* TEX. CIV. PRAC. & REM. CODE § 41.008(b). Under chapter 41, punitive damages were capped at (1) two times any amount of economic damages plus (2) an amount equal to any noneconomic damages not exceeding $750,000. *Id.*[2]

After the Court issued its opinion and judgment, Columbia Medical filed a motion for rehearing, which was denied January 16, 2009. That same day, we issued the mandate. Thirteen days later Columbia Medical issued a wire transfer to the trust account for the Hogues' counsel in the amount of $8,906,385.50, which included payment of compensatory damages, punitive damages, and post-judgment interest at a ten percent rate, compounded annually. Columbia Medical's tender had reduced the amount of damages by properly deducting the loss of inheritance damages from the compensatory damages and adjusting the exemplary damages award accordingly. In other words, Columbia Medical did not include $612,786—two times the amount awarded as loss of inheritance damages—in calculating the exemplary damages cap. The Hogues refused the tender. Columbia Medical thereafter filed a motion to clarify the mandate, asking the Court to clarify that the opinion reversing and rendering the loss of inheritance damages requires the recalculation of the amount of compensatory damages as well as the statutory cap on exemplary damages. The Hogues opposed

[2] Although other subsections of section 41.008 have been amended since the time the case was filed, subsection (b) has remained unchanged since 1995.

the motion, arguing that the motion was untimely or, in the alternative, that the language in the original opinion stating that Columbia Medical "does not challenge the quantum of exemplary damages" indicated that Columbia Medical had waived any right to the recalculation.

Because the Court reversed the damages award for loss of inheritance, those damages are not recoverable as part of a judgment in this case, either directly or indirectly through inclusion in the calculation of the maximum exemplary damages awardable. A reversal of a portion of economic damages requires that the cap on the amount of punitive damages that could be awarded must be recalculated. *See, e.g.*, *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 760 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (recognizing the necessary recalculation of the punitive damages cap when a portion of economic damages is reversed by an appellate court). Columbia Medical excluded those damages from the cap, and the Hogues do not challenge Columbia Medical's math.

Instead, the Hogues essentially contend that Columbia Medical waived the right to recalculation, because Columbia Medical should have been on notice of the issue prior to the issuance of the mandate. The Hogues point to language in the Court's opinion stating that "Columbia Medical does not . . . challenge the quantum of exemplary damages." That sentence refers to Columbia Medical's decision to challenge whether evidence of its mental state supported an award of punitive damages at all, rather than whether the punitive damages award was excessive. *See* TEX. CIV. PRAC & REM. CODE § 41.001(11)(B) (providing one definition of "gross negligence," which supports an award of punitive damages, as an act or omission "of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to

the rights, safety, or welfare of others"). The sentence had no relation whatsoever to the recalculation of exemplary damages that must be undertaken due to our striking of a portion of the economic damages. No party raised an issue with the calculation of the punitive damages cap during this appeal, and the motion to clarify merely seeks confirmation of a necessary mathematical calculation.

And Columbia Medical could not have been expected to raise this issue prior to the Hogues' refusal of the tender of payment after the mandate issued. Columbia Medical had no way of knowing beforehand that the Hogues would interpret the judgment and mandate to attempt to collect damages to which they were not entitled.

The opinion and judgment are clear: The Hogues are not entitled to loss of inheritance damages, either directly or indirectly through an increase of the exemplary damages cap. By denying this motion, the Court is leaving the parties in a quandary. It is not denying that Columbia Medical's position on the punitive damages cap is correct (which it undisputably is). If the Hogues continue to press the issue, at best the failure to address the motion to clarify will force Columbia Medical to continue to litigate this dispute, perhaps by filing a new action, having to pay post-judgment interest that continues to accrue, incurring additional attorneys' fees, and expending time over a matter we settled nearly a year ago. It is possible that this matter will come before the Court again. At worst, the Court's inaction today could result in a more than $612,000 windfall directly contrary to our opinion.

Thomas Jefferson famously said, "Never put off till tomorrow what you can do today." CHARLES D. CLEVELAND, A COMPENDIUM OF AMERICAN LITERATURE 190 (1971). The Court fails

to follow this sage advice. I respectfully dissent from the denial of Columbia Medical's Motion to Clarify the Mandate.

Dale Wainwright
Justice

OPINION DELIVERED: June 19, 2009

IN THE SUPREME COURT OF TEXAS

NO. 04-0641

NICK DIGIUSEPPE D/B/A SOUTHBROOK DEVELOPMENT CO. AND FRISCO MASTER PLAN, PETITIONERS,

v.

ROGER LAWLER, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued October 20, 2005

JUSTICE WALDROP[1] delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE BRISTER, and JUSTICE WILLETT joined.

JUSTICE GREEN filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, and JUSTICE JOHNSON joined.

JUSTICE MEDINA took no part in the decision of the case.

This case involves a claim for specific performance of a real estate purchase contract. After a trial in which the jury found that the seller breached the contract, the trial court rendered judgment in favor of the buyer and ordered specific performance. The court of appeals reversed on the basis that the buyer did not obtain a finding of fact or prove that he was ready, willing, and able to perform. The court of appeals also concluded that the buyer had waived an alternative claim for refund of his earnest money by failing to file a notice of appeal as to that alternative basis for relief. We affirm the judgment of the court of appeals with respect to the claim for specific performance,

[1] Hon. G. Alan Waldrop, Justice, Court of Appeals for the Third District of Texas at Austin, sitting for JUSTICE MEDINA by commission of Hon. Rick Perry, Governor of Texas, pursuant to Section 22.005 of the Texas Government Code.

reverse with respect to the finding of waiver on the alternative claim for refund of earnest money, and remand the case to the trial court for further proceedings.

I. Factual and Procedural Background

In October 1998, Nick DiGiuseppe d/b/a Southbrook Development Co. entered into a contract with Roger Lawler to purchase approximately 756 acres of Lawler's land near Frisco, Texas, for $40,000 an acre.[2] The contract made closing of the purchase contingent on obtaining acceptable rezoning of the property from the City of Frisco to accommodate DiGiuseppe's development plans, and provided that closing that would occur on the fifteenth day after successful completion of rezoning. The purchase contract also provided for a three-stage deposit of earnest money with the title company: (1) $100,000 upon the signing of the contract; (2) $100,000 upon the submission to the City of Frisco of the application to rezone the property; and (3) $400,000 upon "approval by the planning and zoning commission of the City of Frisco of zoning acceptable to Purchaser of the 'Land' as applied for." DiGiuseppe made the first two earnest money deposits. However, a dispute arose as to whether the events that would trigger the requirement for the third deposit had occurred.

In late November 1999, after numerous meetings and a number of revisions to the rezoning application, the Planning and Zoning Commission approved new zoning for the property at issue. This new zoning was approved by the City Council on January 4, 2000. Although the new zoning differed from the zoning that the parties had applied for in their original application, it was acceptable to DiGiuseppe.

On January 12, 2000, Lawler faxed a letter to DiGiuseppe notifying him that Lawler considered DiGiuseppe in default of the purchase contract for failing to make the third earnest money

[2] The parties contemplated a final purchase price of approximately $28 million. The written contract was initially prepared by DiGiuseppe. The signed version included a typewritten main body with a few handwritten deletions and interlineations initialed by the parties, a typewritten addendum with additional handwritten deletions and interlineations, and a two-page, handwritten addition to the addendum relating to earnest money. The contract also included an August 1999 amendment as well as exhibits describing the property and the development plans.

deposit. Lawler took the position that the requirement for the third ($400,000) earnest money deposit had been triggered when the Planning and Zoning Commission had approved zoning that DiGiuseppe found acceptable. The January 12 letter also declared the contract "cancelled" and demanded release of the earnest money on deposit to Lawler. DiGiuseppe objected to Lawler's notification that the contract was terminated, taking the position that the third earnest money installment had not been triggered because the new zoning was not approved "as applied for." He also declared that he was moving forward with the transaction and demanded that Lawler continue to move toward closing.

Acting on the belief that the contract with DiGiuseppe was terminated, Lawler signed a new purchase contract for the property with DRHI, Inc.—the parent company of DR Horton—on February 1, 2000. DiGiuseppe, acting on the belief that the contract was not terminated, proceeded with finalizing his side of the transaction and demanded that Lawler close. The transaction did not close. Both parties alleged the other was responsible for the failure to close. DiGiuseppe then filed the purchase contract in the deed records.[3] On April 14, 2000, Lawler filed suit against DiGiuseppe in Collin County District Court seeking a declaration that the purchase contract was terminated, requesting damages for breach of contract, and also seeking to quiet title as a result of the filing of the purchase contract in the deed records. DiGiuseppe counterclaimed for breach of contract, quantum meruit, breach of a duty of good faith and fair dealing, statutory fraud, promissory estoppel, and specific performance.[4]

The purchase contract limited the remedies available to the parties in the event of a breach. In the event DiGiuseppe failed to close, Lawler's "sole and exclusive" remedy was to retain the

[3] Lawler also did not close with DRHI. The failure of that transaction was the subject of separate litigation.

[4] After the dispute arose, but before he counterclaimed in the lawsuit, DiGiuseppe transferred his interest in the purchase contract to a Texas limited partnership called Frisco Master Plan LP. The parties do not dispute the validity of the assignment to Frisco Master Plan LP or that Frisco Master Plan is controlled by DiGiuseppe. Therefore, for simplicity, we refer to DiGiuseppe, Southbrook Development, and Frisco Master Plan LP collectively as "DiGiuseppe."

earnest money as liquidated damages, and he expressly waived any right to claim any other damages or specific performance from DiGiuseppe. In the event Lawler defaulted in performing his obligations under the contract for any reason other than DiGiuseppe's default or a proper termination of the contract under its provisions, DiGiuseppe could choose between two remedies: (1) terminate the contract and receive a full and immediate refund of the earnest money, or (2) "seek to enforce" specific performance of the contract. DiGiuseppe also expressly waived any right to claim damages.

The case was ultimately tried to a jury and the parties' breach of contract claims were submitted on broad-form questions inquiring as to whether either party failed to comply with the contract. The jury answered favorably to DiGiuseppe that Lawler had failed to comply with the contract and that DiGiuseppe had not failed to comply. A damages question was also submitted and the jury found that DiGiuseppe had suffered $295,696.93 in damages.[5] Although disputed at trial, no question was requested by either party or submitted to the jury with respect to specific performance or whether DiGiuseppe was ready, willing, and able to perform under the contract at the time he alleged the transaction should have closed.

On DiGiuseppe's post-verdict motion, the trial court rendered a take-nothing judgment against Lawler and granted DiGiuseppe specific performance of the purchase contract together with an award of attorneys' fees in the amount of $75,000. The trial court also appointed a receiver to take possession of the property and effectuate a closing of the purchase contract in accordance with its terms.

The court of appeals reversed the trial court's order granting specific performance, holding that DiGiuseppe had failed to conclusively establish, or to request and obtain a finding of fact on,

[5] The jury charge consisted of eight questions, none of which dealt with fact issues related to specific performance. In addition to the two questions on breach of the contract, Question 3 inquired as to damages for Lawler's failure to comply with the contract. Question 4 was a waiver question as to Lawler's claims (unanswered). Question 5 was the liability question on DiGiuseppe's promissory estoppel claim. Question 6 inquired as to damages relating to the promissory estoppel claim. Question 7 inquired whether DiGiuseppe performed compensable work for Lawler. Question 8 inquired as to the value of any compensable work performed by DiGiuseppe (also unanswered).

an essential element of his claim for specific performance—that he was ready, willing, and able to perform under the terms of the purchase contract. *Lawler v. DiGiuseppe*, ___ S.W. 3d ___ (Tex. App.—Dallas 2004) (mem. op.). The court of appeals also held that the omitted fact finding on specific performance was not necessarily referable to a submitted theory and declined to imply a finding that DiGiuseppe was ready, willing, and able to perform. The court of appeals upheld the award of attorneys' fees, however, on the theory that Lawler had pursued a Declaratory Judgment Act claim, and that statute allows the trial court to award fees as are just and equitable.[6] The court of appeals declined to render judgment for the $295,696.93 in damages found by the jury on the basis that there was no evidence to support the finding.[7] The court also declined to award DiGiuseppe any portion of the $200,000 in earnest money that he had deposited on the basis that he had waived this claim by not filing a notice of appeal on that issue.

DiGiuseppe sought review in this Court on two grounds: (1) the purchase contract provided for the remedy of specific performance in the event of a breach by Lawler regardless of whether DiGiuseppe obtained a finding of fact that he was ready, willing, and able to perform; and, (2) in the alternative, if he is not entitled to specific performance, the court of appeals erred in failing either to award the damages found by the jury or to allow DiGiuseppe to recover the $200,000 in earnest money he paid. In his briefing on the merits, DiGiuseppe included a related point that he had also argued in the court of appeals: that a finding relating to the omitted jury question on his being ready, willing, and able to perform should be deemed found pursuant to Texas Rule of Civil Procedure 279 as an omitted element "necessarily referable" to a theory submitted without objection. After considering briefing on the merits, this Court initially declined review. 48 TEX. SUP. CT. J. 440 (Mar. 14, 2005).

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[6] Lawler has not challenged this ruling.

[7] The court did not address the purchase contract language whereby each of the parties expressly waived any claims for damages.

DiGiuseppe then filed a motion for rehearing stressing that the purchase contract gave him the option to obtain at least one of two potential remedies in the event of a breach by Lawler—either seeking to enforce specific performance *or* terminating the contract and receiving a refund of the earnest money deposited. DiGiuseppe adamantly contended on rehearing that, even if this Court declined to review the court of appeals judgment with respect to specific performance, the Court should grant relief with respect to the $200,000 in earnest money paid to Lawler because the jury had found that Lawler breached the contract and DiGiuseppe did not. Having obtained a favorable judgment as to specific performance in the trial court, DiGiuseppe argues he was not obligated to file a notice of appeal in the court of appeals to preserve the option of pursuing a refund of his earnest money in the event an appellate court reversed the trial court's award of specific performance. We granted the motion for rehearing and the petition for review. 48 TEX. SUP. CT. J. 878 (June 17, 2005).

II. Specific Performance

An essential element in obtaining the equitable remedy of specific performance is that the party seeking such relief must plead and prove he was ready, willing, and able to timely perform his obligations under the contract. In 1938, we stated: "'The doctrine is fundamental that a party seeking the remedy of specific performance . . . must show himself to have been ready, desirous, prompt, and eager.' These principles have been long recognized and respected by the Courts of Texas." *Ratcliffe v. Mahres*, 122 S.W.2d 718, 721-22 (Tex. Civ. App.—El Paso 1938, writ ref'd) (quoting 4 JOHN NORTON POMEROY, JR., A TREATISE ON EQUITY JURISPRUDENCE § 1408, at 2779 (3d ed. 1905)); *see also DeCordova v. Smith's Adm'x*, 9 Tex. 129, 146 (1852); *cf. Gober v. Hart*, 36 Tex. 139, 140 (1871-1872). We reaffirmed the rule in *Corzelius v. Oliver*, 220 S.W.2d 632, 635 (Tex. 1949) (notwithstanding defendant's refusal to perform her obligations under contract, plaintiff was required to show that he could have performed his contractual obligations to obtain specific performance), and it has been followed by other courts of appeals in reported decisions in addition to the court of

appeals in this case. *17090 Parkway, Ltd. v. McDavid*, 80 S.W.3d 252, 257-59 (Tex. App.—Dallas 2002, pet. denied); *Chessher v. McNabb*, 619 S.W.2d 420, 421 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Hendershot v. Amarillo Nat'l Bank*, 476 S.W.2d 919, 920-21 (Tex. Civ. App.—Amarillo 1972, no writ). "[T]o be entitled to specific performance, the plaintiff must show that it has substantially performed its part of the contract, and that it is able to continue performing its part of the agreement. The plaintiff's burden of proving readiness, willingness and ability is a continuing one that extends to all times relevant to the contract and thereafter." 25 RICHARD A. LORD, WILLISTON ON CONTRACTS § 67:15, at 236-37 (4th ed. 2002) (citations omitted).

It is also a general rule of equity jurisprudence in Texas that a party must show that he has complied with his obligations under the contract to be entitled to specific performance. *Glass v. Anderson*, 596 S.W.2d 507, 513 (Tex. 1980) ("A party who asks a court of equity to compel specific performance of a contract must show his own compliance with the contract."); *Bell v. Rudd*, 191 S.W.2d 841, 844 (Tex. 1946); *see also Wilson v. Klein*, 715 S.W.2d 814, 822 (Tex. App.—Austin 1986, writ ref'd n.r.e.) ("Generally speaking, it is a prerequisite to the equitable remedy of specific performance that the buyer of land shall have made an actual tender of the purchase price . . . [unless] actual tender would have been a *useless act* . . . ." (citation omitted)). As a consequence, a plaintiff seeking specific performance, as a general rule, must actually tender performance as a prerequisite to obtaining specific performance. *McMillan v. Smith*, 363 S.W.2d 437, 442-43 (Tex. 1962).

A corollary to this rule is that when a defendant refuses to perform or repudiates a contract, the plaintiff may be excused from actually tendering his or her performance to the repudiating party before filing suit for specific performance. In such a circumstance, a plaintiff seeking specific performance is excused from tendering performance pre-suit and may simply plead that performance would have been tendered but for the defendant's breach or repudiation. *Id.*; *Corzelius v. Oliver,* 220 S.W.2d at 632, 634; *Burford v. Pounders*, 199 S.W.2d 141, 143-44 (Tex. 1947). This exception to

the general rule—that actual tender of performance is a prerequisite to obtaining specific performance—is grounded in the notion that actual pre-suit tender of performance should be excused when it would be a "*useless act*, an *idle ceremony*, or *wholly nugatory*." *Wilson,* 715 S.W.2d at 822 (*citing* POMEROY, *supra*). This Court acknowledged this reasoning in *Burford*: "[I]t appears to be quite well settled that a formal tender is excused where a tender would be a useless and idle ceremony; and that a tender is also excused where defendant repudiates the contract . . . ." 199 S.W.2d at 145 (citation and internal quotation marks omitted); *see also Regester v. Lang*, 49 S.W.2d 715, 717 (Tex. Comm'n App. 1932, holding approved) (holding that tender of performance before bringing suit is not required when it would be a "vain and useless thing" given defendant's open repudiation of the contract).

The concept of excusing pre-suit tender of performance when such tender would be useless or futile has been recognized in Texas equity jurisprudence for over one hundred years. *Ward v. Worsham*, 14 S.W. 453, 453 (Tex. 1890) (excusing actual tender of payment by a settler with a right to purchase school land when land at issue had already been sold to a third party and the lawsuit was a suit by the third party for possession of the land). However, even when pre-suit tender of performance is excused, a plaintiff is still obligated to plead and prove his readiness, willingness, and ability to perform at relevant times before specific performance may be awarded. *Corzelius*, 220 S.W.2d at 635; *Burford*, 199 S.W.2d at 144; *17090 Parkway, Ltd. v. McDavid*, 80 S.W.3d 252, 256 (Tex. App.—Dallas 2002, pet. denied); *Chessher v. McNabb*, 619 S.W.2d 420, 421 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Hendershot v. Amarillo Nat'l Bank*, 476 S.W.2d 919, 920 (Tex. Civ. App.—Amarillo 1972, no writ). The rule relating to excusing pre-suit tender of performance together with its corollary that a plaintiff must plead and prove readiness, willingness, and ability to timely perform before specific performance may be awarded was succinctly stated in *Hendershot v. Amarillo National Bank*: "One of the essential equitable elements in obtaining a decree of specific performance is that the party seeking the decree must plead and prove that he is

ready, willing and able to perform, even though a tender of the purchase price may be excused." 476 S.W.2d at 920 (citing *Corzelius,* 220 S.W.2d at 635; *Burford*, 199 S.W.2d at 143-44). As one treatise explains, "[a]lthough a repudiation [by the defendant] usually will excuse the plaintiff from actually tendering performance, courts require that the plaintiff demonstrate his own readiness, willingness, and ability to perform on the date set by the contract before ordering the defendant to perform." EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS § 6.4, at 144-45 (1989) (citation omitted).

In this case, the only questions submitted to the jury relating to the breach of the purchase contract were:

(1) Did Lawler fail to comply with the contract?

(2) Did Di[G]iuseppe fail to comply with the contract?

The jury answered "Yes" as to Lawler and "No" as to DiGiuseppe. Neither party requested a question as to whether DiGiuseppe was ready, willing, and able to perform at the relevant time. Nor did either party object to the omission of such a question. Consequently, there is no finding of fact in this case or objection to a lack of a finding of fact with respect an essential element of specific performance— that DiGiuseppe was ready, willing, and able to perform at relevant times. Notably, the evidence on DiGiuseppe's readiness and ability to perform—all from the testimony of DiGiuseppe—was equivocal and conflicting. DiGiuseppe testified that he did not have the funds to close at the time originally specified by the purchase contract, or any written commitments from

third parties to fund the closing at that time, and that he could not close.[8] He later testified that he

[8] The following exchange occurred during examination by Lawler's counsel:

Q. Mr. DiGiuseppe, you personally did not have the money to close this contract, did you?

A. I did not.

Q. When you assigned—when you entered into this contract, you had a right to assign it, right?

A. That's right.

Q. And so you were going to have to find a third party or parties to assign this contract in order for it to close, correct?

A. That's exactly what [Lawler] was saying.

Q. I'm just asking you. That's what had to happen, isn't it?

A. Yes.

Q. You couldn't close the contract?

A. No.

Q. How did you intend for [Lawler], then, to close this contract?

A. For [Lawler]—

Q. For you to close the contract, for you to make the purchase or for somebody to make the purchase of this contract?

A. Well, normally what I do is—dealing with a piece of property like this, I'll put it under contract, do the work, do the zoning. And through that process, I usually put together parties to be the investors in the deal. And they, then, close on the contract, and they would fund the development of the property and so on. And I would be the development arm of that entity usually.

Q. You never had any written agreement from any third parties to close this contract, did you?

A. I haven't gotten a written agreement with the parties that were going to close it with me, no. That's not the way I do business.

Q. You don't use contracts?

A. No. What I mean is if somebody tells me they are going to do something, I expect them to do it.

Q. Well, in your deposition, didn't you tell me that you felt that there would be three different home builders that might participate and provide that money to close this deal?

* * *

A. Three different home builders were going to close the deal with me, yes.

Q. But you didn't have any written agreement from them that they were going to close the deal?

A. Not a written agreement, no.

* * *

"had the means to close the contract."[9]

When contested fact issues must be resolved before a court can determine the expediency, necessity, or propriety of equitable relief, a party is entitled to have a jury resolve the disputed fact issues. *See State v. Tex. Pet Foods, Inc.,* 591 S.W.2d 800, 803 (Tex. 1979) (holding that litigant has a right to have ultimate issues of fact submitted to a jury in an equitable action); see also *Hollywood Park Humane Soc'y v. Town of Hollywood Park*, 261 S.W.3d 135, 139 (Tex. App.—San Antonio 2008, no pet.) ("[W]e recognize that the right to a jury trial extends to material, disputed issues of fact in equitable proceedings."); *Casa El Sol-Acapulco, S.A. v. Fontenot*, 919 S.W.2d 709, 715-16 (Tex. App.—Houston [14th Dist.] 1996, writ dism'd by agr.); *see also* WILLISTON ON CONTRACTS, *supra*, § 67:15, at 237 ("A trial court's finding in a specific performance action regarding a purchaser's financial inability to purchase involves a factual issue."). Lawler did not concede or stipulate in the trial court that DiGiuseppe was ready, willing, and able to perform. The issue was disputed and it was an issue on which DiGiuseppe—as the party seeking specific performance—had the burden of proof. *Corzelius v. Oliver,* 220 S.W.2d 632, 634 (Tex. 1949); *17090 Parkway, Ltd. v. McDavid*, 80 S.W.3d 252, 256 (Tex. App.—Dallas 2002, pet. denied); *Hendershot v. Amarillo Nat'l Bank*, 476 S.W.2d 919, 920 (Tex. Civ. App.—Amarillo 1972, no writ).

DiGiuseppe does not raise an issue with respect to the state of the applicable law, but contends that the parties' contract alters the manner in which the law applies to this case. He

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Q. When you sent the letter that said you were ready, willing and able to close this contract, you, individually, couldn't close that contract, could you?

A. I, individually, never intended to close that contract.

Q. You didn't have the funds to close the contract, did you?

A. Not personally, no.

[9] The following exchange occurred during examination by DiGiuseppe's counsel:

Q. Mr. DiGiuseppe, you had the means to close the contract, didn't you?

A. Yes. In fact, a month later, we closed one that was $24 million.

concedes that he did not request a finding by the jury on the issue of whether he was ready, willing, and able to perform under the terms of the purchase contract. He complains that the court of appeals misinterpreted and misapplied the remedy provisions of the purchase contract. He argues that, because the parties had agreed in the purchase contract that one of his available remedies would be to seek to enforce specific performance, he had a right to specific performance in the event Lawler breached or defaulted on the contract without the need for any further proof. According to DiGiuseppe, the only *material* disputed fact issue—by virtue of the language of the remedy provision in the contract—is whether Lawler failed to comply with the contract. Consequently, the finding by the jury against Lawler on this point is sufficient, DiGiuseppe contends, to trigger his right to specific performance regardless of whether he had shown that he was ready, willing, and able to perform. DiGiuseppe's basic contention is that the remedy provisions of the purchase contract negate or waive the requirement under Texas law that he prove his readiness, willingness, and ability to perform as a condition to obtaining specific performance.[10]

Lawler responds that specific performance was not automatic under the purchase contract in the event he defaulted. He asserts that the purchase contract's reference to DiGiuseppe having the right to "seek to enforce" specific performance does not equate to a right to automatically receive specific performance. Rather, he argues, the remedy provision is no more than a contractual acknowledgment between the parties that specific performance would be an available remedy for DiGiuseppe in the event of a default by Lawler, and it did not eliminate or waive the requirement

[10] We note that DiGiuseppe's argument on this point is not that the law does not normally require proof of readiness, willingness, and ability to perform before specific performance will be awarded, but that his contract with Lawler negated or waived this requirement by agreement. The dissent argues that DiGiuseppe was not required to prove and obtain a finding of fact that he was ready, willing, and able to perform because Texas law does not require such proof where the defendant has repudiated or breached the contract. However, this argument was not raised or briefed because it is not the position DiGiuseppe takes in the case. Ordinarily, failure to brief an argument waives the claimed error. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 410 (Tex. 1997). This rule is relaxed when fact issues are not germane to the resolution of the issue and the issue is a question of law involving constitutional ramifications. *Id*. The rule may also be relaxed where the issue is one involving fundamental error. *W. J. McCauley v. Consol. Underwriters*, 304 S.W.2d 265, 266 (Tex. 1957) ("[T]he Supreme Court is authorized to and will consider fundamental error even though not assigned by the parties."). The dissent's argument is not of constitutional dimension, and, even if we agreed with this analysis, we would not view it as raising a point of fundamental error.

that DiGiuseppe demonstrate that he is entitled to specific performance under the law. Lawler contends that the "may . . . seek to enforce" language expresses the parties' intent that specific performance would be an available remedy in the event of breach—as distinct from an action for damages, recission, or other remedy—*if* DiGiuseppe can show that he meets the requirements for the grant of specific performance.

We agree with Lawler and the court of appeals that the remedy provision at issue here does not entitle DiGiuseppe to obtain specific performance merely upon a showing of a breach or default by Lawler. The provision at issue limits the available remedies to either (1) terminating the contract and receiving a refund of earnest money, or (2) seeking to enforce specific performance. It does not in any way alter the requirements for obtaining specific performance in the event DiGiuseppe decides to seek such a remedy. The provision states only that DiGiuseppe "may, at [his] option, . . . seek to enforce specific performance of [the] Contract." This language does not speak to altering the legal requirements for obtaining specific performance. Nor does it purport to make obtaining specific performance automatic in the event of a default or breach by Lawler.

To the contrary, the provision plainly grants DiGiuseppe only the right to "seek to enforce" specific performance, leaving open the possibility that he may seek to enforce it, but be unable to do so. The unambiguous language of the provision makes two remedies available to DiGiuseppe in the event of a default by Lawler, and in effect excludes all others. One of those remedies is specific performance. It is available as a remedy, but nothing in the provision suggests DiGiuseppe is relieved of his obligation to prove he is entitled to it under the law. Therefore, we construe the provision in the purchase contract limiting DiGiuseppe's remedies in the event of a default by Lawler to neither waive nor negate DiGiuseppe's obligation to plead and prove all essential elements under Texas common law for obtaining specific performance, including that he was and is ready, willing, and able to perform under the contract.

As an alternative basis for relief, DiGiuseppe argues that the omitted jury finding as to his readiness, willingness, and ability to perform may be deemed found in his favor pursuant to Texas Rule of Civil Procedure 279. His theory is that specific performance was at least partially submitted to the jury in the form of a question regarding his compliance with the contract, and Lawler failed to object to the omission of a "ready, willing, and able" question. We agree with the court of appeals that a deemed finding under Rule 279 is not available here.

If no element of an independent ground of recovery that is not conclusively established by the evidence is included in the charge without request or objection, the ground of recovery is waived. TEX. R. CIV. P. 279. As we have noted, DiGiuseppe did not conclusively establish his claim for specific performance from an evidentiary standpoint. Under Rule 279, if at least one element of an independent ground of recovery was submitted to the jury and is "necessarily referable" to that ground of recovery, an omitted finding that is supported by some evidence shall be deemed found by the court in such a manner as to support the judgment. *Id*. DiGiuseppe contends that the submission of a question as to whether he complied with the contract is the submission of at least one of the elements of a claim for specific performance and is necessarily referable to that ground of recovery. However, as the court of appeals pointed out, DiGiuseppe's compliance with the contract is neither essential nor necessarily referable to his request for specific performance. As discussed previously, DiGiuseppe's tender of performance under the contract could have been excused due to Lawler's breach without altering in any way DiGiuseppe's obligation to prove that he was and is ready, willing, and able to perform. Whether DiGiuseppe complied with the contract or was excused from complying with the contract, he would still be required to prove that he was ready, willing, and able to perform to obtain specific performance. Therefore, the question as to his compliance with the contract, without more, is not "necessarily referable" to specific performance as a ground of recovery.

Moreover, the question submitted to the jury as to DiGiuseppe's compliance with the contract addressed Lawler's breach of contract claim against DiGiuseppe. As the Houston Court of Appeals articulated in *Superior Trucks, Inc. v. Allen*:

> The purpose of the "necessarily referable" requirement in Rule 279 is to give parties, against whom issues are to be deemed, fair notice of a partial submission, so that they have an opportunity to object to the charge or request submission of the missing issues to the ground of recovery or defense. Once a party is on notice of the independent ground of recovery or defense due to the existence of an issue "necessarily referable" thereto, if that party fails to object or request submission of the missing issues, he cannot be heard to complain on appeal, as he is said to have consented to the court's findings on the missing issues.

664 S.W.2d 136, 144 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.). The existence of the question relating to Lawler's claim for breach of contract, standing alone, did not give Lawler fair notice of a partial submission of a claim by DiGiuseppe for specific performance such that Lawler should have known to object to a missing question regarding DiGiuseppe's readiness, willingness, and ability to perform. Pursuant to Rule 279, the question regarding DiGiuseppe's compliance with the contract, therefore, is not necessarily referable to an omitted question relating to DiGiuseppe's readiness, willingness, and ability to perform. DiGiuseppe had the burden to prove that he was ready, willing, and able to perform. He also had the obligation to request a question on this issue. He did not. Rule 279 does not operate to shift the burden to Lawler to request such a jury question regarding specific performance or to object to its absence under these circumstances.

III. Tender of Performance vs. Readiness, Willingness, and Ability to Perform

The dissent argues that a non-breaching plaintiff seeking specific performance satisfies the requirement of showing he is ready, willing, and able to perform by simply offering to perform in his pleadings as opposed to actually proving to the finder of fact that he is and was—in fact—ready, willing, and able to perform.[11] This conflates two distinct concepts: (1) the tender (or offer) of

[11] As noted above, *supra* footnote 10, this issue was not raised by DiGiuseppe as a point of error nor briefed by the parties.

performance and (2) the proof that one has actually been ready, willing, and able to perform. As noted above, in circumstances where a defendant has not repudiated or refused to perform, the law requires a plaintiff seeking specific performance to show both that he was ready, willing, and able to perform at the relevant time *and* that he tendered that performance. These two requirements are not the same thing. One can be perfectly capable of performing contractual obligations and yet not tender or offer that performance. Likewise, a party could very well tender or offer performance, but not be capable of performing. Offering to perform does not establish the ability to perform, nor does having the ability to perform demonstrate a tender of that ability. The law requires a demonstration of both before specific performance may be awarded unless the requirement of tender is excused.

It is entirely reasonable for the law to distinguish between tender of performance and ability to perform when providing the remedy of specific performance. For example, it is sensible to excuse pre-suit tender of performance if it would be useless or if it has been frustrated by the defendant, such as in cases of repudiation by the defendant or an open declaration of a refusal to honor the contract by the defendant. A plaintiff need not actually tender performance when the defendant has repudiated his own obligations. Otherwise, the plaintiff would be required to go further than the defaulting defendant to obtain specific performance. On the other hand, ordering specific performance without requiring the plaintiff to show that he was capable and willing to perform at the time required by the contract grants the plaintiff more than he is entitled to under the contract. A plaintiff's pleading that he *is* ready, willing, and able to perform at the time the lawsuit is filed says nothing about whether he *was* ready, willing, and able to perform at the time required by the contract. A plaintiff who could not arrange funding in time for closing may be able to marshal all the funds he needs by the time he files pleadings in a lawsuit for specific performance.

The dissent's view that merely pleading an offer to perform at the time the lawsuit is filed satisfies or replaces the need to demonstrate the ability to perform at the relevant time would essentially rewrite the parties' contract. It would, in effect, eliminate the plaintiff's contractual

obligation to be capable of performance at the time the contract required, and grant the plaintiff the option to enforce the contract at any time he might become capable of performing before limitations runs. A defendant's breach or repudiation should not alter the contract and give the non-breaching party a contract different from what he had. The plaintiff must prove that he was ready, willing, and able to perform his obligations when they came due. Otherwise, he would be able to take unfair advantage of the defendant by requiring the defendant's performance without showing that he also could and would have performed as required by the contract.

A standard requiring proof of ability to perform, rather than a mere pleading to that effect, is essential to serving the interest of equity underlying the remedy of specific performance. Allowing a plaintiff to simply plead a willingness to tender is no substitute for requiring him to produce evidence showing that he was ready, willing, and able to perform his contractual obligations at the relevant time. Whether a plaintiff was ready, willing, and able to perform his contractual obligations when they came due, and would have done so but for the defendant's breach or repudiation is a question of fact. A fact cannot be proved by a controverted pleading. The pleading simply puts the matter at issue.[12] In this case, DiGiuseppe alleged in pleadings that he "was ready, willing and able to [fund the purchase of property from Lawler] on March 3, 2000," the date DiGiuseppe says his obligation to do so was triggered. The evidence on the subject was conflicting, and the jury was not asked to resolve the dispute. The dissent would hold that DiGiuseppe's pleading was all he needed, that a plaintiff satisfies the need to establish a relevant fact by alleging the truth of the fact. If allegations were the equivalent of proof, there would be no need for trials. The equivocal and conflicting evidence as to DiGiuseppe's ability to close illustrates one of the problems with the dissent's view. What if the evidence establishes that a plaintiff could not and cannot perform? Under the dissent's theory, such a plaintiff would be awarded specific performance based solely on

[12] TEX. R. CIV. P. 92 ("A general denial of matters pleaded by the adverse party which are not required to be denied under oath, shall be sufficient to put the same in issue.").

his pleading even if he, in fact, could not and cannot perform. Without proof that he could perform as required by the contract, the plaintiff gets more than he bargained for—an inequitable result. Without proof that he can perform at the time of the award, the award is pointless.

By combining the pleading and proof requirements, the dissent would nullify the proof requirement and encourage gamesmanship. A purchaser who lacked funds to close a transaction when called for in a contract could later compel performance by a seller who balked. A seller who is unable to deliver title at the agreed time for closing could later compel performance by a remorseful buyer. If a plaintiff was, in fact, unable to perform at the relevant time, a defendant's breach or repudiation is harmless and equity should not provide a remedy in such a situation. The law does not and should not allow pleading readiness, willingness, and ability to perform to substitute for proof of that fact.

The dissent's view is unique. There is no Texas case that has adopted such a rule and we have found none in any other jurisdiction. The dissent's discussion of the Texas cases that have addressed the issue raised by the dissent—*Burford*, *Corzelius*, *Parkway*, *Chessher*, and *Hendershot*—fails to distinguish between pleading tender of performance and proving readiness, willingness, and ability to perform. This distinction is crucial. In each of these cases, *pre-suit tender of performance* was excused due to a repudiation or breach by the party against whom specific performance was sought. None of the cases hold that the repudiation or breach relieved the party seeking specific performance from the obligation to prove readiness, willingness, and ability to perform. Each of these cases is entirely consistent with the rule that a plaintiff seeking specific performance must plead and prove (1) compliance with the contract including tender of performance

unless excused by the defendant's breach or repudiation, and (2) the readiness, willingness, and ability to perform at relevant times.[13]

The seminal case of *Burford v. Pounders*, upon which later cases rely, illustrates the point. 199 S.W.2d 141, 141-42 (Tex. 1947). Beaird leased land to Burford, with an option allowing Burford to purchase the property for $1000, less the rent paid. Beaird ignored the option to purchase and, five months before the lease expired, sold the property to Pounders, who was aware of Burford's lease. *Id*. at 142. According to an undisputed finding by the trial court, Burford was not in a position at the time of the sale to Pounders to exercise his option to purchase the property. *Id*. at 143. Neither Beaird nor Pounders told Burford of the sale. Two months before the lease expired, Burford attempted to exercise his option and tendered $950 to Beaird, which Beaird refused. *Id*. at 142-43. Burford sued for specific performance and the case was tried to the bench. Because he did not know of the sale, Burford did not make any tender of performance on the option at the time of the sale. However, the lease did not specify when the option was to be exercised and the trial court did not find that Burford had failed to invoke his purchase right within a reasonable time. *Id*. at 145. The Court in *Burford* noted with approval the accepted general rules of equity relating to specific performance, stating that a plaintiff "ordinarily is entitled to specific performance where he alleges *and proves* that he . . . is ready, able and willing to perform." *Id*. at 144 (emphasis added). The Court agreed that "it was not incumbent on Burford *to make a tender* in the matter of exercising his option within a reasonable time after learning of the sale, but that *it was sufficient for him to offer to do equity in this pleadings*." *Id*. (emphasis added). The Court then held that since Beaird had repudiated the purchase option by selling to Pounders, *a tender* to Beaird by Burford was

[13] The dissent also points to the comments to section 363 of the Restatement (Second) of Contracts as supporting its position. However, section 363 deals with the issue of securing the ability to perform by a party seeking specific performance *at the time of the order granting specific performance*. RESTATEMENT (SECOND) OF CONTRACTS § 363 (1981). This section of the Restatement notes that if performance by the injured party cannot be secured to the satisfaction of the court at the time of the requested order of specific performance, specific performance may be refused. Section 363 does not address the question of whether proof of the willingness and ability to perform at the time required by the contract is a prerequisite to obtaining specific performance in any way.

unnecessary. *Id*. at 145. At no point did the Court hold or suggest that proof by Burford of readiness, willingness, and ability to perform was unnecessary or waived by Beaird's actions. Burford was required to prove that he was ready, willing, and able to exercise his option to purchase, but because the parties had not specified a deadline for exercising the option, Burford was not required to prove his ability to perform at the time of the illicit sale to Pounders.

Burford makes two things clear: (1) pleading an offer to perform is in lieu of tender; and (2) adducing proof that a plaintiff was ready, willing, and able to perform, as required by the pertinent authorities constitutes an entirely separate requirement from tender. This distinction is consistent with available authorities on the subject and has been consistently followed by Texas courts. The dissent reads the statements in *Burford* as confusing, but we do not. Burford was required to prove he was ready, willing, and able to perform, and he did so. The issue in the case was whether Burford would have to show he was ready, willing, and able to perform at the time of the sale to Pounders, or within a reasonable time. The lower courts held that Burford was required to show his capacity to perform at as of the time of the sale to Pounders—a point at which it was undisputed Burford was not in a position to perform. This Court held that, because there was no deadline in the lease for the purchase option, Burford could meet his burden by showing the ability and willingess to perform within a reasonable time for exercising his option. Burford made this showing.

The dissent also reads *Corzelius* as confusing and seeks to distinguish its holding by reference to the contractual period for performance in the contract at issue in the case. We view *Corzelius* as completely consistent with *Burford* and the other authorities cited above which point out the distinction between tender of performance and proof of ability to perform. The fact that Corzelius needed to show the ability to perform at any point in a contractually agreed time frame does not alter the fact that he needed to show the ability to perform as required by the contract. How such proof could be made rather than whether it must be made was at issue in *Corzelius*. The Court rejected the claim that Corzelius was obliged to produce binding commitments for financing in order

to raise an issue of fact. The Court was careful to note other competent evidence in the record, including evidence showing the value of the property he sought to purchase via a mortgage and testimony from a bank officer and his brother on their willingness to lend money for the purchase, as evidence supporting a finding that Corzelius was in a position to perform per the contract. *Corzelius v. Oliver*, 220 S.W.2d 632, 635-36 (Tex. 1949).

The dissent also argues that policy considerations weigh in favor of its view because non-breaching buyers would be put at a disadvantage by having to demonstrate at the time of the lawsuit that they were capable of performing as called for by the contract. However, this overlooks the fact that if the buyer was not able to perform his obligations as required by the contract, the breach by the seller did no harm. From an equitable standpoint, it would be unfair to reward the buyer with a result that he could not have achieved—specific performance at a later date based on later acquired capability—simply because of a breach by the seller.

All of the language relied on by the dissent from *Parkway, Chessher, Hendershot*, and *Regester v. Lang*, as suggesting that a pleading alone is sufficient to satisfy part of the plaintiff's burden, refers to tender of performance when the defendant has repudiated. None of the cases stand for the proposition that merely pleading readiness, willingness, and ability to perform is sufficient to obtain an award of specific performance. The dissent's theory merges the concepts of tender of performance and proof of ability to perform. The cases do not. The dissent's view is inconsistent with established case law and would be unique to equity jurisprudence.

IV. Refund of Earnest Money

DiGiuseppe argues that if the judgment in his favor for specific performance is reversed, he should be allowed to seek recovery on his alternative remedy under the purchase contract of termination and recovery of earnest money he paid. We agree. The court of appeals held that DiGiuseppe waived this option by failing to file a notice of appeal on the issue. However, this Court has held that a litigant who has obtained a favorable judgment and has no reason to complain in the

trial court is not required to raise an issue regarding an alternate ground of recovery until an appellate court reverses the judgment. *Boyce Iron Works, Inc. v. Sw. Bell Tel. Co.*, 747 S.W.2d 785, 787 (Tex. 1988). Consequently, DiGiuseppe was not required to raise his alternate theory of recovery until the judgment in his favor about which he had no complaint was reversed. *Id*. As soon as he was aware of the reversal of the judgment by the court of appeals, DiGiuseppe raised the issue of his alternative ground for recovery both in the court of appeals and in this Court. The issue is not waived. Since it has been determined on appeal that DiGiuseppe is not entitled to specific performance as awarded by the trial court, he should be allowed to present his alternative ground for recovery to the trial court for a determination in the first instance as to whether he should recover under that alternative theory.

V. Conclusion

We affirm the holding of the court of appeals that the contract at issue in this case does not alter DiGiuseppe's obligation to prove and secure a finding of fact that he was ready, willing, and able to perform his obligations under the purchase contract as a prerequisite to obtaining the equitable relief of specific performance. In affirming this part of the court of appeals' judgment, we hold that an essential element in obtaining the equitable remedy of specific performance is that the party seeking such relief must plead and prove he is ready, willing, and able to timely perform his obligations under the contract. We also affirm the holding of the court of appeals that such a finding cannot be deemed based on the jury charge as submitted under Rule 279. Finally, we reverse the court of appeals's holding that DiGiuseppe waived his claim to the alternate ground of recovery under the purchase contract relating to refund of the earnest money, and hold that he should have an

opportunity to present this claim to the trial court for disposition. Accordingly, we affirm the judgment of the court of appeals in part, reverse in part, and remand the cause to the trial court for further proceedings consistent with this opinion.

G. Alan Waldrop
Justice

Opinion delivered: October 17, 2008

IN THE SUPREME COURT OF TEXAS

NO. 04-0641

NICK DIGIUSEPPE D/B/A SOUTHBROOK DEVELOPMENT CO. AND FRISCO MASTER PLAN, PETITIONERS,

v.

ROGER LAWLER, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued October 20, 2005

JUSTICE GREEN, joined by CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, and JUSTICE JOHNSON, dissenting.

The Court requires an innocent buyer, otherwise excused from his contractual obligations by the seller's breach, to nevertheless prove, in a suit for specific performance, that he could have fully performed those obligations had the seller not breached. ___ S.W.3d at ___. This makes no sense for at least two reasons. First, it provides the breaching seller information he was not entitled to under the contract. A seller entering into a real estate transaction is rarely entitled to know the details of how the buyer intends to finance the transaction. At closing, the buyer will either perform or not, and in the latter event, the contract will provide remedies for the breach. But if the seller breaches the contract before closing and the buyer sues to enforce the deal, the Court now says the buyer must

prove to a fact-finder, at a trial many months or years after the sale was originally supposed to close, that he was, at the time specified by the contract, "ready, willing, and able" to perform. *Id.* at ___. To do this, the innocent buyer will necessarily be required to reveal his plan for financing the transaction—information a seller generally would not be privy to under agreed contract terms.

Second, and perhaps most important, the Court's holding makes no sense because a finding that the buyer was ready, willing, and able to perform at the closing time specified in the contract is irrelevant. Although the Court does not say what the trial court is supposed to do with such a finding, presumably it would order a date for the transaction to close within a reasonable time. But what if the buyer was able to close on the original contract date and is unable to close on the court-appointed date? The whole exercise is rendered meaningless. The only thing that makes sense is to do precisely what the trial court did in this case, which is to set a closing date within a reasonable time after a finding that the seller breached. While it is true that the buyer might gain some benefit by getting a reprieve from the original contract closing date, it is just as likely, particularly in light of today's troubled financial times, that he will be worse off and be unable to close. But at least this has the virtue of being meaningful and of not placing impractical burdens on an innocent party, both features that are lacking in the Court's rule.

The Court's holding will also tend to severely limit or eliminate specific performance as a viable remedy for a seller's breach of a real estate contract. In large transactions, it is doubtful that many non-breaching buyers would be willing to subject themselves and/or their investors to open discovery of financial portfolios on the question of whether the buyer was sufficiently capable of purchasing the property at the time required by the contract. Unscrupulous sellers will be virtually

immunized from the penalty of specific performance, the most severe consequence of breaching a contract of sale, and disorder will be the order of the day in volatile real estate markets. Because the Court's holding lacks common sense and adheres to a misreading of our precedents, I respectfully dissent.[1]

I agree with the Court that it has long been part of the jurisprudence of this state that, to obtain the equitable remedy of specific performance, a party must show himself to have been "ready, willing, and able" to timely perform his obligations under the contract being enforced. *See* ___ S.W.3d at ___; *see also Ratcliffe v. Mahres*, 122 S.W.2d 718, 721–22 (Tex. Civ. App.—El Paso 1938, writ ref'd) (quoting 4 JOHN NORTON POMEROY, JR., A TREATISE ON EQUITY JURISPRUDENCE § 1408, at 2779 (3d ed. 1905)). But it has likewise been a long-standing Texas rule that a non-breaching plaintiff seeking specific performance need only make such a showing by offering to perform in his pleadings. *Burford v. Pounders*, 199 S.W.2d 141, 144 (Tex. 1947). The Court's insistence that a party seek and obtain a jury finding that he is ready, willing, and able to perform before being entitled to the remedy departs from that rule.

Specific performance is an equitable remedy that rests in the sound discretion of the trial court. *Kress v. Soules*, 261 S.W.2d 703, 704 (Tex. 1953); *Am. Apparel Prods., Inc. v. Brabs, Inc.*, 880 S.W.2d 267, 269 (Tex. App.—Houston [14th Dist.] 1994, no writ). Generally, to be entitled to

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[1] In footnote 10, the Court takes the position that DiGiuseppe did not raise or argue that he was not required to prove or obtain a finding of fact that he was ready, willing, and able to perform, suggesting that such an argument should not be addressed in this dissent. ___ S.W.3d at ___. Yet that is the basis for the court of appeals' decision, ___ S.W.3d ___, ___, and the Court provides exhaustive discussion on this very issue in its opinion. *Id.* at ___. In the first issue raised in his petition for review, DiGiuseppe claims that "[t]he court of appeals erred in reversing the trial court's award of specific performance to DiGiuseppe." I believe, as the Court appears to, that DiGiuseppe's issue sufficiently raised the question of whether Texas law requires such proof from a non-breaching buyer.

specific performance, a party must prove that it has complied with all the contract's terms. *Glass v. Anderson*, 596 S.W.2d 507, 513 (Tex. 1980). When a seller breaches a real estate contract, however, we have long held that the buyer need not actually tender the purchase price in order to seek specific performance. *Ward v. Worsham*, 14 S.W. 453, 453 (Tex. 1890).

> The practice in equity in similar cases is not to require a tender or a payment into court of the purchase money. . . . When [the buyer] pleads his right he should offer to pay, and the court, if judgment should be given for him, should decree a payment within a reasonable time, and that, in default of a compliance, his right should cease and be determined.

Id. This has remained the law in Texas for well over 100 years, as the Court recognizes. *See* ___ S.W.3d at ___. Until today, however, the Court has not required a non-breaching buyer to make the "useless and idle" showing of proof of ability to complete the transaction when the seller's repudiation of the contract excused the buyer from tendering the purchase price. *See Burford*, 199 S.W.2d at 145.

The issue of a party's own performance as a condition to obtaining specific performance is a matter to be contemplated by the trial court's judgment, not the jury's verdict. *See Regester v. Lang*, 49 S.W.2d 715, 716–17 (Tex. Comm'n App. 1932, holding approved) (holding it was reversible error for a defendant to argue to the jury that the plaintiff had not paid the purchase money into the court registry, and that specific performance might result in the defendant delivering his property without being paid). "It is sufficient if [the party seeking specific performance] is ready and willing and offers to perform in his pleadings." *Id.* at 717. To require anything more would be futile because, as this Court recognized in *Regester*, the buyer "would be required under a proper decree of specific performance to pay this sum before he could obtain any interest" in the property. *Id.*

We reiterated these principles in *Burford v. Pounders*, instructing that when a seller has refused to perform and the buyer's tender would be futile, "the material consideration is that [the buyer] offered in his pleadings to do equity," and nothing more is required. 199 S.W.2d at 145. The plaintiff Burford was a tenant in possession with an option to buy under a right of first refusal. *Id.* at 141–42. The lessor, ignoring Burford's option, conveyed the property to defendant Pounders. *Id.* at 142. Two months after the sale, Burford attempted to exercise his option, eventually seeking specific performance. *Id.* at 142–43. Burford would not have been able to make payment at the time of the sale to Pounders, but would have been able to pay two months later. *Id.* at 143–44. Because Burford had to exercise the option to buy within a "reasonable time," the issue in the case was whether Burford was required to tender performance within a reasonable time of learning of the sale to Pounders, or whether it was sufficient for Burford to later offer to perform in his pleadings. *Id.* at 144–45. Citing *Regester*, we again emphasized that all that was necessary in such a case is that the party seeking specific performance be ready and willing and offers to perform *in his pleadings*. *Id.* at 144 (citing *Regester*, 49 S.W.2d at 717). And when a party offers in his pleadings to do equity, "[t]he *only* matter remaining to be done by the trial court is to direct that payment be made" and that the sale be completed, awarding the purchaser judgment for title. *Id.* at 145 (emphasis added).

One statement in *Burford*, however, appears to have given rise to the confusion of the lower courts on this issue. Quoting from Corpus Juris, the Court in *Burford* stated that a "complainant ordinarily is entitled to specific performance where he alleges *and proves* that he . . . is ready, able, and willing to perform." *Id.* at 144 (quoting 58 C.J. *Specific Performance* § 316 (1932)) (emphasis

added). After citing that general rule, though, the Court went on to explain the exception that excuses tender for non-breaching buyers, citing additional Corpus Juris sections and comments:

> [Regarding a specific performance suit brought by a purchaser, under a footnote to section 342], it is stated that "In Texas" an actual tender "is not necessary where the purchaser pleads and proves a willingness to pay, but is entitled to relief provided that, within a time fixed in the decree, he shall pay the amount due" . . . . In section 348 it is stated that "whatever difference of opinion may exist as to the original necessity of a tender of the consideration before suit, . . . it appears to be quite well settled that a formal tender is excused where a tender would be useless and idle ceremony"; and that a "tender is also excused where defendant repudiates the contract"; and further that "tender in pleadings (is) sufficient" where plaintiff sets forth that he is ready, able and willing "or . . . pays the consideration into the court." In section 349, . . . it is stated that "the necessity of tender is dispensed with where defendant repudiates the contract, or makes any declaration which amounts to a repudiation . . . . In the following section (350) it is stated that "if a tender of the purchase price or other sums before suit is necessary, it is excused where the vendor or seller has put it out of his power to perform, as where he has conveyed the property . . . to a third person."

Id. at 144–45 (emphasis removed). The Court never returned to any discussion of the general rule that requires proof of ability to pay, instead holding that the seller defaulted and repudiated by selling the property to Pounders. *Id.* at 145. For a non-breaching buyer, "[t]he material consideration is that [he] offer[s] in his pleadings to do equity." *Id.* The court emphasized this rule with italics: "[A]ll that is required in such case is that the plaintiff place himself in favor with the court, *and this may be done by a proper offer in the pleadings.*" *Id.* at 143 (quoting 49 Am. Jur. *Specific Performance* § 144, at 167 (1943)) (italics in original). Because Burford had made the sufficient showing by offering in his pleadings to do equity, the Court held that Burford was entitled to specific performance. *Id.* at 145. The Court later confirmed that holding, saying that *Burford* adopted the substance of the rule that "if, because of defects in the vendor's title, which he fails or refuses to

cure, . . . a tender of performance by the vendee would be a useless act . . . , his failure to make such tender will not preclude in his behalf the equitable relief of specific performance, at least where he tenders performance in his bill or petition." *McMillan v. Smith*, 363 S.W.2d 437, 442–43 (Tex. 1962) (quoting 79 A.L.R. 1240).

Although the Court claims *Burford* holds that a non-breaching plaintiff is required to prove he was ready, willing, and able to perform, and somehow distinguishes between tender and proof of ability to pay, the Court misrepresents the rule in that case. In *Burford*, the Court held that when a seller repudiates the contract, tender is excused and "all that is required" is that the plaintiff offer to do equity, which can be done in the pleadings. 199 S.W.2d at 143. *Burford* does not support the Court's new rule, and neither do the other cases relied on by the Court.

The Court cites *Corzelius v. Oliver*, another case involving the buyer's ability to pay within a contractual time limit for exercising an option. 220 S.W.2d 632, 633 (Tex. 1949). In *Corzelius*, the plaintiff had a one-year option to reacquire lands conveyed to his ex-wife as part of a divorce settlement. *Id.* Although the plaintiff attempted to exercise the option, his ex-wife (the defendant) refused because she objected to his source of financing, and eventually a jury found for the plaintiff. *Id.* at 633–34. At trial, one of the issues before the jury was whether the plaintiff could have made payment within the one-year time limit contemplated by the contract. *Id.* at 634. The jury found that, but for the defendant's actions, such a payment could have been timely made. *Id.* On appeal, the only issue was the defendant's contention that "there was no evidence to show that Corzelius was ready and able to perform within the time limit of the option." *Id.* In addressing that point, the Court noted that "it would appear but reasonable" for Corzelius to show that he could have performed

under the agreement, *id.* at 635, and then detailed the evidence to conclude that there was at least some evidence to support the jury's finding in that regard. *Id.* Certainly, taken alone, this part of *Corzelius* could arguably support an interpretation that proof of the ability to pay is an appropriate subject for a fact-finder's consideration in a specific performance case. But such a reading is not accurate and has given rise to confusion in the lower courts. Contrary to the Court's conclusion, *see* ___ S.W.3d at ___, nowhere does *Corzelius* indicate that a non-breaching buyer, under a non-option contract, must prove ability to perform at the time specified in the contract when tender of payment is excused. *Corzelius* is distinct from the non-option contract case because the timing of the buyer's ability to pay was relevant to whether the buyer had exercised his option to purchase and therefore the seller had an obligation to convey the property. Even when a buyer must show ability to pay, a buyer need not show a firm financing commitment to be entitled to specific performance, but need only put on evidence of his financial capacity and creditworthiness. *Corzelius*, 220 S.W.2d at 635 (recognizing that financing sources would probably be reluctant to execute a commitment for financing to complete a sale of lands the owner had decided not to convey). Notwithstanding the evidence offered at trial and the jury's finding, "Corzelius [was not] bound to do more here than make the tender which was contained in his pleadings." *Id.*

It appears that misreading of the brief statements in *Burford* and *Corzelius* led courts of appeals to rule erroneously that a plaintiff seeking specific performance must always prove to a fact-finder that he is ready, willing, and able to perform under the contract. *See 17090 Parkway, Ltd. v. McDavid*, 80 S.W.3d 252, 256 (Tex. App.—Dallas 2002, pet. denied); *Chessher v. McNabb*, 619 S.W.2d 420, 421 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Hendershot v. Amarillo*

Nat'l Bank, 476 S.W.2d 919, 920 (Tex. Civ. App.—Amarillo 1972, no writ). Those cases did not offer any reasoning as to why proof before a fact-finder is necessary even though actual tender is excused when a seller has breached. On this point, *17090 Parkway* simply cites *Chessher* and *Hendershot*. 80 S.W.3d at 256. *Chessher* cites only *Hendershot*. 619 S.W.2d at 421. *Hendershot* cites only this Court's decisions in *Burford* and *Corzelius* without any analysis and without recognizing that those cases involved option contracts containing conditions precedent to the seller's obligation to convey the property. *See* 476 S.W.2d at 920. *Hendershot*'s misreading of *Burford* and *Corzelius* therefore resulted in repeated error in the courts of appeals, which now repeats itself in this Court, eclipsing the long-standing rule that a party seeking specific performance need only offer to perform in its pleadings.

Lawler cites a number of cases in support of his position that ability to pay must be proven at trial, but I am not persuaded that such a rule exists in Texas.[2] As already discussed, the cases requiring proof of ability to pay at trial are perpetuating *Hendershot*'s erroneous reading of our opinions in *Burford* and *Corzelius*, which did not distinguish, as the Court does, between an excused tender requirement and an unexcused requirement to prove ability to pay. The Court contends that such a distinction is "entirely reasonable," noting that a party could well offer performance but not be capable of performing. ___ S.W.3d at ___. But when the seller's breach relieved the buyer of

[2] See *Kress*, 261 S.W.2d at 704 (recognizing that specific performance is an equitable remedy); *17090 Parkway*, 80 S.W.3d at 256 (relying on erroneous and distinguishable courts of appeals' cases, as explained above); *Lazy M. Ranch, Ltd. v. TXI Operations, LP*, 978 S.W.2d 678, 683 (Tex. App.—Austin 1998, pet. denied) (rejecting specific performance because the buyer breached the contract and had unclean hands); *Am. Apparel Prods.*, 880 S.W.2d at 269–70 (rejecting specific performance because the buyer unilaterally rescinded the contract); *Gordin v. Shuler*, 704 S.W.2d 403, 408 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (rejecting specific performance because the buyer failed to comply with the contract terms and failed to disclose material information); *Chessher*, 619 S.W.2d at 421 (same); *Hendershot*, 476 S.W.2d at 920 (erroneously interpreting *Burford* and *Corzelius*, as explained above).

his obligation to appear at closing and perform as required under the contract, it may be impossible for anyone to know whether the buyer could have performed. Continued efforts to perform such as arranging financing or appearing at the scheduled closing would be useless, just as the Court recognizes that tendering payment would be. The Court erroneously concludes that ordering specific performance without requiring the non-breaching buyer to prove ability to pay at the time required by the contract "grants the plaintiff more than he is entitled to under the contract." *Id.* at ___. In fact, the opposite is true. When a contract provides for simultaneous performance by both seller and buyer, the seller must give the buyer the full opportunity to perform as provided by the contract, or face remedies for breach in cutting off that opportunity. Requiring a buyer to prove that it could have performed at a time when the seller's breach eliminated that obligation and when the subject property was under contract for sale to a third party imposes a much higher burden on the buyer than the contract requires. The seller's own breach cannot impose an extra-contractual obligation on the buyer to prove useless financing commitments. The Court contends that my view would "essentially rewrite the parties' contract" and "eliminate the plaintiff's contractual obligation to be capable of performance at the time the contract required." ___ S.W.3d at ___. In fact, it is actually the breaching seller who altered those contractual obligations when he breached the contract by agreeing to sell the property to a third party.

The Court relies on contracts treatises as support for its claim that requiring a non-breaching buyer to prove ability to pay is an entrenched rule in Texas jurisprudence. ___ S.W.3d at ___. The author of the primary treatise relied on by the Court cites law from various jurisdictions, seemingly favoring Montana and Connecticut, but the only citation to Texas law is to a case that does not

mention or discuss the showing a plaintiff must make to obtain specific performance. 25 RICHARD A. LORD, WILLISTON ON CONTRACTS § 67:15, at 236–38) (4th ed. 2002); *see Shuler v. Gordin*, 644 S.W.2d 446, 447–49 (Tex. 1982). Edward Yorio's treatise, which states the general rule that a plaintiff must show readiness, willingness, and ability to perform, is silent on whether or how a non-breaching buyer must make that showing. EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS § 6.4, at 145 (1989 & supp. 2004). Yorio acknowledges the Texas rule in a footnote, however, by quoting a Seventh Court of Appeals case holding that "when the seller has conspicuously breached the contract, it is only necessary that the purchaser be ready and willing, and offers to perform within his pleadings." *Id.* at n.10 (quoting *Abraham Inv. Co. v. Payne Ranch, Inc.*, 968 S.W.2d 518, 527 (Tex. App.—Amarillo 1998, pet. denied), which relied on *Burford*, and also citing *17090 Parkway*). Comment b to section 363 of the Restatement (Second) of Contracts, which addresses securing performance for an agreed exchange and states that specific performance may be refused if "performance is not secured to the satisfaction of the court," supports the long-standing Texas rule:

> The desired security can often be afforded by the terms of the order itself. If performance by the injured party is already due or will be due simultaneously with the performance of the party in breach, the order may be made conditional on the injured party's rendition of his performance. . . .
>
> The question of security does not arise until the time for issuance of an order. At the pleading stage, a mere allegation by the plaintiff that he is ready and willing to perform is usually sufficient in a suit for specific performance or an injunction. Actual performance or tender is generally not required.

Restatement (Second) of Contracts § 363 cmt. b (1981). Because DiGiuseppe need only offer to perform in his pleadings to establish his entitlement to specific performance, the only disputed fact

issue to be resolved by the jury was whether Lawler breached the contract. *See White v. Sw. Bell Tel. Co.*, 651 S.W.2d 260, 262 (Tex. 1983) (holding that only disputed factual issues are presented to the jury).

Aside from the doctrinal reasons for this rule, there are important policy considerations at stake here. Requiring advance proof of an ability to pay puts the breaching seller in a better position than he would have been if the deal had gone through as contemplated in the contract by allowing him greater security in the solvency of the transaction. Unless the contract provides otherwise, sellers must wait until closing to find out whether the buyer can and will actually go through with the deal. If a seller suspects that a buyer cannot perform, the seller faces a choice: (1) wait until closing to see if the buyer tenders the required payment, or (2) breach the contract and face remedies for breach. The Court introduces the concept of harmless breach, concluding that a seller's breach "does no harm" when the seller, in advance of closing, believes a buyer will not be capable of performing under the contract and prematurely eliminates the buyer's opportunity to complete the transaction. ___ S.W.3d at ___. But such a breach, which cuts off a buyer's opportunity to show that he is in fact capable of performing at the time performance is due, is inherently harmful.

Requiring a non-breaching buyer to demonstrate ability to pay imposes a burden on buyers to secure firm funding commitments well in advance of closing and disclose funding sources, a burden that typically would not exist in transactions performed under a property sales contract. Until today, we have never required a non-breaching purchaser to put on such proof. *Cf. Corzelius*, 220 S.W.2d at 635 (explaining that it would not be necessary for a purchaser "to produce a firm commitment for an adequate loan" and recognizing that "[b]anks, insurance companies, and others

loaning money would probably be reluctant to execute a commitment for a loan to complete a sale of lands which the owner had declared she would not convey"). The sale of property often becomes a complex transaction that may involve developers with many properties, numerous lenders, investors who may wish to remain confidential until closing, and other sources of cash flow that may not come together until the last minute. Sellers find out at closing whether a buyer can pay, and buyers need not choose a source of financing or secure a financing commitment until shortly before closing. *See Shuler*, 644 S.W.2d at 448 (indicating that the time for buyer and seller to show their ability to perform is at closing). I see no reason to change this state of affairs simply because a seller has, for whatever reason, breached his agreement and forced a non-breaching plaintiff to seek judicial enforcement. And, in a case such as this, in which the buyer testified that he was ready and able to close when acceptable zoning was approved and continued to be ready and able to close, equity demands no more of a non-breaching buyer.

Finally, it is entirely possible that a buyer who is ready, willing, and able to perform at the time of trial may find his fortunes diminished by the time the closing date arrives such that he is no longer able to make payment. Just as we do not require tender of payment when it would be a "useless and idle ceremony," we cannot require a showing of ability to perform at the time of trial when it, in many cases, would be equally meaningless. *See Burford*, 199 S.W.2d at 145. The most efficient way to ensure DiGiuseppe's payment is not to burden the fact-finder with a speculative inquiry into the buyer's finances and potential financing prospects, but rather for the trial court to set a prompt closing date, supervised by the court, during which DiGiuseppe may tender

performance. Only then must DiGiuseppe prove ability to pay, by tendering the payment due. If DiGiuseppe is unable to close, Lawler will then be entitled to remedies the contract provides.

In my view, once a party has pled the remedy of specific performance with sufficient specificity, nothing else is required with regard to ability to pay. It is understood that by bringing the action (and undertaking the costs and risk involved in such litigation), the party is ready and willing to consummate the transaction should the court render judgment in its favor. Here, DiGiuseppe has done all that is required.[3] His first pleading in the trial court and his cross-petition requested the remedy of specific performance and stated that, as soon as acceptable zoning was approved, he was ready, willing, and able to satisfy his funding obligations under the contract. DiGiuseppe's pleadings indicated that he "possessed the necessary capital to move forward with the acquisition of the Property." Moreover, during trial, he testified that he was ready and able to close after March 7, 2000, the date the city council approved acceptable zoning.[4] DiGiuseppe stated that

[3] Strictly speaking, the pleadings filed by DiGiuseppe did not request the remedy of specific performance. Frisco Master Plan, the limited partnership to which DiGiuseppe transferred his interest under the contract, requested specific performance as a third-party plaintiff to the suit between DiGiuseppe and Lawler. Accordingly, the trial court's judgment granted specific performance in favor of Frisco Master Plan, not DiGiuseppe. Because DiGiuseppe was acting on behalf of Frisco Master Plan and Southbrook Development Company, I have not distinguished between these three parties for the purposes of this opinion.

[4] DiGiuseppe testified as follows:

Q. Could you close after March 7th [the date DiGiuseppe accepted the zoning changes]?

A. Absolutely.

Q. Could Mr. Lawler close after March 7th?

A. No.

Q. Were you ready and able to close after March 7th?

A. We were.

he had three homebuilders who would have funded the purchase and that "if there hadn't been another contract in place, [they] would have closed the deal." Though the Court finds DiGiuseppe's testimony "equivocal and conflicting" because DiGiuseppe did not demonstrate that would not have been able to close the transaction on his own, ___ S.W.3d at ___, I am satisfied that DiGiuseppe presented at least some evidence of his ability, with the help of investors he had secured, to tender the money required under the contract.[5] *See Corzelius*, 220 S.W.2d at 635 (holding that a buyer is

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Q. Are you ready and able to close today?

A. We are.

* * *

Q. You want to close this contract in accordance with its terms, don't you?

A. Yes, I do.

[5] Though, as the Court points out, DiGiuseppe did not have cash in hand to personally tender payment under the contract, DiGiuseppe testified that he had secured financing sources.

Q. Now, you had no ability to close this transaction yourself, did you?

A. I, personally, was not going to close the deal myself, no.

Q. You were going to get some investors to do it, weren't you?

A. I had them.

* * *

Q. . . . Is there any question – I want you to tell the jury – is there any question that you have the commitments and have the money to close this deal?

A. Not at all –

* * *

Q. And can you close this deal now?

A. Yes.

obligated to do no more than offer to perform in his pleadings, but a buyer who put on some evidence of creditworthiness and willing funding sources sufficiently established ability to pay). Contrary to the Court's suggestion, DiGiuseppe was not required to prove that he had cash in hand or that a written financing agreement was in place. DiGiuseppe offered to do equity in his pleadings, and he presented some evidence of his willingness and ability to perform under the contract. When a seller's repudiation of a contract makes the buyer's tender of payment useless and excuses that requirement, there is no principled reason to impose on the innocent buyer an obligation to establish pre-closing funding arrangements, which is not required by the contract and has never been required by this Court. DiGiuseppe did all that is required to show that he is entitled to the remedy of specific performance. I believe that, upon the jury's finding that Lawler breached the contract and DiGiuseppe did not, the trial judge had authority to order specific performance. Because the Court holds otherwise, I respectfully dissent.

_____

PAUL W. GREEN
JUSTICE

OPINION DELIVERED: October 17, 2008

IN THE SUPREME COURT OF TEXAS

NO. 04-1118

CITY OF SAN ANTONIO, PETITIONER,

v.

CHARLES POLLOCK AND TRACY POLLOCK,
INDIVIDUALLY AND AS NEXT FRIENDS OF
SARAH JANE POLLOCK, A MINOR CHILD, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued October 18, 2006

JUSTICE HECHT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE JOHNSON and JUSTICE WILLETT joined, and in all but Part II-C of which JUSTICE BRISTER joined.

JUSTICE MEDINA filed a dissenting opinion, in which JUSTICE O'NEILL joined.

JUSTICE GREEN did not participate in the decision.

When the government maintains a public nuisance that it knows is substantially certain to cause a specific injury to private property, it may be required by article I, section 17 of the Texas

Constitution[1] to provide adequate compensation for taking or damaging the property.[2] The claim in this case is that benzene from a closed municipal waste disposal site migrated through the soil to a nearby home, reducing its value and causing the owners' minor daughter to contract leukemia. We hold that there is no evidence the city knew its actions were substantially certain to cause the asserted injuries or that the personal injuries were caused by exposure to benzene. Accordingly, we reverse the judgment of the court of appeals[3] and render judgment for petitioner.

I

Charles and Tracy Pollock's daughter Sarah was born in June 1994. In February 1998, she was diagnosed with acute lymphoblastic leukemia ("ALL"). Cancer is rare in children, but leukemia is the most common, and ALL is the most common type of childhood leukemia.[4] A bone marrow biopsy also found that sixty percent of Sarah's bone marrow cells had 56 to 58 chromosomes instead

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[1] TEX. CONST. art. I, § 17 ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . .").

[2] *City of Dallas v. Jennings*, 142 S.W.3d 310, 314, 316 (Tex. 2004) ("We . . . hold that when a governmental entity physically damages private property in order to confer a public benefit, that entity may be liable under Article I, Section 17 if it (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action — that is, that the damage is necessarily an incident to, or necessarily a consequential result of the government's action. . . . [A] city may be held liable for a nuisance that rises to the level of a constitutional taking." (internal quotation marks omitted)).

[3] 155 S.W.3d 322 (Tex. App.–San Antonio 2004).

[4] Acute lymphoblastic leukemia is also called acute lymphocystic leukemia. The American Cancer Society reported in its publication, CANCER FACTS AND FIGURES 2000, at 19 (2000), *available at* http://www.cancer.org/downloads/STT/F&F00.pdf (last visited Nov. 20, 2008): "Leukemia is the most common form of cancer in childhood, affecting approximately 2,600 children under age 15 in the United States each year. Leukemia accounts for about one-third of all cancers in children under age 15 and about one-fourth of all cancers occurring before age 20. Acute lymphoblastic leukemia (ALL) constitutes approximately three-fourths of all childhood leukemias. The peak occurrence of ALL is between ages 2 and 3, with rates slightly higher among whites and males. Five-year relative survival from ALL has greatly increased over time, and is now nearly 80%, primarily due to several improvements in treatment."

of the expected 23 pairs; there were trisomies, a tetrasomy, and a translocation.[5] Following an intensive regimen of chemotherapy lasting more than two years, the cancer went into remission and the chromosomal anomalies disappeared. The statistical chance of recurrence is twenty percent.[6]

After Sarah began treatment, the Pollocks decided their family had outgrown the home in which they had been living in San Antonio since January 1992, before Sarah and her younger sister were born, and they put it up for sale. The home backed up to an old limestone quarry the City had used as a waste disposal site from 1967 to 1972 called the West Avenue landfill. The landfill had been closed and covered over with several feet of dirt twenty years before the Pollocks bought their home, but they had always smelled what Tracy described as "a really strong, pungent odor" in the house, particularly in the bathrooms. They smelled the same odor in the back yard for several days after a rain.

The Pollocks' realtor, wanting to fully disclose the condition of the property to prospective buyers, obtained an April 1998 report prepared for the City on methane gas concentrations around the landfill and gave it to the Pollocks. Anaerobic bacteria digesting landfill waste can produce large quantities of methane. Methane, the principal component of natural gas, is a colorless, odorless gas

[5] Normally, each of the 23 pairs of human chromosome consists of two copies of a linear strand of DNA material, one from the father and one from the mother, joined together at a point along their lengths called the centromere in a four-armed shape. A trisomy has three strands instead of a pair, and a tetrasomy has four. In 60% of Sarah's bone marrow cells there were nine trisomies — at pairs 4, 6, 8, 9, 10, 14, 17, 18, and 23 — and a tetrasomy — at pair 21. A translocation occurs when part of a chromosome is missing and attached instead to another chromosome. Sarah had a portion of chromosome pair 1 translocated to chromosome pair 22.

[6] Sarah also faces an increased risk of developing a secondary cancer as a result of her chemotherapy regimen.

at room temperature and standard pressure.[7] It has a lower explosive limit of 5% and an upper explosive limit of 15%, which means that it is explosive at a concentration of between 5% and 15% in air. Though not toxic, it can cause asphyxiation at a concentration above 14% in air. Bacterial production of methane increases when leachate is present. Leachate is water that has seeped down into a landfill and percolated through it, collecting various contaminants along the way. Methane can serve as a carrier for other landfill byproducts and volatile organic compounds, such as benzene. Benzene is an aromatic hydrocarbon found in crude oil. At room temperature and standard pressure, benzene is a clear liquid with a sweet smell, but it evaporates quickly and is highly flammable. It is widely used as a gasoline additive, an industrial solvent, and a precursor in the production of other chemicals, and is present in cigarette smoke. Benzene is a known carcinogen.

Attached to the report the realtor obtained was an analysis of gas samples taken at the landfill, reflecting that small traces of benzene had been detected — 13.3 ppb in one sample and 146 ppb in another.[8] Tracy showed the report to one of Sarah's oncologists, Dr. Kenneth Lazarus, who became alarmed and warned her to keep her children out of the back yard. The Pollocks immediately moved out of their home and sold it a few months later for $75,000. (They had paid $77,000 for it seven years earlier and were asking $94,000.) In January 2000, the Pollocks sued the City, claiming

[7] As a consumer safety measure, a foul-smelling odorant, usually methanethiol or ethanethiol, is added to natural gas sold for fuel.

[8] The Texas Commission on Environmental Quality gives these examples to illustrate "ppb" — parts per billion: 1 penny in 10 million dollars; 1 second in 32 years; 1 foot of a trip to the moon; 1 blade of grass on a football field; 1 drop of water in an Olympic-size swimming pool. *See* http://www.tceq.state.tx.us/assets/public/remediation/superfund/jonesroad/ppb_chart.pdf (last visited Nov. 20, 2008).

that Sarah's ALL was caused by Tracy's exposure to benzene from the West Avenue landfill during her pregnancy.

The evidence revealed that several years after the City closed the landfill in 1972, it began receiving complaints from nearby residents about odors caused by gases escaping from the landfill. In 1980, the City found that pockets of methane gas had formed near the landfill, some in potentially explosive concentrations. The highest observed concentrations were along the southwest side of the landfill, in the neighborhood where the home the Pollocks later bought was located. To collect methane from the landfill and prevent its migration into the surrounding area, the City drilled a system of ventilation wells around the perimeter, connected by a pipe, with a compressor to lower the pressure so that gas would be drawn from the landfill into the wells. The City also purchased two residences near the landfill in which gas had been detected, one just two blocks from the Pollocks' property, to use as monitoring facilities.

In 1982, a survey of the water quality in several wells in the Edwards Aquifer detected various volatile organic compounds, including benzene, which might have come from the landfill. A consulting firm hired by the City concluded that methane was migrating through subsurface cracks in the walls and base of the landfill. Once outside the landfill, methane could also flow through the soil along trenches that had been dug to lay residential utilities, like water and sewer lines, and refilled. In that way, methane carrying benzene and other chemicals could migrate to the houses surrounding the landfill, endangering residents. The consultants also concluded that leachate had accumulated in the landfill, increasing methane production and blocking it from reaching the

ventilation wells. The consultants recommended that the methane collection system be improved and wells drilled to remove leachate from the landfill.

The City made several improvements in 1985, but subsidence in the landfill continued to impair operation of the methane collection system and the leachate collection wells, causing portions of the system to collapse. Subsidence also allowed water to pool at the surface, increasing drainage through the landfill and the amount of leachate, which in turn increased methane production. When the Pollocks bought their home, there was a large hole in the back yard, apparently due to subsidence near the landfill. At the Pollocks' request, the City filled the hole, but it developed again later, and the City filled it a second time.

In late 1989, a City engineer recommended major repairs to the methane collection system, and in August 1994, an outside contractor hired by the City recommended that the entire system be replaced. The City installed a new system in early 1998.

Over the years, the City regularly tested for landfill gas in the ventilation wells and at several homes near the landfill, including those used as monitoring facilities. The air near the Pollocks' home was field-tested for methane at various times between 1981 and 1997, using a hand-held explosimeter. No methane was detected near the Pollocks' home while they lived there. At trial, the Pollocks' expert, Dan Kraft, an engineer with experience in landfill management, attempted to extrapolate the presence of landfill gas on the Pollocks' property in 1993 and 1994, when Tracy was pregnant with Sarah, from samples taken in 1998 from a sealed monitoring well 128 feet deep, located 30 feet from the Pollocks' back yard and 70 feet from their home. Those samples contained methane at a concentration of 477,000 ppm (47.7%) and benzene at 146 ppb by volume. Assuming

that the ratio of benzene to methane remained constant over time while methane from the landfill was decreasing — an assumption the City agreed was reasonable — and using an accepted EPA gas generation model, Kraft concluded that, had a sample from the sealed well been taken in 1993-1994, it would have contained at least 160 ppb benzene. Kraft then stated that in his opinion, gas with a composition similar to the sample entered the Pollocks' home "on a regular basis". Of course, landfill gas would immediately dissipate in the open air.[9] Even greatly diluted, the gas would have been asphyxiating and explosive. Kraft offered no opinion regarding any concentrations of methane or benzene in the ambient air in the Pollocks' home and yard.

Dr. Mahendar Patel, Sarah's other treating oncologist, testified that in his opinion, Sarah's leukemia was caused by Tracy's exposure to benzene while she was pregnant with Sarah. Patel was experienced in diagnosing and treating ALL but had done no research himself on the causes of the disease or any connection between ALL and benzene. He based his opinion at trial on Kraft's testimony and on several studies of cancer rates in workers occupationally exposed to benzene. None of the studies considered an exposure to benzene at a concentration less than 31 ppm, which is 31,000 ppb, over 200 times the concentration in the 1998 sample on which Kraft relied. The studies also found chromosomal anomalies in subjects, some of which were similar to Sarah's, but the studies did not conclude that exposure to benzene was the most likely cause of anomalies like Sarah's.

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[9] Methane is much lighter than air (0.55 specific gravity at standard temperature and pressure). Benzene vapor, though heavier than air, is volatile and dissipates rapidly in air. AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, U.S. DEPT. OF HEALTH & HUMAN SERVS., HEALTH CONSULTATION: REVIEW OF ON-SITE AIR MONITORING DATA DURING THE REMOVAL AT LE MARS COAL GAS SITE 7 (2005).

Garbage removal and disposal is a governmental function[10] for which the City is immune from liability, but the Pollocks contend that governmental immunity does not bar their recovery for nuisance and negligence. Article I, section 17 of the Texas Constitution requires compensation for a nuisance that amounts to a taking of property,[11] and the Texas Tort Claims Act waives immunity for governmental negligence in some circumstances.[12] The jury found that:

- the landfill was a nuisance;
- the City was negligent;
- the City acted with malice;
- actual damages caused by the nuisance and the negligence were:
    - $7 million for Sarah's past and future physical pain and mental anguish, disfigurement, and physical impairment;
    - $111,000 for past medical care; and
    - $6 million for future medical care;
- property damages caused by the nuisance was $29,000; and
- $10 million exemplary damages should be assessed against the City.

The Pollocks elected to recover on their nuisance claim. The trial court reduced the award for future medical expenses to $500,000 and otherwise rendered judgment on the verdict, plus prejudgment

[10] TEX. CIV. PRAC. & REM. CODE § 101.0215(a)(6).

[11] TEX. CONST. art. I, § 17.

[12] TEX. CIV. PRAC. & REM. CODE § 101.021.

interest and costs, for a total of $19,999,223.78. On appeal by the City, the court of appeals reversed the exemplary damage award and affirmed in all other respects.[13]

We granted the City's petition for review.[14]

II

A

The Pollocks rest their claim that Sarah's ALL was caused by *in utero* exposure to benzene from the West Avenue landfill on the opinions of their experts, Kraft and Patel. The City contends that the expert testimony was conclusory and therefore legally insufficient to support a judgment. The City raised this objection repeatedly in the trial court, in motions for directed verdict after the Pollocks rested their case and again at the close of the evidence, and by post-trial motions for judgment non obstante veredicto and for new trial. But the City did not object to the admission of the evidence.

Bare, baseless opinions will not support a judgment even if there is no objection to their admission in evidence. In *Coastal Transportation Co. v. Crown Central Petroleum Corp.*, we summarized settled law as follows:

> [A]lthough expert opinion testimony often provides valuable evidence in a case, "it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness." *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999). Opinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact "more probable or less probable." *See* TEX. R. EVID. 401. This Court has labeled

[13] 155 S.W.3d 322 (Tex. App.–San Antonio 2004).

[14] 49 Tex. Sup. Ct. J. 567 (May 5, 2006).

> such testimony as "incompetent evidence," and has often held that such conclusory testimony cannot support a judgment. *Cas. Underwriters v. Rhone*, 134 Tex. 50, 132 S.W.2d 97, 99 (1939) (holding that a witness's statements were "but bare conclusions and therefore incompetent"); *see also Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997) ("[A]n expert witness's conclusory statement . . . will neither establish good faith at the summary judgment stage nor raise a fact issue to defeat summary judgment."). Furthermore, this Court has held that such conclusory statements cannot support a judgment even when no objection was made to the statements at trial. *Dallas Ry. & Terminal Co. v. Gossett*, 156 Tex. 252, 294 S.W.2d 377, 380 (1956) ("It is well settled that the naked and unsupported opinion or conclusion of a witness does not constitute evidence of probative force and will not support a jury finding even when admitted without objection."); *Rhone*, 132 S.W.2d at 99 (holding that "bare conclusions" did not "amount to any evidence at all," and that "the fact that they were admitted without objection add[ed] nothing to their probative force"); *see also Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 712 (Tex. 1997) ("When the expert 'brings to court little more than his credentials and a subjective opinion,' this is not evidence that would support a judgment . . . . If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no.").[15]

We held that a party may complain that conclusory opinions are legally insufficient evidence to support a judgment even if the party did not object to the admission of the testimony.[16]

When a scientific opinion is not conclusory but the basis offered for it is unreliable, a party who objects may complain that the evidence is legally insufficient to support the judgment.[17] An objection is required to give the proponent a fair opportunity to cure any deficit and thus prevent trial by ambush.[18] As we explained in *Coastal*, there is

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[15] *Coastal Transp. Co. v. Crown Central Petrol. Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (footnote omitted).

[16] *Id.* ("We disagree that an objection is needed to preserve a no-evidence challenge to conclusory expert testimony.").

[17] *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711-712 (Tex. 1997).

[18] *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998) ("To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered. Without requiring a timely objection to the reliability of the scientific evidence, the offering party is not given

> a distinction between challenges to an expert's scientific methodology and no evidence challenges where, on the face of the record, the evidence lacked probative value. When the expert's underlying methodology is challenged, the court necessarily looks beyond what the expert said to evaluate the reliability of the expert's opinion. When the testimony is challenged as conclusory or speculative and therefore non-probative on its face, however, there is no need to go beyond the face of the record to test its reliability. We therefore conclude that when a reliability challenge requires the court to evaluate the underlying methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct this analysis. However, when the challenge is restricted to the face of the record — for example, when expert testimony is speculative or conclusory on its face — then a party may challenge the legal sufficiency of the evidence even in the absence of any objection to its admissibility.[19]

In *Coastal*, the plaintiff contended that the defendant was grossly negligent in using a defective device to prevent overfilling gasoline tanker trucks, resulting in a spill and fire.[20] An expert's opinions that the defendant acted with conscious indifference were simple assertions with no basis at all, and we held that they were legally insufficient to support the judgment.[21] But even when some basis is offered for an opinion, if that basis does not, on its face, support the opinion, the opinion is still conclusory. Our decision in *Volkswagen of America, Inc. v. Ramirez*[22] is an example. There, the plaintiff's car bumped against another vehicle traveling the same direction, then crossed a 500-foot grassy median to the opposite side of the highway and hit a third car head-on.[23] The

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an opportunity to cure any defect that may exist, and will be subject to trial and appeal by ambush." (citations omitted)).

[19] *Coastal*, 136 S.W.3d at 233 (citations omitted).

[20] *Id.* at 230.

[21] *Id.* at 231, 233.

[22] 159 S.W.3d 897 (Tex. 2004).

[23] *Id.* at 901-902.

plaintiff's expert concluded that the rear wheel of the plaintiff's car came loose from the axle before the accident rather than after, and therefore caused, rather than was caused by, the accident.[24] The expert pointed to several facts to show that the wheel bearing failed and noted that after the accident, grass was found in the hub of the detached wheel.[25] But he could not explain how the wheel detached before the accident but nevertheless remained in the car's wheel well while the car crossed the median and collided with another car.[26] We concluded that, even assuming the expert's methodology was reliable (the defendant had not objected to it) and taking the record at face value, the facts on which he relied did not support his conclusion.[27]

When a scientific opinion is admitted in evidence without objection, it may be considered probative evidence even if the basis for the opinion is unreliable. But if no basis for the opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection. "[A] claim will not stand or fall on the mere *ipse dixit* of a credentialed witness."[28] In the case before us, the Pollocks argue that the City's challenge to their experts' testimony is really a challenge to its reliability — to the data used and the experts' methodology. The City insists that it is not challenging the reliability of Kraft's and Patel's testimony, even conceding that it agrees with much

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[24] *Id.* at 902.

[25] *Id*. at 911.

[26] *Id.*

[27] *Id.*

[28] *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999).

of their methodology. Rather, the City contends that there is no basis in the record for the experts' ultimate opinions, and therefore they cannot support the judgment. We examine each expert in turn and conclude that there was no evidence to support an award of personal injury damages on the Pollocks' theories of nuisance or negligence.

B

Kraft's testimony was offered to prove that Sarah Pollock was exposed *in utero* to landfill gas at levels high enough to cause ALL. Landfill gas had never been found on the Pollocks' property from the time they lived there to the time of trial, but it had been found in other homes in the neighborhood, and it could have migrated to the Pollock's property along underground utility lines or through the ground generally. The Pollocks smelled odors in their home and back yard which might have been landfill gas, and subsidence in their back yard might have been due to underground leachate from the landfill. In 1998, gas in a sealed monitoring well 128 feet deep and 30 feet from the Pollocks' property tested 47.7% methane with 146 ppb benzene by volume. Using an EPA-approved gas model, Kraft extrapolated that in 1993-1994, gas in the well would have been more than 50% methane with 160 ppb benzene by volume. Based on this data and analysis, Kraft concluded: the Pollocks were exposed to gas levels like that in the sealed well. In other words, air on the Pollock's property would have been like that found in the sealed well.

The City does not challenge any part of Kraft's analysis except his final conclusion. The City does not quarrel with Kraft's decision to use 1998 gas samples taken from the monitoring well closest to the Pollocks' property, or with his assumptions that the benzene-to-methane ratio was constant over time while methane from the landfill was decreasing, or with his conclusion that

therefore the benzene concentration in the well between 1993 and 1994 would have been 160 ppb. The City does not dispute that methane migrated out of the landfill or that it was possible for methane to migrate onto surrounding property, including the Pollocks' property, through utility trenches or otherwise.

The City contends that none of these facts or analyses supports Kraft's conclusion that the Pollocks were exposed to benzene at a level of 160 ppb in the air in their home and on their property. Assuming from Kraft's data that in 1993-1994, gas in the monitoring well would have been 50% methane and 160 ppb benzene, and that gas of that composition migrated onto the Pollocks' property, it unquestionably dissipated in the ambient air. Unless the landfill gas was less than 28% of the ambient air — and the methane concentration reduced below 14%, with a benzene concentration of 44.8 ppb — the Pollocks would have suffocated *from the methane*. Unless gas like that found in the well were less than 10% of the ambient air — and the methane concentration reduced below 5% methane, with a benzene concentration of 16 ppb — there would almost certainly have been an explosion *from the methane*. There is no evidence whatever from which one could infer the concentration to which Tracy Pollock was exposed in the ambient air of her home and yard, but at the highest concentration possible, the methane — and consequently the level of benzene — could have been only a fraction of that in the sealed monitoring well. Kraft's opinion that she was chronically exposed to benzene concentrations of 160 ppb has no basis in the record. Indeed, it is directly contradicted by his own data showing such concentrations present only in the well. Kraft's opinion is the kind of naked conclusion that cannot support a judgment.

C

The purpose of Patel's testimony was to prove that Tracy Pollock's exposure to benzene concentrations of 160 ppb — assuming Kraft was correct — could cause Sarah's ALL *in utero*. The City does not challenge the reliability of Patel's data or methodology. The City concedes that Patel appropriately relied on epidemiological studies indicating that an unborn baby's exposure through her mother to chemicals, including benzene, is capable of causing chromosomal anomalies and childhood leukemia.[29] The study most favorable to Patel's view found that chromosomal aberrations like Sarah's may result from exposure to concentrations of benzene less than 10 ppm[30] — more than 60 times the level of exposure that Kraft claimed. Another study on which Patel relied found a correlation between exposure to concentrations of benzene greater than 31 ppm and a particular chromosomal aberration, but noted that the effect was "clear[ly] dose dependent".[31] The Pollocks' maximum claimed level of exposure is only 1/200th of that exposure. No study was offered showing a relationship between chromosomal anomalies like Sarah's and exposure to benzene at the lower levels the Pollocks claimed. This is perhaps hardly surprising, since the OSHA standard for maximum exposure to benzene in the work place is 1 ppm[32] — more than six times the Pollocks'

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[29] David A. Savitz & Kurtis W. Andrews, *Review of Epidemiologic Evidence on Benzene and Lymphatic and Hematopoietic Cancers*, 31 AM. J. OF INDUS. MED. 287, 292-294 (1997); Martyn T. Smith & Luoping Zhang, *Biomarkers of Leukemia Risk: Benzene as a Model*, 106 ENVTL. HEALTH PERSP. 937, 943 (1998); Henriette Van Steensel-Moll et al., *Childhood Leukemia and Parental Occupation: A Register-Based Case-Control Study*, 121 AM. J. OF EPIDEMIOLOGY 216, 223 (1985).

[30] Smith & Zhang, *supra* note 29, at 941.

[31] Luoping Zhang et al., *Interphase Cytogenetics of Workers Exposed to Benzene*, 104 ENVTL. HEALTH PERSP. 1325, 1328 (1996).

[32] 29 C.F.R. § 1910.1028(c)(1) (2008).

exposure, according to Kraft. Given this large gap between the exposure levels in the studies that Dr. Patel relied on and the concentration Kraft hypothesized that the Pollocks had been exposed to, those studies provide no basis for his opinion that the Pollocks' claimed benzene exposure caused Sarah's ALL.

Patel asserted that the Pollocks' exposure to benzene, as found by Kraft, was really higher than the exposure levels in the reports on which he relied because it occurred over a longer period. While it is possible that a long-term exposure to a low level of toxin might be worse than a short-term exposure to the toxin at much higher levels, it is just as likely, in the abstract, that the opposite is true.[33] Nothing in any of the materials on which Patel relied supported his assertion.

While some of Sarah's chromosomal anomalies were also found with exposure to benzene, Patel testified others were unrelated to benzene exposure. There is therefore no basis for Patel's testimony that Sarah's pattern of chromosomal anomalies indicate her ALL was benzene-induced. Because neither the epidemiological studies nor the similarities in Sarah's chromosomal anomalies support Patel's opinion that Sarah's ALL was caused by exposure to benzene *in utero*, his testimony was conclusory and cannot support liability.

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[33] See, e.g., LAWRENCE G. CETRULO, TOXIC TORTS LITIGATION GUIDE § 5.14 (2008) ("Proof of exposure is not, by itself, sufficient to prove medical causation. A plaintiff must also prove that he was exposed to a sufficient amount, or dose, of a particular toxin to cause a particular disease. Virtually any agent, even tap water, may produce a toxic effect at a sufficiently high level of exposure. Conversely, it may be argued that even the deadliest poison is harmless at a sufficiently low level of exposure."); FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 403 (2000) (stating that a central tenet of toxicology is that "'the dose makes the poison'; this implies that all chemical agents are intrinsically hazardous—whether they cause harm is only a question of dose. Even water, if consumed in large quantities, can be toxic." (footnote omitted)).

A few months after this case was tried, the court of appeals in *Exxon Corp. v. Makofski*[34] reviewed all of the studies the parties could produce attempting to link ALL to benzene exposure and concluded that nothing showed a correlation to meet the standard of probative evidence set by this Court in *Merrell Dow Pharmaceuticals, Inc. v. Havner.*[35] The court concluded that the unsupported opinions of the experts in that case were no evidence.[36] For the same reasons, we reach the same conclusion here. Patel's opinions were conclusory and provided no evidence that Sarah's ALL was caused by Tracy's exposure to benzene from the landfill.

III

The Pollocks claim property damages on the ground that the West Avenue landfill was a nuisance that amounted to a taking of property without adequate compensation in violation of article I, section 17 of the Texas Constitution.

We have held that the government's "mere negligence which eventually contributes to the destruction of property is not a taking";[37] rather, the government must act intentionally. This requirement is rooted in the constitutional provision that a compensable taking occurs "only if property is damaged or appropriated for or applied to public use."[38] An accidental destruction of

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[34] 116 S.W.3d 176, 183 (Tex. App.–Houston [14th Dist.] 2003, pet. denied).

[35] 953 S.W.2d 706, 725-726 (Tex. 1997).

[36] Makofski, 116 S.W.3d at 187-188.

[37] *City of Tyler v. Likes*, 962 S.W.2d 489, 504-505 (Tex. 1997); *see also City of Dallas v. Jennings*, 142 S.W.3d 310, 313 (Tex. 2004)..

[38] *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 554-555 (Tex. 2004) (internal quotation marks omitted) (quoting *Steele v. City of Houston*, 603 S.W.2d 786, 792 (Tex. 1980)(citing *Davis v. City of Lubbock*, 326 S.W.2d 699, 702-709 (Tex. 1959))).

property does not benefit the public. The public-use limitation "is the factor which distinguishes a negligence action from one under the constitution for destruction."[39]

For purposes of article I, section 17, a governmental entity acts intentionally if it knows either "that a specific act [was] causing identifiable harm" or "that the specific property damage [was] substantially certain to result from" the act.[40] A governmental entity is substantially certain that its actions will damage property only when the damage is "necessarily an incident to, or necessarily a consequential result of the [entity's] action."[41] The government's knowledge must be determined as of the time it acted, not with benefit of hindsight.[42]

The Pollocks contend that the City knew its management of the West Avenue landfill[43] was damaging their property, or knew at least that damage to their property was a necessary result. But the evidence is all to the contrary. Whenever the City was aware that gas was migrating from the landfill, it took steps to prevent damage. It monitored gas generation, monitored leachate, and installed methane collection systems. We assume, as the Pollocks assert and the jury found, that those efforts were inadequate and that the City was negligent. But there is no evidence that the City knew that the Pollocks' property was being damaged or that damage was a necessary consequence.

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[39] *Gragg*, 151 S.W.3d at 555 (quoting *Steele*, 326 S.W.2d at 792).

[40] *Jennings*, 142 S.W.3d at 314.

[41] *Id.* (citations omitted).

[42] *Id.* at 315 ("[T]here is no evidence that the City knew, *when it unclogged the sewer line*, that any flooding damage would occur." (emphasis added)).

[43] *See City of Tyler v. Likes*, 962 S.W.2d 489, 504-505 (Tex. 1997) (noting that a governmental entity may commit a taking through either the construction of a public work or the subsequent maintenance and operation of one).

The Pollocks contend that the fact the City knew that subsidence, ponding, and gas generation and migration are inherent in the operation of a landfill is sufficient to show that the City knew its operation of the landfill was substantially certain to damage their property. We rejected essentially the same argument in *City of Dallas v. Jennings*, where homeowners attempted to show the city's intent to damage their property by sewage flooding from the fact that the city knew that unclogging a sewer can sometimes cause it to back up.[44] The governmental entity's awareness of the mere possibility of damage is no evidence of intent. The damage the Pollocks claim — the migration of gas onto their property — is neither necessarily incident to or a consequential result of the operation of a landfill. It can be prevented.[45] The City's negligent failure to prevent landfill gas migration in this case is no evidence that it intended to damage the Pollocks' property.

Since there was no evidence of a compensable taking, the City is immune from the Pollocks' property damage claims.

* * *

We therefore reverse the court of appeals' judgment and render judgment that the Pollocks take nothing on their claims.

Nathan L. Hecht
Justice

Opinion delivered: May 1, 2009

[44] *Jennings*, 142 S.W.3d at 315.

[45] *See* Jeffrey Ball, *Pollution Credits Lets Dumps Double Dip*, WALL ST. J., Oct. 20, 2008, at A1. The EPA has issued detailed regulations regarding the operation of a methane collection system. 40 C.F.R. §§ 60.750-.759 (2008).

IN THE SUPREME COURT OF TEXAS

NO. 04-1118

CITY OF SAN ANTONIO, PETITIONER,

v.

CHARLES POLLOCK AND TRACY POLLOCK, INDIVIDUALLY AND AS NEXT FRIENDS OF SARAH JANE POLLOCK, A MINOR CHILD, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued October 18, 2006

JUSTICE MEDINA, joined by JUSTICE O'NEILL, dissenting.

The Pollocks claim that Sarah's leukemia was caused by her *in utero* exposure to benzene, which had migrated from the West Avenue landfill into their home. The claim rests on the testimony of two expert witnesses: Dr. Mahendra Patel, a pediatric oncologist and Sarah Pollock's treating physician, and Daniel Kraft, a petroleum engineer with extensive experience in the design, construction, and post-closure maintenance of landfills. Kraft gave his opinion about the amount of benzene in the Pollock home, and how it got there. Dr. Patel testified that Sarah's mother's exposure to benzene during pregnancy caused chromosomal damage, and Sarah's acute lymphoblastic leukemia (ALL). Dr. Patel's opinion was based on a review of the scientific literature

on the subject, his differential diagnosis, his treatment of Sarah, and Sarah's chromosomal injury that he described as a unique fingerprint of benzene exposure and damage *in utero*.

The City concedes that methane and benzene migrated from its landfill into the surrounding community. The City also does not contest the underlying science relied on by Dr. Patel or the dangers of exposure to benzene, a known carcinogen. Instead, the City contends that analytical gaps in the testimony of both experts render their respective opinions conclusory. The Court eventually agrees after delving into the underlying science. The Court analyzes the relationship between methane and benzene, the respective physical properties of both gasses, benzene's relationship to certain types of leukemia and chromosomal damage, and the respective testimony of both experts. Most significantly, however, the Court concludes that the City did not have to object or point out these analytical gaps in the trial court to preserve error. I respectfully disagree.

As a general rule, an objection is required to preserve error regarding the admission of evidence, and expert testimony is no exception. *See* TEX. R. APP. P. 33.1(a); TEX. R. EVID. 103(a)(1); *Osterberg v. Peca,* 12 S.W.3d 31, 55 (Tex. 2000). Without an objection, a trial court simply cannot be expected to fulfill its role as gatekeeper. Nor can an appellate court assume this role, particularly after the witnesses have testified, been dismissed, and the record closed. Nevertheless, the Court here assumes the role of gatekeeper *ex post facto*, allowing the City to complain about analytical gaps for the first time on appeal. Because the City did not object to the reliability of either expert witness in the trial court or complain about the analytical gaps it now details in this appeal, I would hold that the complaint has been waived.

I

I agree, however, that analytical gaps can undermine the reliability of an expert's opinion. The Supreme Court said as much in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), observing that courts do not have to focus entirely on the reliability of the underlying methodology or technique as in *Daubert,*[1] but are free to test reliability by analyzing whether the expert's opinion fits the facts of the case:

> [C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence . . . connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. at 146; *see also* Richard O. Falk & Robert O. Hoffman, *Beyond Daubert and Robinson: Avoiding and Exploiting "Analytical Gaps" in Expert Testimony*, 33 THE ADVOCATE 71, 72 (Winter 2005). The Supreme Court also has recognized that the trial court's role as gatekeeper, like other rulings on the admission of evidence, is a discretionary decision subject to review only for an abuse of that discretion. *Joiner*, 522 U.S. at 142-43.

This Court soon followed *Joiner*, concluding in *Gammill v. Jack Williams Chevrolet, Inc.*, that an expert's opinion can be unreliable if there is too great an analytical gap between the underlying data and the expert's opinion.[2] 972 S.W.2d 713, 727 (Tex. 1998). We cautioned,

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[1] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993); *see also E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

[2] One observer has suggested that analytical gaps are of two types: "(1) the underlying data-facts gap, which focuses on material variances between the data underlying the expert opinion and the actual facts of the plaintiff's case; and (2) the methodology-conclusion gap, which focuses on whether the expert properly explains how the

however, that the trial court's job was not to determine whether an expert's conclusions were correct, but only whether the analysis used to reach them was reliable. *Id.* at 728. We further noted that the trial court's gatekeeper decisions in this regard were to be reviewed under the abuse of discretion standard. *Id.* at 727.

A trial court, however, cannot abuse its discretion if it is never asked to exercise it. Thus, to preserve a no-evidence complaint that expert testimony is unreliable, a party must object in the trial court. *See Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409-10 (Tex. 1998) (objection made after jury verdict was too late); *see also Gen. Motors Corp. v. Iracheta*, 161 S.W.3d 462, 471 (Tex. 2005) (objection must be made when deficiency becomes apparent)*; Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 252 (Tex. 2004) (motion to strike made immediately after cross-examination held timely). But an objection is not invariably required; there is a limited exception to the general rule.

When the expert's testimony is speculative or conclusory on its face, a party does not have to object to its admissibility to complain that the expert's naked opinion is no evidence. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004) ("bare conclusions–even if unobjected to–cannot constitute probative evidence"). It is obviously important then to distinguish unreliable expert testimony from conclusory expert testimony because the former requires a timely objection, while the latter does not. What then separates the conclusory from the merely unreliable?

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methodology was applied to the plaintiff's facts in arriving at the conclusion." Kimberly S. Keller, *Bridging the Analytical Gap: The Gammill Alternative to Overcoming Robinson & Havner Challenges to Expert Testimony*, 33 ST. MARY'S L.J. 277, 310 (2002).

The distinction apparently is the difference between something and nothing. As the Court recently explained in *Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 389 (Tex. 2008): An expert's testimony is conclusory if the expert merely gave an unexplained conclusion or asked the jury to "take my word for it" because of his status as an expert. Arkoma concluded that an expert's opinions were not conclusory even though the expert's foundational data was not in the record, and it was not entirely clear how the expert had reached his conclusions. We wrote:

> [The expert's] testimony could have been a lot clearer; his references to "up here" and "right there" on slides and posters used at trial often make it hard to tell what he is talking about. But we cannot say on this record that his opinions were unreliable or speculative. Nor were they conclusory as a matter of law; [the expert] did not simply state a conclusion without any explanation, or ask jurors to "take my word for it." It is true that without the foundational data in the appellate record, we cannot confirm that "cash off my runs ... divided by mcf" yielded the $1.62, $1.41, $1.43, and $1.59 prices he calculated as the low range for damages. But experts are not required to introduce such foundational data at trial unless the opposing party or the court insists.

Id. at 389-90 (footnotes omitted). *Arkoma* further explained when a party should object to preserve error:

> Texas law requires an objection to expert testimony before or during trial if the objection "requires the court to evaluate the underlying methodology, technique, or foundational data," but no objection is required if the complaint "is restricted to the face of the record," as when the complaint is that an opinion was speculative or conclusory on its face, or assumed facts contrary to those on the face of the record.

Id. at 388 (footnote omitted) (citing *Coastal Transp. Co.,* 136 S.W.3d at 233). Thus, an objection is not required to preserve an appellate complaint about an expert's naked conclusions, but if the expert purports to rely on something more than his credentials or reputation, an objection is necessary. This

exception is rarely applied, probably because naked conclusions ordinarily draw immediate objections.

The exception was applied in *Coastal*, however. In that case, Coastal failed to object to the following testimony from a trucking-safety expert regarding gross negligence:

> Q: When viewed objectively from Coastal's point of view at the time of the September '93 incident, in your opinion, did Coastal's failure to stop using probes that could have [sensor failure] problems, did that involve a high degree of risk, considering the probability and magnitude of the potential harm to others?
> A: Yes, it did, very high.
>
> Q: In your opinion, did Coastal have an actual subjective awareness of the risk involved in failing to stop using probes that can have [sensor failure] problems?
> A: Yes, again and again.
>
> Q: And in your opinion, did Coastal nevertheless proceed with conscious indifference to the rights, safety, or welfare of others?
> A: That's the only conclusion I can draw.

Id. at 231. Distinguishing a no-evidence reliability complaint from a no-evidence conclusory complaint, we said that an expert's "bare conclusions–even if unobjected to" are not probative evidence. *Id.* at 233. We thus drew a "distinction between no evidence challenges to the reliability of expert testimony in which we evaluate the underlying methodology, technique or foundational data used by the expert and no evidence challenges to conclusory or speculative testimony that is non-probative on its face." *Volkswagen of Am., Inc. v. Ramirez,* 159 S.W.3d 897, 910 (Tex. 2004) (citing *Coastal Transp. Co.,* 136 S.W.3d at 233).[3] *Coastal* did not involve a reliability challenge requiring

[3] The Court suggests that *Ramirez* concerned only a conclusory challenge, but the case also involved a reliability complaint. One significant issue in the case was when the left rear wheel on the Volkswagen came off its axle. *Ramirez*, 159 S.W.3d at 902. Edward Cox, the plaintiff's metallurgical expert at trial, testified that a defective bearing caused the wheel to separate from the axle. *Id.* at 910. Cox "was not offered as an accident reconstructionist to help establish when . . . the defect caused the accident," and the Court rejected his "limited opinions on the

an objection in the trial court because there was nothing for the trial court to evaluate; the expert did not purport to use any methodology, technique, or foundational data but rather merely delivered his subjective opinion concerning Coastal's gross negligence. That is not the present case.

In rendering his opinion, Kraft, the landfill engineer, used a generally accepted Environmental Protection Agency ("EPA") landfill air model,[4] testimony regarding odors in the Pollock home indicative of the presence of organic hydrocarbons, such as benzene, the City's gas monitoring records, a physical site inspection, and two decades of historical geologic records and maps. Because no benzene readings had actually been taken at the Pollock home, Kraft relied on, among other things, a 1998 benzene reading from a sealed monitoring well known as GMP-9A. This well was in the landfill 100 feet from the Pollock home and 128 feet underground. Although the reading at GMP-9A was taken more than four years after Sarah's alleged *in utero* exposure in 1993, Kraft concluded that the benzene levels in the Pollock home would have been equal to or greater than that of a sample taken from the well in 1998, that being, 160 ppb (parts per billion) benzene.

The City argues that Kraft's opinion is conclusory because he does not explain how the benzene concentration level in the Pollock home can be the same as that in a sealed testing well. Although Kraft's opinions were predicated on various reports and an EPA landfill gas emissions

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causation issue" as conclusory. *Id*. at 910-11. When the Court says here that there was no objection, it is referring to Cox's testimony. *See* ___ S.W.3d at ___ & n.27. Volkswagen objected to the testimony of Ronald Walker, the plaintiff's accident reconstructionist, and that testimony was analyzed by the Court under "the standards of reliability." *Id*. at 904. The *Ramirez* Court concluded that Walker's opinion was indeed unreliable because of a particular analytical gap in his analysis. *Id*. at 906. Thus, the trial court abused its discretion in admitting the testimony and erred in not sustaining Volkswagen's objection.

[4] Kraft estimated the methane-benzene generation ratio by using the USEPA Landfill Gas Generation Model (LandGEM) version 2.01. The model was developed by the EPA's Control Technology Center for estimating landfill gas emissions.

model, the City maintains that his testimony contains a fatal "analytical gap" because he failed to account for atmospheric conditions. This analytical gap, the City argues, renders Kraft's opinion conclusory.

The complaint, however, goes to Kraft's methodology or technique in evaluating the data because he was comparing benzene concentrations not only at different locations but also at different points in time. Relying on his air model, Kraft testified that the benzene levels produced by the landfill peaked in the late seventies and began to diminish thereafter. Thus, benzene levels would have been higher in 1993 during Sarah's gestation than in 1998 when the benzene reading from the monitoring well was taken. Kraft testified to the following without objection:

> Q. Mr. Kraft, have you done any calculations and projections about the migration of gas that the – from the West Avenue Landfill to the Pollock home during the period 1992 to 1994?
> A. Yes.
>
> * * *
>
> Q. Okay. What kind of records did you look at in reaching your opinions?
> A. Field data sheets from methane surveys that were done in the neighborhood surrounding the landfill, interoffice correspondence with the City of San Antonio, letters to the City of San Antonio from the TNRCC [Texas National Resource Conservation Committee] and the Texas Department of Health, records on geologic data that was collected by City employees, reports that were produced by the City's consultants.
>
> * * *
>
> Q. Do you have an opinion, Mr. Kraft, as to whether the Pollocks were chronically exposed to benzene concentrations in their home?
> A. Yes, I do have an opinion on that.
>
> Q. And what is that opinion?
> A. It's my opinion that they were chronically exposed to landfill gas.

Q. And did the landfill gas include benzene?
A. Yes, it did.

Q. What is your opinion of the range of benzene to which they were exposed? And please express it in terms of a numerical value.
A. I believe that they were consistently exposed to benzene concentrations in the vicinity of 160 parts per billion, or even higher.

Q. In your report, Mr. Kraft, I believe you said 40 to 160 parts per billion; is that correct?
A. That's correct.

Q. Why are you now saying it might be higher than 160 parts per billion?
A. For several reasons.

Q. And what are those reasons?
A. Number one would be the gas modeling that I did with the United States Environmental Protection Agency model, the — you know, the landfill gas emissions model, which indicates that the amount of benzene produced by the landfill decreased over time.

Q. What other reasons, Mr. Kraft?
A. The analytical results that were collected at GMP-9 in January of 1998, they also measured the oxygen concentration. Landfill gas – landfill gas samples that have over 2 percent oxygen indicate that there has been some dilution from atmospheric air occurring, therefore, the concentrations that were measured in that sample were likely to be slightly lower than they were in the actual landfill gas itself, because it was diluted while they were sampling it.

In accordance with the City's argument, the Court suggests that Kraft testified that the air in the Pollock's home was the same as that in the sealed well, but the above demonstrates this to be an inaccurate representation of his testimony. Kraft testified that the concentration of gas in the landfill was likely higher than the samples taken from the well because these samples had already been diluted with atmospheric air. Thus, the Court assumes the existence of an analytical gap that may have existed, but also might have been explained had the City made an appropriate objection.

Next, Dr. Patel, the pediatric oncologist, gave his opinion that Sarah's *in utero* exposure to benzene during the first trimester caused her ALL. He relied on: (1) his review of the literature, (2) the matched pattern of abnormalities in Sarah's chromosomes and the chromosomal abnormalities in lab-induced carcinogenesis caused by benzene exposure, (3) his academic background in human genetics, and (4) Kraft's opinion that Sarah's mother was chronically exposed to at least 160 ppb of benzene while Sarah was *in utero*. Dr. Patel, moreover, excluded other plausible factors for Sarah's ALL, including family history and benzene exposure from other sources.

While the City acknowledges that Dr. Patel based his opinion, in part, on his review of certain epidemiological studies, it maintains that Dr. Patel's testimony is conclusory because none of these studies actually support his scientific opinion. In particular, the City argues that these studies all involve substantially higher exposure levels and, moreover, fail to find a causative association between benzene exposure and Sarah's particular type of leukemia. None of these concerns were brought to the trial court's attention, and Dr. Patel testified without objection.

Moreover, Dr. Patel explained that the exposure levels in these studies were actually less than Sarah's daily, chronic exposure during gestation. Dr. Patel explained that the effect of a toxin is based on two types of exposure, the peak dose exposure and the duration of that exposure. Taking both into account, the studies report their results as cumulative exposure over time, often as an annual dosage. Dr. Patel testified that the Pollocks' chronic exposure here would convert to a much greater annual dosage than those discussed in the studies. Moreover, Dr. Patel testified that Sarah's chronic and cumulative *in utero* benzene exposure as a developing fetus was more significant than the annual exposure to an adult as described in the studies. Again, there was no objection to these conclusions.

The underlying epidemiological studies referenced by Dr. Patel reflect a correlation between exposure to benzene and an increased risk for certain types of leukemia. For example, the studies in evidence reflected that occupational benzene exposure in the mother was related to a risk of childhood leukemia, especially acute nonlymphocytic leukemia ("ANLL"); that benzene metabolites could cause chromosomal damage in human lymphocytes; that benzene could cross the placenta and harm a fetus; that exposure to benzene could cause chromosomal damage similar to that suffered by Sarah; and that benzene exposure is responsible for at least a portion of childhood cancers of which ALL is the most common. Dr. Patel further testified about epidemiological evidence linking benzene to another form of leukemia, acute myeloid leukemia ("AML"), and quoted from the article "that evidence linking benzene to AML is no less persuasive than for ALL." None of this testimony came as a surprise to the City as Dr. Patel had made these same points in his expert report.[5]

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[5] In the concluding paragraphs of that report, Dr. Patel stated:

> If one looks at Sarah's chromosomal markers as mentioned above, the specific chromosomal aberrations noted and those detected in benzene-exposed workers are remarkably similar. There is aneuploidy, i.e.: > 46 chromosomes and specifically in benzene exposed workers there were trisomies in the G group of chromosomes as noted for Sarah, specifically for chromosomes: 7, 8, 9 and 21. It should be noted that the association with childhood leukemia and benzene exposure has been reported from Holland, China, United States, Britain and Japan.
>
> Particularly of parental exposure of solvents containing benzene, there is an increased risk of childhood leukemia. The odds ratio for parental benzene exposure was as high as 5.81. As mentioned above it was suggested benzene and its metabolites may cause genetic damage in germ cells, which are then passed on to the offspring and/or cause direct genetic damage in developing fetus following maternal exposure.
>
> It also suggests that there is an increased likelihood of ALL when such an exposure occurs during the critical organogenesis phase if not as germ mutation. In-vitro experimentation using human leukemia cells HL60 and human lymphocytes following exposure to benzenetriol, a direct derivative of benzene, shows oxidated DNA damage. Similar DNA damage has also been shown to correlate in animal model systems. It has been mentioned that benzene is associated with acute myeloid leukemia; however, the overall data clearly does not indicate association limited to AML but also to ALL.

The opinions and testimony of the engineer and doctor here are far removed from the "bare conclusions" we rejected as conclusory in *Coastal*. *See Coastal Transp. Co.*, 136 S.W.3d at 232 (witnesses qualifications and bare opinion not enough). Neither expert asked the jury to trust their opinion merely on the basis of their expertise. They instead purported to analyze the underlying data that they (and apparently the City also) considered relevant before rendering their respective opinions.

The City's present complaints about analytical gaps is nothing more than an unpreserved reliability challenge. Analytical gaps are not complaints about naked opinions, lacking any basis in the record, but rather are assertions that specific errors or omissions in an expert's analysis render his or her opinion unreliable. *See, e.g., Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 38-39 (Tex. 2007); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006); *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006); *Kerr-McGee Corp.*, 133 S.W.3d at 254; *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002). When the complaint is that the expert's analysis of otherwise reliable scientific data is flawed or that the underlying data itself is questionable, a party must object to preserve its complaint. *See Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002) ("a party must object to the testimony before trial or when it is offered"); *see also Gen. Motors Corp.*, 161 S.W.3d at 471 (objection must be made when deficiency becomes apparent). And the failure to object to expert testimony cannot be cured through cross-examination or counter-expert testimony. *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 590-91 (Tex. 1999). The Court's

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> Thus, after reviewing the literature and Sarah's case, per se, it is in my medical opinion that there is reasonable medical and scientific certainty and probability of linking maternal exposure to benzene, organic acids and hydrocarbons in the environment with the development of ALL in Sarah Pollock.

opinion today unfortunately blurs the distinction between expert testimony that purports to have a basis in science (unreliable expert testimony) and expert testimony that lacks any apparent support apart from the expert's claim to superior knowledge (conclusory expert testimony).[6] The Court's decision today is not only wrong, it is also unfair and may encourage gamesmanship in the future. Why have a pretrial *Robinson* hearing or make a reliability objection during trial and run the risk that the proffering party may fix the problem, when the expert's opinion can be picked apart for analytical gaps on appeal? *See Robinson*, 923 S.W.2d at 552; *see also Ellis,* 971 S.W.2d at 411.

Reliability objections are important; they serve several purposes. First, they give the proffering party an opportunity to cure any defects, thus, avoiding trial and appeal by ambush; second, they give the trial court the opportunity to test and question the expert's testimony and thereby intelligently perform its role as gatekeeper; and, third, they result in a more fully developed record for appellate review under the abuse of discretion standard. *Ellis,* 971 S.W.2d at 409, 412. Because the City's complaints here go to reliability, an objection was required. Because the Court holds otherwise, I dissent.

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[6] The Court's indiscriminate mixing of unreliable and conclusory expert opinions is most apparent in its reliance on *Exxon Corp. v. Makofski*, 116 S.W.3d 176 (Tex. App.–Houston [14th Dist.] 2003, pet. denied), a court of appeals' opinion written by a current member of this Court, and *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997). In both cases, timely objections were made to the reliability of the respective experts. JUSTICE BRISTER, writing for the Fourteenth Court of Appeals, observed that it was the defendant's responsibility "to object at trial (which it did repeatedly) so the plaintiffs would have an opportunity to cure any defects regarding reliability and present us with a fully developed record." *Makofski*, 116 S.W.3d at 180-81 (citations omitted). Having preserved its complaint, the court of appeals subsequently concluded that the expert's testimony was unreliable and thus no evidence because "[n]o epidemiological study established a statistically significant doubling of the risk of ALL from exposure to benzene" as required by *Havner*. *See id.* at 188. This Court then concludes that "[f]or the same reasons, we reach the same conclusion here." ___ S.W.3d at ___. But this case is not *Makofski* or *Havner* as the City conceded during oral argument, stating: "We cannot go into the statistical significant part of *Havner* because we did not object to the scientific reliability, we didn't make a *Daubert* objection and we have not tried to do that." Thus, the Court's conclusion is based on an authority the City has expressly conceded does not apply.

II

I agree with the Court, however, that there is no evidence to support the Pollocks' takings claim under article I, section 17 of the Texas Constitution for damage to their property. The Pollock's theory in this case was that the City effectively took their property (and caused their daughter's illness) by failing to abate the migration of benzene gas from the landfill after learning of the problem. I agree with the Court that there is no evidence of the City's requisite intent for a takings claim here. ___ S.W.3d at ___ (citing *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004)). Nor do I find any basis for the Pollocks' personal injury claim under this constitutional provision.

Article I, section 17, entitled "Taking, damaging or destroying property for public use," does not mention bodily injury or death. TEX. CONST. art. I, § 17. It refers only to property, granting the government the legal right to take property for a public purpose with the corresponding obligation to pay for it. Thus, the "State, in the exercise of its sovereign power, has the unquestioned right to take, damage, or destroy private property for public use," *State v. Hale*, 146 S.W.2d 731, 736 (Tex. 1941), but the constitution does not authorize the state to kill or cause bodily injury when doing so. Government actions that cause death or personal injury are neither validated, nor compensated, as the lawful exercise of the State's eminent domain authority. Such actions may be subject to other types of lawsuits, but they are not the basis for liability under the takings clause of our constitution. 1 GEORGE D. BRADEN, ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 63 (1977).

I accordingly agree with the Court that the Pollocks cannot recover under Article I, Section 17 because there is no evidence that the City intended a taking, and, apart from that, no basis for the award of personal injury damages even had the City intended to damage the Pollocks' property.

III

Although the Pollocks do not have a takings claim, they have also asserted a negligence claim, raising the issue of whether the Tort Claims Act applies here to waive the City's governmental immunity. *See* TEX. CIV. PRAC. & REM. CODE §§ 101.001-.109. The Tort Claims Act provides a limited waiver of governmental immunity "when personal injury or death is caused by a 'use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.'" *Texas A&M Univ. v. Bishop*, 156 S.W.3d 580, 583 (Tex. 2005) (quoting TEX. CIV. PRAC. & REM. CODE § 101.021(2)). Neither the court of appeals nor this Court has considered this issue, albeit for different reasons. The court of appeals, having concluded that the Texas Constitution authorized the Pollocks' claims, found application of the Tort Claims Act unnecessary. 155 S.W.3d 322, 332-33. This Court, on the other hand, renders any waiver under the Act irrelevant by concluding there is no evidence that the City's negligence caused Sarah's leukemia. Because I disagree with both conclusions, I turn now to the arguments on this issue.

The City argues that the Tort Claims Act does not apply in this case because the Pollocks failed to establish a claim within its narrow waiver of immunity. The City's argument focuses on the court's charge that asked the jury (1) whether the "negligence, if any, of the City of San Antonio proximately caused the occurrence or injury in question" and (2) whether the City's "operation of the West Avenue Landfill constituted a nuisance" as that term was defined in the charge. The jury

answered yes to both questions. The City objected to the charge, arguing that the case should be submitted as a premises liability case rather than as a case of general negligence and nuisance. The City submits that this charge error is fatal to the Pollocks' claim of waiver under the Act. I disagree.

"Premises liability is the body of law that [defines] the duties owed by an owner or occupier of land to persons who come onto his or her real property to protect them from injury on account of dangerous conditions or activities on the property." 19 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 310.01[1] at 310-6 (2009). It is not a separate species of tort but rather a branch of the law of negligence that categorizes duty in relation to the plaintiff's purpose for entering the property, that is, as an invitee, licensee, or trespasser. *Western Invs., Inc. v. Urena,* 162 S.W.3d 547, 550 (Tex. 2005). A premises liability case requires that the jury be instructed on the elements of the landowner's duty and thus the distinction between general negligence and premises liability remains important in Texas. *See Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997) (rule stated in context of general contractor's liability for negligence of subcontractor); *see also Nixon v. Mr. Prop. Mgmt. Co.,* 690 S.W.2d 546, 551 (Tex. 1985) (Kilgarlin, J., concurring) (suggesting that modern trend is "away from basing a landowner's liability on his visitor's artificially determined purpose of entry").

By definition then a premises liability case involves an injury on the defendant's premises. But Sarah Pollock was not injured on the City's property; she became ill at her own home, allegedly because of the City's negligent use and management of the neighboring landfill. The duty owed by the City under these circumstances is not dependent on Sarah's status as an invitee, licensee, or trespasser, and thus the Pollocks' claim is not a premises liability case. The duty here instead rests

on the City's obligation not to contaminate adjoining private property with its waste disposal operations at the West Avenue Landfill.

The jury found that the City's operation of the landfill was both negligent and a nuisance. Although there was not evidence that the nuisance rose to the level of a taking, there was evidence that the City's negligence was a cause of the nuisance created by the landfill. We have said that personal injury damages may be recovered under these circumstances. *See Vann v. Bowie Sewerage Co*., 90 S.W.2d 561, 563 (Tex. 1936) (nuisance created by private sewage company sickening neighboring property owner); *City of Fort Worth v. Crawford*, 12 S.W. 52, 54 (Tex. 1889) (nuisance created by operation of garbage dump causing illness). Moreover, this Court and others have recognized that an owner or occupier's negligence on its own property may lead to liability for injuries suffered on adjoining property.[7]

I conclude then that the negligent operation of a landfill that causes a neighbor to become ill on her adjoining property is a condition or use of property causing personal injury within the contemplation of the Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(2) (governmental unit of the State may be liable for personal injury or death caused by a condition or use of tangible personal or real property if a private person would be liable under Texas law). The Tort Claims Act, however, limits the State's liability for the bodily injury or death of a person to the

[7] *See, e.g., Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910–911 (Tex. 1981) (owner or occupier liable for injury caused by debris falling across public street from building being demolished); *Atchison v. Tex. & P. Ry. Co.,* 186 S.W.2d 228, 229 (Tex. 1945) (duty breached when smoke from a grass fire on the defendant's premises reached an adjacent public highway, causing a collision); *Texas & P. Ry. Co. v. Brandon*, 183 S.W.2d 212, 214 (Tex. Civ. App.—Eastland 1944, writ ref'd) (duty to keep premises free of combustible materials to avoid fire that could spread to neighboring property); *Skelly Oil Co. v. Johnston*, 151 S.W.2d 863, 863-67 (Tex. Civ. App.—Amarillo 1941, writ ref'd) (gasoline manufacturing plant liable for creating oil slick on adjoining highway); *see also* J. HADLEY EDGAR, JR. & JAMES B. SALES, TEXAS TORTS & REMEDIES § 20.08, Liability for Losses Outside Property (2009).

"maximum amount of $250,000." TEX. CIV. PRAC. & REM. CODE § 101.023(a). I therefore would modify the court of appeals' judgment to reflect the $250,000 cap imposed by the Tort Claims Act, and, as modified, affirm the judgment awarding damages for Sarah Pollock's personal injury.

David M. Medina
Justice

OPINION ISSUED: May 1, 2009

IN THE SUPREME COURT OF TEXAS

NO. 05-0030

TXI OPERATIONS, L.P., PETITIONER,

v.

DAVID PERRY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued January 26, 2006

JUSTICE GREEN delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE BRISTER, and JUSTICE JOHNSON joined.

JUSTICE HECHT filed a dissenting opinion, in which JUSTICE MEDINA and JUSTICE WILLETT joined.

Rural unpaved roads with potholes at the cattle guards are quite common in this state. In this case, an invitee truck driver drove through one of those potholes several times, claiming injury on one of his last trips, and sued the landowner for its failure to adequately warn of the danger. The premises owner does not challenge whether it had a duty to warn,[1] but claims instead that a fifteen miles-per-hour speed limit sign posted near the pothole was an adequate warning as a matter of law. We conclude that it was not. Accordingly, we affirm the judgment of the court of appeals.

I

TXI Operations, LP, owns and operates the Dolen Sand Pit and is responsible for maintaining an unpaved road that connects the pit to the highway. David Perry, a truck driver for Campbell

[1] TXI does not argue that the pothole did not constitute an unreasonably dangerous premises condition, or that the condition was open and obvious. *See Gen. Elec. Co. v. Moritz*, 257 S.W. 3d 211, 216 (Tex. 2008). Accordingly, for purposes of this opinion, we will assume there was a duty to warn.

Ready Mix, regularly drove back and forth on the road to load and transport materials in connection with his duties for Campbell. On one trip down the road, his vehicle struck a hole at a cattle guard. As a result, he was thrown into the roof of the truck's cab and injured. Perry had already driven the road at least four times that day without injury, and admitted he knew the hole was there. He was also aware of a fifteen miles-per-hour speed limit sign that TXI had posted near the hole. Perry nevertheless claimed that TXI was negligent in failing to warn him of the existence of a road condition that it knew was dangerous.

A jury found that Perry and TXI were both negligent and equally at fault. As a result, the trial court entered a judgment for Perry, reducing the jury's damage award by his percentage of fault. TXI appealed, claiming that posting the speed limit sign discharged its duty to warn Perry of the dangerous road condition. The court of appeals disagreed and affirmed the trial court's judgment. __ S.W.3d __. In this Court, TXI does not contest that it owed a duty to warn its invitees; it asserts only that the speed limit sign was an adequate warning of the dangerous road condition as a matter of law.[2]

II

Premises owners and occupiers owe a duty to keep their premises safe for invitees against known conditions that pose unreasonable risks of harm. *See, e.g.*, *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 99 (Tex. 2000). The duty is to "take whatever action is reasonably prudent under the circumstances to reduce or to eliminate the unreasonable risk from that condition." *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 295 (Tex. 1983). The existence of this duty is a question of

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[2] TXI presents the following single issue:

> Is a 15 mile per hour speed limit sign adequate warning when the evidence is Perry saw the speed limit sign, heeded the warning to slow down, saw and appreciated the danger of the condition in which he was injured by crossing the condition four times prior to sustaining an injury on the fifth crossing?

According to TXI, "submission of the issue of negligence (and any attendant damages) was error" because "TXI discharged its duty as a matter of law by posting a 15 mile per hour speed limit sign."

law for the court. *Moritz*, 257 S.W.3d at 217. When such a duty is owed, the premises owner or occupier must either adequately warn of the dangerous condition or make the condition reasonably safe. *See State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996) (per curiam). On appeal, it is undisputed that Perry was an invitee on TXI's premises, that TXI knew about the hole in the road, that the hole constituted a dangerous condition, and that TXI did not attempt to repair the hole. Perry also admits that he knew about the hole and had encountered it several times before his injury. But TXI does not attempt to argue that it owed no duty of care because of Perry's voluntary conduct or because the hole was obvious. Rather, TXI argues that its duty to Perry was discharged when it posted the speed limit sign.

In a premises liability case such as this, the defendant's negligence is determined by asking whether the defendant "exercise[d] reasonable care to reduce or to eliminate the risk" created by the premises defect. *Corbin*, 648 S.W.2d at 296; *see also Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 521 (Tex. 1978). Negligence is commonly a question of fact unless the evidence establishes a complete absence of negligence as a matter of law. Here, it does not. A "be careful" warning might be *some* evidence that the premises owner was not negligent, but it is not conclusive in a situation such as this where the posted speed-limit sign was only a general instruction; it neither informed the driver of road hazards generally, nor did it identify the particular hazard that TXI now says the sign was meant to warn against. *See State v. McBride*, 601 S.W.2d 552, 554, 556–57 (Tex. App.—Waco 1980, writ ref'd n.r.e.) (holding that an owner had not satisfied the duty to warn drivers of a slick and muddy road with a "'SLOW' sign and a '35 MPH' sign"). The inadequacy of the sign is supported by the evidence that Perry was following the sign's instruction at the time of his injury. Of course, an alternative to providing an adequate warning would have been for TXI to repair the pothole so as to make the condition reasonably safe as a matter of law. *See Williams*, 940 S.W.2d at 584. But the record does not reflect that TXI took this action.

The dissent takes issue with the notion that potholes in rural roads pose an unreasonable risk of harm to 18-wheel truck drivers because potholes are common, they are open and obvious, and no warning about them should even be necessary. But even the dissent concedes, as it must, that the duty issue is not before us. That being so, of course, we do not decide it. Instead, we must assume that a duty to warn exists. The dissent's view seems to be that because it concludes no warning should really be necessary, any warning is adequate. That view, of course, completely discounts the existence of duty. If a duty is owed, an adequate warning is required. We agree with the dissent that a speed limit sign does not necessarily mean the driver should expect the posted limit to be a safe speed under all circumstances. Regardless, the record reflects some evidence that the warning here was not adequate to warn of the pothole and that the pothole presented a risk even at a speed slower than the posted limit. As a result, the jury could have properly concluded that TXI's sign did not adequately warn Perry of the dangerous condition.

The judgment of the court of appeals is affirmed.

_____
Paul W. Green
Justice

OPINION DELIVERED: February 27, 2009

IN THE SUPREME COURT OF TEXAS

NO. 05-0030

TXI OPERATIONS, L.P., PETITIONER,

v.

DAVID PERRY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued January 26, 2006

JUSTICE HECHT, joined by JUSTICE MEDINA and JUSTICE WILLETT, dissenting.

The morning was clear and hot, the sun brightly shining, as the 18-wheeler sand-and-gravel truck lumbered along the rough dirt road from the main highway over to the Dolen sand pit. Behind the wheel sat David Perry, 36. For seven years, he had been driving rigs for Campbell Concrete & Materials, L.P. That day, his job was hauling sand from the Dolen pit to Campbell's ready-mix concrete plant about an hour away.

TXI Operations, L.P. owned the Dolen sand pit and maintained the three-mile dirt road that ran from the highway through the woods to the facility. Trucks would enter the sand pit, load, weigh at the scale house, and then leave the way they came in. The road was wide enough for trucks to pass each other coming and going. Eight to twelve thousand trucks a year went in and out. The day Perry was injured, seventy trucks crossed the scales, thirty-seven of them driven by twelve Campbell truckers, three by Perry himself.

The heavy 18-wheelers — each weighed some 30,000 pounds empty and 80,000 pounds loaded — were hard on the road, especially when it was wet. The road was rough as a scrub board

and filled with potholes. TXI graded the road regularly, though not frequently enough to suit the drivers, who often complained about how bumpy it was, to little avail. TXI encouraged truckers to slow down, especially on blind curves, posting speed limit signs from 15 mph to 25 mph along the road.

Jeff Casey, a Campbell driver, testified: "We ran that road so much that we kind of knew where the [rough] areas were, but right there at the cattle guard, it was always a little bit worse right there." The cattle guard to which he referred was toward the end of the road, not far from the sand pit and scale house. The road up to the cattle guard ran straight for half a mile or so. The cattle guard was only one truck wide and plainly visible. Stretched indolently in front of the cattle guard, as one entered the plant, lay a large pothole. The day of Perry's accident, the pothole was nine inches deep (other days it was deeper) and wide enough that a truck could not avoid it and still get through the cattle guard. TXI's posted speed limit there was 15 mph, although a trucker could not drive an empty truck even 10 mph through the pothole without being bounced around the cab and risking injury. But in fact, no one was injured, ever. Scores of truckers crossed the cattle guard thousands of times without injury, except for one fateful day in May.

Perry first crossed the cattle guard in his empty truck a little before 10:30 a.m. He was running with Casey, who was driving the truck right ahead of him. The two trucks loaded, weighed, and left, crossing the cattle guard on their way out. About two hours later they returned with Casey again in the lead, crossing the cattle guard as before, both on their way in and on their way out. At 3:00 p.m., they were back, this time with Perry in the lead. At the cattle guard, he hit the pothole going 10-15 mph and bounced the truck, jamming his head into the roof of the cab. He radioed back to Casey, who had seen Perry's truck bounce, telling him what had happened. The two continued on to the plant, loaded, weighed, and left without further incident.

Perry did not report his injury for several weeks. Three days before the two-year statute of

limitations would have run, he sued TXI for his injuries.[1]

Generally — with an exception I discuss below — a person who knows that a condition of his property poses an unreasonable risk of harm to invitees must use ordinary care to protect them from danger, either by adequately warning them or making the condition reasonably safe.[2] The Court holds that there is evidence in this case that TXI failed to discharge this duty to Perry. I respectfully disagree.

TXI does not challenge, so therefore I must assume, that potholes in dirt roads leading to sand pits present an unreasonable risk of harm to experienced 18-wheeler sand-and-gravel haulers. This, of course, is preposterous. Potholes pock the surface of the civilized world. If potholes — all but yawning chasms capable of suddenly swallowing up an entire vehicle — posed an unreasonable risk of harm to anyone, let alone experienced and reasonably careful drivers, whole swaths of civilization would have to be closed off to human traffic. Manhattan would be the first to shut down, but no city, town, or village would escape. Across the planet, ground transportation would be brought to a halt. Commerce would cease. The end could not be averted by posting adequate warnings. Signs at city limits — Warning! Potholes! — would hardly be adequate. Each pothole would require its own warning sign. Even if available resources could supply enough signs, warnings that unreasonable danger is everywhere provide no warning that it is anywhere in particular.

Potholes do pose a risk of harm, no question. But the risk is simply not an unreasonable one unless the pothole is one of those rare, menacing kinds that lure unsuspecting travelers into danger. The potholes that permeated the dirt road to the Dolen sand pit were all of the ordinary variety. As one Campbell driver testified, they were "all up and down the road". Nothing about the one at the

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[1] At trial, TXI contested whether Perry had been injured as he claimed, whether it occurred on the day he asserted, and whether there was a pothole near the cattle guard. Although the jury found TXI and Perry both negligent, I have summarized the evidence most favorable to Perry.

[2] *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992).

cattle guard posed a significantly greater risk of harm than any of the others. To the contrary, because the pothole was usually there, and did not, in the words of one driver, "sneak[] up on you", as potholes are sometimes wont to do, drivers knew to be careful, and were careful, as they necessarily slowed to cross over the narrow cattle guard. Casey testified that the road was not dangerous: "whenever the road was bad," he said, "we all knew to slow it down". Another Campbell driver, asked why he did not consider the pothole at the cattle guard dangerous, stated:

> Why would I consider it not dangerous? I mean, it wasn't, it wasn't dangerous, no. It was not dangerous. It was a pothole; but if you hit it just right, yeah, it would jar you.

But as I say, TXI does not argue that the pothole did not pose an unreasonable risk of harm, so I turn to the argument TXI does make: that its warning, a 15 mph maximum speed limit sign, was adequate under the circumstances. The Court seems to think that a posted 15 mph speed limit means that a person can safely drive up to 15 mph no matter what. After Perry sued, TXI restaged the accident using the same truck Perry was driving the day he was injured. The test driver hit a pothole like the one Perry had described at 10 mph and hit his head in the cab. So if the speed limit sign means what the Court seems to think it does, then there is some evidence to support the jury's finding that the warning was inadequate.

But that is not what a maximum speed limit sign means. Texas law provides that "[a] speed in excess of [legal limits] is prima facie evidence that the speed is not reasonable and prudent and that the speed is unlawful."[3] The inverse is not true: a speed below the legal limit is not, prima facie, reasonable and prudent. To the contrary, Texas law provides that, regardless of any maximum speed limit set by law, "[a]n operator . . . may not drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for actual and potential hazards then existing".[4]

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[3] TEX. TRANSP. CODE § 545.352(a).

[4] *Id.* § 545.351(b)(1).

Courts uniformly hold that a vehicle's speed may be excessive even though it is below the posted limit.[5] Perry could not argue that a 15 mph speed limit posted by public authorities licensed him to drive up to 15 mph regardless of the circumstances, and there is no more basis for the argument simply because the speed limit was posted by TXI. Indeed, Casey, the Campbell driver Perry was running with, testified that the speed limit signs only told him "more or less just to be watchful". Perry testified that he thought a posted speed limit signaled that a slower speed was safe, but tellingly, he could not recall what the speed limit was at the cattle guard, and he did not testify that he looked over at the speed limit sign and thought to himself, "I can drive that fast safely, no matter what."

It was not feasible, of course, for TXI to post speed limits that were safe under all conditions because road conditions were constantly changing. When the road was graded, it was smoother. When it rained, the road surface was worse. The 40-ton trucks constantly lumbering over the road tore into its surface. A safe speed on a dry, flat road would not be safe on a rough, wet one, and no one could reasonably expect truckers to drive as slowly on good stretches of road as they had to on bad stretches. As a practical matter, the warnings TXI gave were the only ones it could give: slow down to a speed that allows actual road conditions to be assessed.

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[5] *See*, *e.g.*, *Hokr v. Burgett*, 489 S.W.2d 928, 930 (Tex. Civ. App.–Fort Worth 1973, no writ) ("Speed may be excessive even though it is below the posted speed limit. Although a motorist may not be exceeding the speed limit, he is under a duty to drive no faster than a person of ordinary prudence under the same or similar circumstances." (citations omitted)); *Fitzgerald v. Russ Mitchell Constructors, Inc.*, 423 S.W.2d 189, 191 (Tex. Civ. App.–Houston [14th Dist.] 1968, writ ref'd n.r.e.) ("The fact that [appellant] was driving below the speed limit of a presumed 30 miles per hour . . . does not relieve her of the common law duty to operate her vehicle at a speed at which an ordinarily prudent person would operate a vehicle under the same or similar circumstances."); *Billingsley v. Southern Pac. Co.*, 400 S.W.2d 789, 794 (Tex. Civ. App.–Tyler 1966, writ ref'd n.r.e) ("Although a motorist may not be exceeding the 'legally posted speed limit,' nevertheless, he is under the duty to drive no faster than an ordinarily prudent person in the exercise of ordinary care would drive under the same or similar circumstances. A speed may be held excessive under the circumstances although below the 'legally posted limit.'"); *Seay v. Kana*, 346 S.W.2d 384, 386 (Tex. Civ. App.–Houston 1961, no writ) ("Even if [appellant] were not exceeding it [the speed limit], he was under the duty not to drive faster than an ordinarily prudent person in the exercise of ordinary care would drive under the same or similar circumstances."); *Vardilos v. Reid*, 320 S.W.2d 419, 423 (Tex. Civ. App.–Houston 1959, no writ) ("The fact that [appellant] was driving below the speed limit of 30 miles per hour . . . does not relieve him of the common law duty to operate his vehicle at a speed at which an ordinarily prudent person in the exercise of ordinary care would operate a vehicle under the same or similar circumstances."); *Morrison v. Antwine*, 51 S.W.2d 820, 821 (Tex. Civ. App.–Waco 1932, no writ) ("A person may be guilty of negligence or contributory negligence in operating his car at an excessive rate of speed even though . . . the maximum limit as fixed by the statute is not exceeded . . . .").

Moreover, TXI's speed signs actually worked. Truckers drove through the potholes without incident. Had Perry driven up to the cattle guard the first time, noted the 15 mph speed limit sign, thought to himself that the sign assured a safe speed, driven through the pothole, and been injured, he could at least argue that the sign misled him. But that is not, according to him, what happened. Perry, like all the other truckers on the road to the Dolen sand pit, slowed to where the bumps could be navigated safely. Nor is there evidence that any driver ever drove the road thinking, contrary to law and reason, that the posted speed was safe, regardless of the circumstances. In all of the thousands of times truckers crossed the cattle guard, there is no evidence of a single injury, except Perry's. And Perry himself crossed the cattle guard four times in five hours without incident the same day he was injured.

The Court concludes that reasonable minds can disagree about whether TXI's speed limit gave adequate warning of the dangers of the cattle guard pothole when there was one accident in thousands of crossings. What warning could no reasonable person think inadequate? Here, the Court is a little vague. A "be careful" warning will not do, the Court says, because it is too general.[6] The speed limit sign was inadequate, according to the Court, even though it did not "necessarily mean the driver should expect the posted limit to be a safe speed under all circumstances",[7] because it did not "identify the particular hazard".[8] For goodness' sake, the "particular hazard" was a plain old *pothole*, not a cliff overhanging the ocean. So should warning signs be site-specific, one per pothole? Maybe something like:

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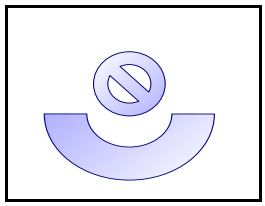
[6] *Ante* at ___.

[7] *Ante* at ___.

[8] *Ante* at ___.



Scores, maybe hundreds, would have been required on this one short road alone. This probably would not satisfy the Court:

[9]

Since "[r]ural unpaved roads with potholes at cattle guards are quite common in this state",[10] as the Court acknowledges, one cannot help but wonder why any warning at all is required. But if warnings must be given, owners should be told straight out what is adequate, so they can ensure safety and avoid liability. On this rather important subject the Court offers nothing helpful. I guess we'll know an adequate warning when we see it.

If TXI was required to warn of rough conditions on its road, I think the warnings it gave were adequate as a matter of law. There is also another reason, besides the fact that the potholes posed no unreasonable risk of harm, why no warning was required: road conditions were open and obvious. Perry argues that in *Parker v. Highland Park, Inc.*,[11] we discarded the principle that there is no duty to warn of open and obvious conditions, even when the risk of danger is fully apparent and avoidable, because a plaintiff's failure to avoid injury due to an open an obvious condition is no more than one

[9] Unattributed photograph found at supanet.com (http://www.supanet.com/motoring/car_gallery/gallery/939/1/).

[10] *Ante* at ___.

[11] 565 S.W.2d 512 (Tex. 1978).

factor to be taken into account in comparing and assessing the responsibility of both the plaintiff and the defendant. As we explained long ago, that argument over-reads *Parker*.

In *Parker*, an elderly lady visiting friends in an upstairs apartment left after dark and fell, attempting to descend an unlit stairwell. She sued the owner of the apartment complex, alleging that the dark stairwell was an unreasonably dangerous condition. The owner countered that it owed her no duty of care because the darkness in the stairwell was open and obvious.[12] We rejected the argument, holding that liability should be determined under principles of contributory negligence and comparative responsibility.[13]

The flaw in the no-duty argument in *Parker* was that the stairwell was made no less dangerous by the fact that the darkness was open and obvious. The plaintiff and her hosts all tried to exercise caution, descending together slowly with a flashlight, but the plaintiff fell anyway because of an unseen step.[14] In such circumstances, a premises owner is not excused from liability merely because the risk of danger was open and obvious. The obviousness of the risk did not allow the plaintiff to avoid it. It remains a general rule, however, that a plaintiff must show that a defendant breached a duty of care. As we explained only a few years after *Parker* was decided:

> The term "no-duty," as used in *Parker*, referred to the oddity that had uniquely developed in Texas to confuse negligence law. It meant that a plaintiff had the burden to negate his own knowledge and his own appreciation of a danger. The rule that the plaintiff does not have the burden to obtain findings that disprove his own fault does not, however, mean that a plaintiff is excused from proving the defendant had a duty and breached it. A plaintiff does not have the burden to prove and obtain findings that he lacked knowledge and appreciation of a danger; he must, however, prove the defendant had a duty and breached it.[15]

It is one thing to reject the argument that an apartment owner has no duty to see to it that tenants and

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[12] *Id*. at 513, 514.

[13] *Id*. at 517, 521.

[14] *Id*. at 514.

[15] *Dixon v. Van Waters &Rogers*, 682 S.W.2d 533, 533-534 (Tex. 1984) (per curiam) (citation omitted).

their guests can safely exit the premises; it is quite another to argue, as Perry does, that a landowner must warn truckers to be careful driving through potholes on a dirt road that are obvious and safely traversed without difficulty.

In *Lugo v. Ameritech Corp.*,[16] the Michigan Supreme Court rejected a pedestrian's claim that a pothole in a parking lot was unreasonably dangerous, holding that the owner owed her no duty because the condition was open and obvious:

> [T]ypical open and obvious dangers (such as ordinary potholes in a parking lot) do not give rise to [a uniquely high likelihood of harm]. . . . [T]he condition is open and obvious and, thus, cannot form the basis of liability against a premises possessor.[17]

Most other states hold that the possessor of premises has no duty to warn of open and obvious conditions when any danger can be fully appreciated and averted by a reasonable person.[18] This is

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[16] 629 N.W.2d 384 (Mich. 2001).

[17] *Id*. at 388.

[18] *See Jones Food Co. v. Shipman*, 981 So. 2d 355, 362-363 (Ala. 2006) (landowner has no duty to warn of open and obvious hazards, even if invitee failed to perceive the risk of the condition); *McGlothen v. Municipality of Anchorage*, 991 P.2d 1273, 1279 (Alaska 1999) (landowner has no duty to warn of open and obvious condition of which invitee is aware); *Kuykendall v. Nugent*, 504 S.W.2d 344, 345 (Ark. 1974) ("The duties of owners and occupiers of land to business invitees usually end when the danger is either known or obvious to the invitee. However, most authorities . . . recognize that under some circumstances a possessor of land may owe a duty to the business invitee despite the knowledge of the latter."); *Shanley v. Am. Olive Co.*, 197 P. 793, 794 (Cal. 1921) ("[O]wner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger."); *Fleming v. Garnett*, 646 A.2d 1308, 1312-1313 (Conn. 1994) (landowner has no duty to warn invitee of dangerous condition of which invitee was or should have been aware of); *Ashcroft v. Calder Race Course, Inc.*, 492 So. 2d 1309, 1311-1312 (Fla. 1986) ("A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." (quoting RESTATEMENT(SECOND) OF TORTS § 343A(1) (1965))); *LeFever v. Kemlite Co.*, 706 N.E.2d 441, 447-448 (Ill. 1998) (same); *Kocinek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 618 (Iowa 1990) (same); *Bonn v. Sears, Roebuck & Co.*, 440 S.W.2d 526, 528-529 (Ky. 1969) (landowner owes no duty to warn of "dangers that are known to the visitor or so obvious to him that he may be expected to discover them"); *Isaacson v. Husson Coll.*, 297 A.2d 98, 105 (Me. 1972) (adopting RESTATEMENT(SECOND) OF TORTS § 343A(1) (1965)); *Lloyd v. Bowles*, 273 A.2d 193, 196 (Md. 1971) ("If the injured person knew or should have known of the dangerous condition, there is no right to recovery . . . the reason for the latter ruling being that the [landowner's] liability is based on a presumption that he has greater knowledge concerning the dangerous condition than the invitee."); *O'Sullivan v. Shaw*, 726 N.E.2d 951, 954-955 (Mass. 2000) ("Landowners are relieved of the duty to warn of open and obvious dangers on their premises because it is not reasonably foreseeable that a visitor exercising (as the law presumes) reasonable care for his own safety would suffer injury from such blatant hazards."); *Riddle v. McLouth Steel Prods. Corp.*, 485 N.W.2d 676, 680-681 (Mich. 1992) ("[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee."); *Richardson v. Corvallis Pub. Sch. Dist. No. 1*, 950 P.2d 748, 753-756 (Mont. 1997) (landowner owes no duty to warn "persons foreseeably upon the premises for physical harm caused to them by any activity or condition on the premises whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such

the rule of the *Restatement (Second) of Torts*,[19] and is still the law in Texas.

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knowledge or obviousness."); *Tichenor v. Lohaus*, 322 N.W.2d 629, 632-633 (Neb. 1982) (adopting RESTATEMENT(SECOND) OF TORTS § 343A(1) (1965)); *Tagle v. Jakob*, 763 N.E.2d 107, 109-110 (N.Y. 2001) ("We have long held that a landowner has no duty to warn of an open and obvious danger."); *Wren v. Hillcrest Convalescent Home, Inc.*, 154 S.E.2d 483, 484 (N.C. 1967) (per curiam) ("However, defendant was under no duty to warn plaintiff, as an invitee, of an obvious condition or of a condition of which the plaintiff had equal or superior knowledge."); *Johanson v. Nash Finch Co.*, 216 N.W.2d 271, 276-278 (N.D. 1974) (adopting RESTATEMENT(SECOND) OF TORTS § 343A(1) (1965)); *Armstrong v. Best Buy Co.*, 788 N.E.2d 1088, 1089-1091 (Ohio 2003) ("Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises."); *Nicholson v. Tacker*, 512 P.2d 156, 158 (Okla. 1973) ("It can be stated with equal force that the invitor has no duty to protect the invitee from dangers which are so apparent and readily observable that one would reasonably expect them to be discovered."); *Carrender v. Fitterer*, 469 A.2d 120, 123-124 (Pa. 1983) (adopting RESTATEMENT(SECOND) OF TORTS § 343A(1) (1965)); *Coln v. City of Savannah*, 966 S.W.2d 34, 40-44 (Tenn. 1998) (same), *overruled on other grounds by Cross v. City of Memphis*, 20 S.W.3d 642 (Tenn. 2000); *Hale v. Beckstead*, 116 P.3d 263, 265-270 (Utah 2005) (same); *Tazewell Supply Co. v. Turner*, 189 S.E.2d 347, 349-350 (Va. 1972) (landowner owes no duty to warn "if the alleged dangerous condition was open and obvious to a person exercising reasonable care for his own safety."); *Monk v. Virgin Islands Water & Power Auth.*, 53 F.3d 1381, 1384-1388 (3d Cir. 1995) (applying Virgin Islands law) (concluding RESTATEMENT(SECOND) OF TORTS § 343A(1) (1965) is consistent with Virgin Islands' adoption of comparative fault); *Tincani v. Inland Empire Zoological Soc'y*, 875 P.2d 621, 630-631 (Wash. 1994) (adopting RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965)).

A few jurisdictions have held that the openness and obviousness of the condition is relevant to whether the landowner breached a duty to the invitee, but not the threshold matter of whether the landowner owed a duty to warn of the condition. *See Markowitz v. Ariz. Parks Bd.*, 706 P.2d 364, 367-368 (Ariz. 1985), abrogated in part by statute; *Smith v. Baxter*, 796 N.E.2d 242, 243-245 (Ind. 2003); *Harris v. Niehaus*, 857 S.W.2d 222, 225-226 (Mo. 1993).

Some other jurisdictions have concluded that this rule is inconsistent with their comparative fault statutes, *see Koutoufaris v. Dick*, 604 A.2d 390, 395-398 (Del. 1992); *Harrison v. Taylor*, 768 P.2d 1321, 1323-1329 (Idaho 1989); *Tharp v. Bunge Corp.*, 641 So. 2d 20, 23-25 (Miss. 1994); *Woolston v. Wells*, 687 P.2d 144, 147-150 (Ore. 1984), or another state statute, *see Vigil v. Franklin*, 103 P.3d 322, 328-332 (Colo. 2004) (holding that COLO. REV. STAT. ANN. § 13-21-115 preempted the doctrine).

Lastly, some courts hold that whether a danger is open and obvious is merely one factor to be considered. *See, e.g.*, *Pitre v. La. Tech Univ.*, 673 So. 2d 585, 590-591 (La. 1996); *Klopp v. Wackenhunt Corp.*, 824 P.2d 293, 297-298 (N.M. 1992); *Rockweit by Donahue v. Senecal*, 541 N.W.2d 742, 748-749 (Wisc. 1995).

[19] RESTATEMENT (SECOND) OF TORTS § 343 ("A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger."); *id.* § 343A(1) ("A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."); *see also* RESTATEMENT (SECOND) OF TORTS § 343A cmt. f (1965) ("There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.").

The proposed draft of the *Restatement (Third) of Torts* § 18(a) approaches the question of an open and obvious danger in a more philosophical manner, but the rule remains the same. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 18(a) (Proposed Final Draft No. 1, 2005) ("A defendant whose conduct creates a risk of physical harm can fail to exercise reasonable care by failing to warn of the danger if: 1) the defendant knows or has reason to know: (a) of that risk; and (b) that those encountering the risk will be unaware of it; and 2) a warning might be effective in reducing the risk of physical harm."); *see also id.* § 18 cmt. f ("*Generally appreciated dangers*. A defendant can be negligent for failing to warn only if the defendant knows or can foresee that potential victims will be unaware of the hazard. Accordingly, there generally is no obligation to warn of a hazard that should be appreciated by persons whose

With respect, holding the owners of dirt roads liable for inadequately warning sand-and-gravel 18-wheeler truckers how to drive through potholes mocks the law of premises liability as well as common sense. I would render judgment for TXI, and accordingly, I dissent.

Nathan L. Hecht
Justice

Opinion delivered: February 27, 2009

intelligence and experience are within the normal range. When the risk involved in the defendant's conduct is encountered by many persons, it may be foreseeable that some fraction of them will be lacking the intelligence or the experience needed to appreciate the risk. But to require warnings for the sake of such persons would produce such a profusion of warnings as to devalue those warnings serving a more important function.").

IN THE SUPREME COURT OF TEXAS

NO. 05-0130

UNAUTHORIZED PRACTICE OF LAW COMMITTEE, PETITIONER,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY AND SEAN P. MARTINEZ, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

PER CURIAM

Nationwide Mutual Insurance Co. and its managing trial attorney, Sean P. Martinez, sued the Unauthorized Practice of Law Committee for a "declaration that the employment of duly licensed staff legal counsel by Nationwide to represent the interest of its insureds, where the insurance company has a contractual obligation to defend and indemnify the insured, does not constitute the unauthorized practice of law under any Texas law," and for other relief. The trial court granted summary judgment for the plaintiffs, specifically granting the declaration sought, and the court of appeals affirmed. 155 S.W.3d 590, 599 (Tex. App.–San Antonio 2004).

In *Unauthorized Practice of Law Committee v. American Home Assurance Co.*, ___ S.W.3d ___, ___, 51 Tex. Sup. Ct. J. 590, 590 (Mar. 28, 2008), we held that

> an insurer may use staff attorneys to defend a claim against an insured if the insurer's interest and the insured's interest are congruent, but not otherwise. Their interests are congruent when they are aligned in defeating the claim and there is no conflict of interest between the insurer and the insured.

Based on our decision in that case, we denied the Committee's petition for review in the present case. 51 Tex. Sup. Ct. J. 562 (Mar. 28, 2008).

The Committee argues in its motion for rehearing that the present case raises an issue not involved in *American Home*, namely, whether an insurer engages in the unauthorized practice of law by employing staff attorneys to represent its affiliates' insureds. The Committee has argued on appeal in this case that even if an insurer may employ staff counsel to represent its own insureds, it cannot represent its affiliates' insureds. The court of appeals rejected the argument on the grounds that there was no evidence that Nationwide provided legal services to insureds of "any entity other than the Nationwide group of wholly owned and controlled companies." But because the trial court did not address the issue in its judgment, it cannot be considered on appeal. Tex. R. App. P. 25.1(c).

Accordingly, the Committee's motion for rehearing is denied.

Opinion issued: September 26, 2008

IN THE SUPREME COURT OF TEXAS

NO. 05-0171

SOUTHWESTERN BELL TELEPHONE COMPANY, L.P.,
D/B/A SBC TEXAS, PETITIONER,

v.

WILLIAM C. MITCHELL, BENEFICIARY OF
LOUISE MITCHELL, DECEDENT, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued March 23, 2006

JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE JOHNSON, and JUSTICE WILLETT joined.

CHIEF JUSTICE JEFFERSON filed a dissenting opinion, in which JUSTICE O'NEILL and JUSTICE MEDINA joined.

JUSTICE GREEN took no part in the decision of the case.

In *Continental Casualty Co. v. Downs*, we construed section 409.021(a) of the Workers' Compensation Act[1] to preclude a carrier from contesting the compensability of an employee's injury unless, within seven days of receiving notice of injury, it either began to pay benefits or gave written notice of its refusal to do so.[2] For more than a decade, the Texas Workers' Compensation

[1] Act of December 12, 1989, 71st Leg., 2d C.S., ch. 1, § 5.21, 1989 Tex. Gen. Laws 1, 51 (effective Jan. 1, 1991) (formerly TEX. REV. CIV. STAT. ANN. art. 8308-5.21), codified by Act of May 12, 1993, 73d Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987, 1195-1196, as TEX. LABOR CODE §§ 409.021-.022.

[2] 81 S.W.3d 803, 804, 807 (Tex. 2002).

Commission, the entity then charged with carrying out the Act,[3] had consistently taken the position that a carrier had sixty days to contest compensability.[4] Less than nine months after *Downs* was final, the Legislature amended section 409.021 to make clearer that a carrier who "fails to comply with Subsection (a) does not waive the . . . right to contest the compensability of the injury".[5]

Because the rule announced in *Downs* was in effect for only about a year, petitioner contends we should overrule that case as having been wrongly decided. We agree. We reverse the judgment of the court of appeals[6] and remand the case to the trial court for further proceedings.

I

On August 14, 2000, Louise Mitchell, a clerk-typist for petitioner Southwestern Bell Telephone Company, was diagnosed with Legionnaire's disease. Claiming to have contracted the disease at work, Mitchell sent Bell a notice of injury, which Bell received on August 23. Mitchell died four days later, and her husband, respondent William Mitchell, claimed workers' compensation death benefits. On October 5, 43 days after receiving notice of injury, Bell, a self-insured nonsubscriber, contested compensability in a filing with the Commission.

At the time, section 409.021(a) of the Texas Labor Code stated:

> An insurance carrier shall initiate compensation . . . promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:
>
> (1) begin the payment of benefits as required by this subtitle; or

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[3] The Commission was created in 1989 to replace the Industrial Accident Board, and was abolished effective September 1, 2005, with its functions transferred to a new division of the Texas Department of Insurance. Act of December 12, 1989, 71st Leg., 2d C.S., ch. 1, §§ 2.01-.09, 17.01, 1989 Tex. Gen. Laws at 7, 115 (see former TEX. REV. CIV. STAT. ANN. art. 8308-2.01 *et seq*., codified in 1993 as Chapter 402 of the Texas Labor Code); Act of May 29, 2005, 79th Leg., R.S., ch. 265, §§ 1.003, 8.001, 2005 Tex. Gen. Laws 469, 470, 607-608.

[4] *Downs*, 81 S.W.3d at 809 (Jefferson, J., dissenting) (citing cases).

[5] Act of May 28, 2003, 78th Leg., R.S., ch. 1100, § 1, 2003 Tex. Gen. Laws 3161, 3162 [H.B. 2199].

[6] ___ S.W.3d ___ (Tex. App.—San Antonio 2005) (mem. op.).

(2) notify the commission and the employee in writing of its refusal to pay and advise the employee of:

(A) the right to request a benefit review conference; and

(B) the means to obtain additional information from the commission.[7]

Earlier in the year, on January 26, the court of appeals had issued its opinion in *Downs* holding that a carrier who failed to meet this seven-day deadline could not contest compensability. The Commission had always taken the position that failing to meet the deadline resulted only in a possible administrative penalty,[8] not in a loss of the right to contest compensability.[9] The Commission believed a carrier had sixty days to contest compensability, based on section 409.021(c), which stated:

(c) If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.[10]

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[7] Act of May 12, 1993, 73d Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987, 1195, codifying Act of December 12, 1989, 71st Leg., 2d C.S., ch. 1, § 5.21 (a) (in part), (b), 1989 Tex. Gen. Laws 1, 51 (effective Jan. 1, 1991) (formerly TEX. REV. CIV. STAT. ANN. art. 8308-5.21).

[8] TEX. LABOR CODE § 409.021(e) ("An insurance carrier commits a violation if the insurance carrier does not initiate payments or file a notice of refusal as required by this section. A violation under this subsection is a Class B administrative violation. Each day of noncompliance constitutes a separate violation."), Act of May 12, 1993, 73d Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987, 1196, codifying, as rewritten, Act of December 12, 1989, 71st Leg., 2d C.S., ch. 1, § 5.21(a) (in part), (b), 1989 Tex. Gen. Laws 1, 51 (effective Jan. 1, 1991) (formerly TEX. REV. CIV. STAT. ANN. art. 8308-5.21 (a) - (b)) .

[9] *See* Tex. Workers' Comp. Comm'n, Appeal No. 960949, 1996 WL 367060, at *6 (June 28, 1996); Tex. Workers' Comp. Comm'n, Appeal No. 950944, 1995 WL 481670, at *5 (July 24, 1995); Tex. Workers' Comp. Comm'n, Appeal No. 92532, 1992 WL 373451, at *4 (Nov. 13, 1992); Tex. Workers' Comp. Comm'n, Appeal No. 92122, 1992 WL 358230, at *6 (May 4, 1992).

[10] TEX. LABOR CODE § 409.021(c).

After the court of appeals' *Downs* decision, the Commission adhered to its position, adopting rules in March that reflected its construction of the statute.[11] On August 16, the court granted rehearing and issued a substitute opinion reaching the same result,[12] and twelve days later the Commission's executive director issued the following advisory:

> After consultation with the Office of the Attorney General . . . , the Commission understands that the August 16th decision in the *Downs* case should not be considered as precedent at least until it becomes final upon completion of the judicial process. In addition, the related Commission's rules, such as those found at 28 TEX. ADMIN. CODE §§ 124.2, 124.3, and 132.17, remain in effect.[13]

For the Mitchell claim, *Downs*'s new seven-day deadline fell two weeks after the court of appeals' final opinion and two days after the Commission's advisory against compliance. Bell did not meet that deadline but did file its contest of compensability within sixty days, as the Commission required. For more than two years, the administrative proceeding languished while *Downs* was appealed to this Court. We affirmed the court of appeals on June 6, 2002, but pending rehearing, the Commission remained adamant in its position. On June 17, it issued an advisory stating that "the 7 day 'pay or dispute' provision in the *Downs* case is not final pending the motion for rehearing."[14] On July 31, a Commission appeals panel followed the Commission's construction of the statute, holding that a carrier did not waive the right to contest compensability as long as it did so within sixty days of receiving notice of injury.[15] We overruled the motion for rehearing in *Downs* on

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[11] 25 Tex. Reg. 2101 (Mar. 10, 2000) (adopting new Rule 124.3, 28 Tex. Admin. Code § 124.3 (2000)); *id*. at 2106-2114 (Mar. 10, 2000) (adopting new Rule 132.17, 28 Tex. Admin. Code § 132.17 (2000)).

[12] *Downs v. Continental Cas. Co.*, 32 S.W.3d 260 (Tex. App.— San Antonio 2000), *aff'd*, 81 S.W.3d 803 (Tex. 2002).

[13] Tex. Workers' Comp. Advisory 2000-07 (Aug. 28, 2000), http://www.tdi.state.tx.us/wc/news/advisories/ad2000-07.html.

[14] Tex. Workers' Comp. Advisory 2002-08 (June 17, 2002), http://www.tdi.state.tx.us/wc/news/advisories/ad2002-08.html.

[15] Tex. Workers' Comp. Comm'n, Appeal No. 021635, 2002 WL 1981340, at *2-3 (July 31, 2002), http://www.tdi.state.tx.us/appeals/2002cases/021635r.pdf.

August 30 and issued the mandate September 9. On September 12, the Commission issued an advisory acknowledging that *Downs* was final and stating that "[a]ll previous Advisories issued by the Commission regarding this issue are superseded by this Advisory and the Supreme Court decision."[16]

The Mitchell proceeding then resumed. A contested case hearing was held in March 2003, the focus of which was, according to the hearing officer, "where the bacteria [legionella pneumophilia] was contracted, that is, at work, or somewhere else." Based on medical evidence that "the bacteria is everywhere in the environment and because no other co-workers, including those at high risk, contracted the disease", the hearing officer concluded that Mitchell's husband had failed to prove that Mitchell contracted her illness in the course and scope of employment, finding instead that "[t]he legionnaire's disease that caused her death was an ordinary disease of life." However, the hearing officer also rejected Bell's argument that *Downs* should not be applied retroactively and concluded that by failing to pay benefits or give notice of its refusal to do so within seven days of notice of Mitchell's injury, Bell was precluded from contesting compensability. Consequently, the hearing officer awarded death benefits to Mitchell's husband. Bell filed an administrative appeal.

On May 28, 2003, about nine months after *Downs* was final, the Legislature amended section 409.021 to make clearer that the rule the Commission had long applied was the rule that the Legislature believed should be followed. The amendment added the following paragraph (a-1):

> An insurance carrier that fails to comply with Subsection (a) does not waive the carrier's right to contest the compensability of the injury as provided by Subsection (c) but commits an administrative violation subject to Subsection (e).[17]

On May 29, the day after the amendments to section 409.021 passed, the Commission appeals panel affirmed the hearing officer's decision, holding that *Downs* should apply retroactively

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[16] Tex. Workers' Comp. Advisory 2002-15 (Sept. 12, 2002), http://www.tdi.state.tx.us/wc/news/advisories/ad2002-15.html.

[17] Act of May 28, 2003, 78th Leg., R.S., ch. 1100, § 1, 2003 Tex. Gen. Laws 3161, 3162.

to injuries occurring before the Court's decision was final. Bell sought review in the district court, which, though of the view that this Court "may . . . very well [have] been wrong in *Downs*", granted summary judgment for Mitchell's husband. The court of appeals affirmed.[18]

We granted Bell's petition for review.[19]

II

Bell, supported by several amici curiae,[20] argues that we should overrule *Downs*. We agree.

"Generally, the doctrine of stare decisis dictates that once the Supreme Court announces a proposition of law, the decision is considered binding precedent",[21] but we have long recognized that the doctrine is not absolute. "[W]e adhere to our precedents for reasons of efficiency, fairness, and legitimacy",[22] and "when adherence to a judicially-created rule of law no longer furthers these interests, and 'the general interest will suffer less by such departure, than from a strict adherence,' we should not hesitate to depart from a prior holding."[23] "[U]pon no sound principle do we feel at liberty to perpetuate an error, into which either our predecessors or ourselves may have unadvisedly fallen, merely upon the ground of such erroneous decision having been previously rendered."[24]

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[18] ___ S.W.3d ___, ___ (Tex. App.—San Antonio 2005) (mem. op.).

[19] 49 Tex. S. Ct. J. 360 (Feb. 24, 2006).

[20] Texas Municipal League – Intergovernment Risk Pool, Texas Association of Business, Texas Association of School Boards, Insurance Council of Texas, Texas Mutual Insurance Co., and Edwards Risk Management, Inc.

[21] *Lubbock County v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 585 (Tex. 2002).

[22] *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995).

[23] *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 215 (Tex. 2001) (Baker, J., concurring) (quoting *Benavides v. Garcia*, 290 S.W. 739, 740 (Tex. Comm'n App. 1927, judgm't adopted).

[24] *Willis v. Owen*, 43 Tex. 41, 48-49 (1875).

We have observed that "in the area of statutory construction, the doctrine of *stare decisis* has its greatest force"[25] because the Legislature can rectify a court's mistake, and if the Legislature does not do so, there is little reason for the court to reconsider whether its decision was correct. But when the Legislature does not acquiesce in the court's construction, when instead it immediately makes clear that the proper construction is one long adopted by the agency charged with enforcing the statute, judicial adherence to the decision in the name of *stare decisis* may actually disserve the interests of "efficiency, fairness, and legitimacy" that support the doctrine. It is hardly fair or efficient to give effect to a judicial construction of a statute for a brief period of time when the Legislature has reinstated for future cases the same rule that had been followed before the court's decision. The doctrine of *stare decisis* does not justify inequity and confusion in such a narrow gap of time.

That is precisely the situation here. In *Downs*, we construed section 409.021(a) of the Workers' Compensation Act to provide that a carrier that did not pay or dispute a claim by paragraph (a)'s seven-day deadline could not contest compensability.[26] We issued our opinion on June 6, 2002, denied rehearing on August 30, and issued our mandate on September 9. The Legislature convened in regular session on January 14, 2003. House Bill 2199 was filed on March 11. After minor changes in committee, the bill added the following paragraph (a-1) to section 409.021, stating:

> An insurance carrier that fails to comply with Subsection (a) does not waive the carrier's right to contest the compensability of the injury as provided by Subsection (c) but commits an administrative violation subject to Subsection (e).[27]

The effect of the amendment was to restore the rule the Texas Workers' Compensation Commission had applied for a decade.

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[25] *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 186 (Tex. 1968) (citing *Moss v. Gibbs*, 370 S.W.2d 452, 458 (Tex. 1963), and *United States v. South Buffalo Ry.*, 333 U.S. 771, 774-775 (1948)).

[26] *Downs v. Continental Cas. Co.*, 81 S.W.3d 803, 804, 807 (Tex. 2002).

[27] Tex. H.B. 2199, 78th Leg., R.S. (2003) (committee substitute); TEX. LAB. CODE § 409.021(a-1).

Thus, *Downs* is simply an anomaly in the law. Prior cases unaffected by *Downs*, and cases controlled by House Bill 2199, are all treated alike. The rule for them is the same. Were we to adhere to *Downs*, a different rule would apply only in those cases caught in the *Downs* gap. *Stare decisis* does not warrant an obstinate insistence on precedent that appears to be plainly incorrect.

We believe, as the dissent does, that finality is an important consideration in statutory construction, and that an appellate court's decisions should not change merely because the judges have changed. But while we think *Downs* was wrongly decided, as does the author of the dissent, even if our view of *Downs* were different, we could not insist that it disrupt the orderly application of the law in a few cases before the Legislature's amendment to the statute. No interest in *stare decisis* supports the application of different rules in these circumstances. Contrary to the dissent, we opt for stability in the law–a rule that has been followed for years and is, by legislative action, to continue to be followed in the future. The error in *Downs* can easily be remedied without violating the principles of *stare decisis*. The case is overruled.

* * * * *

Accordingly, we reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

Nathan L. Hecht
Justice

Opinion delivered: December 19, 2008

IN THE SUPREME COURT OF TEXAS

NO. 05-0171

SOUTHWESTERN BELL TELEPHONE COMPANY, L.P.,
D/B/A SBC TEXAS, PETITIONER,

v.

WILLIAM C. MITCHELL, BENEFICIARY OF
LOUISE MITCHELL, DECEDENT, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued March 23, 2006

CHIEF JUSTICE JEFFERSON, joined by JUSTICE O'NEILL and JUSTICE MEDINA, dissenting.

As I noted in dissent six years ago, I believe *Downs* was wrongly decided. *Continental Casualty Co. v. Downs*, 81 S.W.3d 803, 808 (Tex. 2002) (Jefferson, J., dissenting). Echoes of my dissent ring in the Court's decision today, but the vindication associated with the Court's ruling comes at too high a price. A dissent does many things—it pinpoints perceived faults in the Court's opinion, it speaks to a future Court, it may suggest a legislative fix—but it is not the law. The *Downs* Court declared the statute's meaning even if a subsequent Legislature determined that it misconstrued legislative intent. A Court's decision on statutory construction is not infallible, but it must be final so that Texas citizens know how to conduct their affairs and can engage the political process to modify policy that has purportedly gone awry. Such is the case here. To continue to press

a dissent after the Legislature has had occasion to change the law essentially refutes the constitutional principle, laid down in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), that the *Court* ultimately declares the law's meaning.

Downs stated the law, and we should not so quickly cast it aside. *Dickerson v. United States*, 530 U.S. 428, 443 (2000)("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now."). The Legislature altered the law as announced in *Downs*, but *Downs* still governs cases filed before the legislative amendment. Because the Court overrules *Downs*, and because I would not apply *Downs* prospectively only, I respectfully dissent.

I
Overruling *Downs*

Stare decisis has its greatest force in cases involving statutory construction. *Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000). "More practically, it results in predictability in the law, which allows people to rationally order their conduct and affairs." *Id.* Thus, "'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" *John R. Sand & Gravel Co. v. United States*, 552 U.S. ___, ___ (2008) (quoting *Burnet v. Coronado Oil & Gas Co*., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)). A willingness to abandon precedent merely because we no longer believe the decision is correct "substitute[s] disruption, confusion, and uncertainty for necessary legal stability." *Id*.; *see also Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995)(noting that "if we did not follow our own decisions, no issue could ever be resolved" and cautioning that "[t]he potential volume of speculative

relitigation under such circumstances alone ought to persuade us that *stare decisis* is a sound policy").

Downs, a 5-4 decision, was thoroughly briefed (including submissions from the Texas Workers' Compensation Commission and a chorus of other amici, at least one of which also urges us today to overrule the decision), and it was carefully considered. Bell makes a number of arguments for overruling *Downs*, most of which were raised and, to my dismay, rejected in *Downs*. The only new reason advanced is that the Legislature amended section 409.021 nine months after our decision. That is enough, says Bell, to conclude that *Downs* was "manifestly erroneous." While it is true that the Seventy-Eighth Legislature amended section 409.021 in 2003, its actions provide no insight into the Seventy-First Legislature's intent when enacting the law some fourteen years earlier. *Massachusetts v. EPA*, 549 U.S. 497, ___ (2007) (noting that what subsequent Congresses have done "tells us nothing about what Congress meant" when it previously amended the statute at issue); *United States v. Price*, 361 U.S. 304, 313 (1960) (holding that "the views of a subsequent Congress form a hazardous basis for infer ring the intent of an earlier one"); *Rowan Oil Co. v. Tex. Employment Comm'n*, 263 S.W.2d 140, 144 (Tex. 1953) (observing that "neither does one session of the Legislature have the power to construe the Acts or declare the intent of a past session"); *see also* Texas Workers' Compensation Act, 71st Leg., 2d C.S., ch. 1, § 5.21(a), (b), 1989 Tex. Gen. Laws 1, 51. Moreover, even in the face of swifter and clearer subsequent legislative action, we have nonetheless abided by our prior decisions. *See Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004) (noting that "[a]lthough the Legislature ten weeks later amended the Labor Code

to prohibit pre-injury waivers, *Lawrence* remains the law for those claims, like Reyes', brought by workers who both signed non-subscriber agreements and suffered injury before [the amendment]").

Legislatures write statutes; courts construe them. *Cf.* THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)("The interpretation of the laws is the proper and peculiar province of the courts."). We did so in *Downs*, and subsequent legislative action should not affect our construction. This is not to suggest we are infallible. When there are "compelling reasons" for doing so, *Weiner*, 900 S.W.2d at 320, we can, and should, reexamine our decisions, *Gutierrez v. Collins,* 583 S.W.2d 312, 317 (Tex. 1979) ("*Stare decisis* prevents change for the sake of change; it does not prevent any change at all."). But when the principal arguments for overruling a case are the same contentions we rejected the first time around, we should not be so quick to reconsider. In overruling *Downs*, the Court does a disservice to those who abided by the decision (as well as Continental Casualty, the *Downs* petitioner) and trades stability for disruption, confusion, and uncertainty. *John R. Sand & Gravel Co.*, 552 U.S. at ___. Today's decision encourages the very sort of "speculative relitigation" we warned against in *Weiner*. We should not abandon *stare decisis* principles here.

II
Non-retroactive Application

Nor would I hold, as Bell urges, that *Downs* should be applied prospectively only. As a rule, our decisions apply retroactively. *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992). Nevertheless, we have long recognized narrow exceptions to this rule—largely in common-law cases regarding torts and contracts. *See, e.g.*, *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971) (limiting

prospective application of new tort-liability rule); *Pollard v. Steffens*, 343 S.W.2d 234, 238 (Tex. 1961) (expressing contrary presumption of non-retroactivity in contracts). In 1992, we adopted the Supreme Court's test articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971), to determine when such exceptions should apply. *See Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Ind. Sch. Dist.*, 826 S.W.2d 489, 518–21 (Tex. 1992).

Since our adoption of the *Chevron Oil* test, however, the Supreme Court explicitly overruled it as it applies to constitutional decisions and suggested that prospective application was not only wrong as to constitutional decisions, but contrary to the role of the judiciary. The Court stated:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule . . . . [W]e can scarcely permit the substantive law [to] shift and spring according to the particular equities of [individual parties'] claims of actual reliance on an old rule and of harm from a retroactive application of the new rule.

Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993) (internal quotation marks omitted). Specifically, the Court recognized that "'the nature of judicial review' . . . strips [courts] of the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit." *Id.* at 95 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)). As Justice Scalia wrote in a concurring opinion: "Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*. . . . The true traditional view is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice." *Id.* at 105–106 (Scalia, J., concurring) (emphasis omitted); *see also Hulin v. Fibreboard Corp.*, 178 F.3d 316, 333 (5th Cir. 1999) (noting that the Supreme Court has "substantially reject[ed] . . .

departures [from the retroactivity doctrine] and return[ed] to the general rule of adjudicative retroactivity, leaving only an indistinct possibility of the application of pure prospectivity in an extremely unusual and unforeseeable case.").

Even if *Chevron*'s rule is still viable, applying it here would ignore the Legislature's role in setting a statute's effective date. Although a legislature cannot interpret the law, *see Rowan Oil*, 263 S.W.2d at 144 ("one session of the legislature [does not] have the power to . . . declare the intent of a past session"), it can establish the effective date of a law it enacts—and, subject to constitutional restraints not raised here, can make that law retroactively effective if it so chooses. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994) ("[The Legislature] may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of what it perceives to be a misinterpretation of its work product. No such change, however, has the force of law unless it is implemented through legislation."). In this case, the Legislature was clear:

> This Act takes effect September 1, 2003, and applies only to a claim for workers' compensation benefits based on a compensable injury that occurs on or after that date. *A claim based on a compensable injury that occurs before the effective date of this Act is governed by the law in effect on the date the compensable injury occurred, and the former law is continued in effect for that purpose.*

Act of May 28, 2003, 78th Leg., R.S., ch. 1100, § 2, 2003 Tex. Gen. Laws 3161, 3162 (emphasis added). Thus, the Legislature chose not to disrupt the law in effect prior to September 1, 2003—the law as interpreted by this Court in *Downs*, 81 S.W.3d at 804. The Legislature having made that choice, the Court should not disturb it. *See Lasater v. Lopez*, 217 S.W. 373, 376-77 (Tex. 1919)

(Courts "violate their true powers and endanger their own authority whenever they undertake the legislative role[.]").

"It is not the duty of the court to write the laws of our state, but the proper function of the courts is to enforce the laws as made by the Legislature." *Cent. Ed. Agency v. Ind. Sch. Dist.*, 254 S.W.2d 357, 361 (Tex. 1953). In *Downs*, this Court did just that, thereby announcing what section 409.021 of the Workers' Compensation Act had *always* meant. *See Rivers*, 511 U.S. at 312-13 ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."). I would reject Bell's argument that *Downs* not be given retroactive effect.

III
Conclusion

The Court holds today that, "without violating the principles of *stare decisis,*" it may overturn very recent precedent construing a statute. Ironically, those principles counsel just the opposite. When we observe the time-honored tradition of adherence to precedent, particularly in statutory cases, the democratic process generally works as intended. It worked here. The Court declared the law in *Downs*. Though I believed then (and do now) that the Court's statutory analysis was flawed, the *Downs* holding nevertheless bound all litigants. It should also bind the Court. It was entirely appropriate, of course, for a subsequent Legislature to revise the statute. But the fact that the Legislature changed the law does not alter its former validity. Otherwise, the force of any prior decision in which we have determined statutory meaning is subject to change, threatening the law's stability. I would affirm the court of appeals' judgment.

Wallace B. Jefferson
Chief Justice

Opinion delivered: December 19, 2008

IN THE SUPREME COURT OF TEXAS

NO. 05-0272

ENTERGY GULF STATES, INC., PETITIONER,

v.

JOHN SUMMERS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued October 16, 2008

JUSTICE GREEN delivered the opinion of the Court, in which JUSTICE WAINWRIGHT and JUSTICE BRISTER joined, and in Parts I, II, III, IV, V, VI, VIII and IX of which JUSTICE HECHT joined, and in Parts I, II, III, IV, V, VI, VII, and IX of which JUSTICE JOHNSON joined, and in Parts I, II, III, VI, VII, and IX of which Justice Willett joined.

JUSTICE HECHT filed a concurring opinion.

JUSTICE WILLETT filed a concurring opinion.

JUSTICE O'NEILL filed a dissenting opinion in which CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA joined.

Rehearing was granted in this case and our previous opinion was withdrawn. We now substitute the following in its place. The judgment remains unchanged.

* * * * *

In this workers' compensation case, we decide whether a premises owner that contracts for the performance of work on its premises, and provides workers' compensation insurance to the contractor's employees pursuant to that contract, is entitled to the benefit of the exclusive remedy defense generally afforded only to employers by the Texas Workers' Compensation Act. While the Act specifically confers statutory employer status on general contractors who qualify by providing workers' compensation insurance for their subcontractors' employees, it says nothing about whether premises owners who act as their own general contractor are also entitled to employer status, and thus the exclusive remedy defense. We hold that the exclusive remedy defense for qualifying general contractors is, likewise, available to premises owners who meet the Act's definition of "general contractor," and who also provide workers' compensation insurance to lower-tier subcontractors' employees. Because we conclude that Entergy Gulf States, Inc. meets the definition of "general contractor" under the Act, and because Entergy otherwise qualifies under the Act as having provided workers' compensation insurance under its written agreement with International Maintenance Corporation (IMC), it is entitled to the exclusive remedy defense against the negligence claims brought by IMC's employee, John Summers. We reverse the court of appeals' judgment and render judgment for Entergy.

I

Entergy contracted with IMC to assist in the performance of certain maintenance, repair and other technical services at its various facilities. The parties agreed that Entergy would provide, at its own cost, workers' compensation insurance for IMC's employees through an owner provided insurance program, or OPIP, in exchange for IMC's lower contract price. Entergy complied with

its obligation under the agreement by purchasing workers' compensation insurance covering IMC's employees. John Summers, an IMC employee, was injured while working at Entergy's Sabine Station plant. He applied for, and received, benefits under the workers' compensation policy purchased by Entergy. He then sued Entergy for negligence. Entergy moved for summary judgment on the ground that it was a statutory employer immune from common-law tort suits. *See* TEX. LAB. CODE § 408.001(a). The trial court agreed and granted judgment for Entergy. The court of appeals reversed. ___ S.W.3d ___. We granted Entergy's petition for review to examine whether section 406.121(1) of the Workers' Compensation Act excludes a premises owner from serving as its own general contractor for the purpose of qualifying for immunity as a statutory employer of its contractors' employees.

II

The Act outlines a process by which a general contractor qualifies for immunity from common-law tort claims brought by the employees of its subcontractors.[1] First, the general contractor and subcontractor must enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor. *Id*. § 406.123(a).[2] This agreement makes the general contractor a statutory employer

[1] Such immunity arises when the statutory employer invokes the "exclusive remedy" defense, which limits the employee's "exclusive remedy" to recovery of workers' compensation benefits. TEX. LAB. CODE § 408.001(a).

[2] "A general contractor and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor." TEX. LAB. CODE § 406.123(a).

of the subcontractor's employees for purposes of the workers' compensation laws. *Id.* § 406.123(e).[3] The statutory employer is entitled to immunity from common-law tort actions brought by the subcontractor's employees, and a covered employee's "exclusive remedy" for work-related injuries is workers' compensation benefits. *Id.* § 408.001(a).[4]

Summers first argues that Entergy failed to establish as a matter of law that Entergy and Summers executed a written agreement under which Entergy would provide workers' compensation coverage. *See* TEX. LAB. CODE § 406.123(a). Summers' chief argument is that the contract for maintenance, construction, and general services was between IMC and another Entergy company, Entergy Services, Inc., as opposed to Entergy Gulf States, Inc. However, the contract stated that Entergy Services, Inc. acted for itself and as agent for other Entergy Companies, defined to include the Entergy petitioner here. Summers also admitted in his response to Entergy's summary judgment motion that the contract was between IMC and Entergy Gulf States. In addition, the blanket contract order states that Entergy would be paying "O.P.I.P. wage rates," indicating that the contract's purpose included insurance coverage. Entergy also offered an affidavit from a risk manager, stating that pursuant to the contract between Entergy and IMC, Entergy agreed to procure a workers' compensation policy for IMC employees. As a matter of law, these documents establish that Entergy satisfied the written agreement requirement under the statute. Under this agreement, the workers'

[3] "An agreement under this section makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of this state." *Id.* § 406.123(e).

[4] "Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee." *Id.* § 408.001(a).

compensation coverage for IMC's employees was secured by Entergy, not IMC. Likewise, it is undisputed that Summers sought and collected benefits for his injury from Entergy's OPIP. Thus, in determining Entergy's qualification as a statutory employer entitled to the exclusive remedy defense, the only remaining inquiry is whether Entergy falls within the Act's definition of "general contractor." TEX. LAB. CODE § 406.121(1). We conclude that it does.

III

The meaning of a statute is a legal question, which we review *de novo* to ascertain and give effect to the Legislature's intent. *F.F.P. Operating Partners., L.P. v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007). Where text is clear, text is determinative of that intent. *State v. Shumake,* 199 S.W.3d 279, 284 (Tex. 2006) ("[W]hen possible, we discern [legislative intent] from the plain meaning of the words chosen."); *see also Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006). This general rule applies unless enforcing the plain language of the statute as written would produce absurd results. *Fleming Foods of Tex., Inc. v. Rylander,* 6 S.W.3d 278, 284 (Tex. 1999). Therefore, our practice when construing a statute is to recognize that "the words [the Legislature] chooses should be the surest guide to legislative intent." *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999). Only when those words are ambiguous do we "resort to rules of construction or extrinsic aids." *In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex. 2007).

With these principles in mind, we examine what the Legislature meant by the term "general contractor" in the workers' compensation statute. We do not look to the ordinary, or commonly understood, meaning of the term because the Legislature has supplied its own definition, which we

are bound to follow. TEX. GOV'T CODE § 311.011(b). The Legislature defines "general contractor" as:

> [A] person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors. The term includes a "principal contractor," "original contractor," "prime contractor," or other analogous term. The term does not include a motor carrier that provides a transportation service through the use of an owner operator.

TEX. LAB. CODE § 406.121(1). That a premises owner can be a "person" within the meaning of the statute is not challenged. The dispute, instead, centers on whether one who "undertakes to procure the performance of work" can include a premises owner, or whether that phrase limits the definition of general contractor to non-owner contractors downstream from the owner.

Since the words contained within the definition are not themselves defined, we apply a meaning that is consistent with the common understanding of those terms. According to Black's Law Dictionary, "undertake" generally means to "take on an obligation or task," and "procurement" means "the act of getting or obtaining something." BLACK'S LAW DICTIONARY 981, 1238 (7th ed. 2000). In other words, a general contractor is a person who takes on the task of obtaining the performance of work. That definition does not exclude premises owners; indeed, it describes precisely what Entergy did. In the words of Summers' own summary judgment response, Entergy "entered into a contract with [IMC] for IMC to perform various maintenance work at Entergy's plant in Bridge City, Texas." Therefore, we conclude that a premises owner can be a general contractor under the definition provided in the Act.

IV

The dissent, and some amici, contend that our reading of the statute constitutes a major change in the law that, for the first time, would enable premises owners to become statutory employers entitled to the exclusive remedy defense—a result they say the Legislature never intended. ___ S.W.3d ___. However, the Legislature enacted the section that established "deemed employer" status in 1917, the very first provision to address a subscriber's coverage of subcontractors' employees. *See* Act of Mar. 28, 1917, 35th Leg., R.S., ch. 103, § 1, Part II, sec. 6, 1917 Tex. Gen. Laws 269, 284–85. Since then, subsequent revisions have not indicated an intent to create the kind of exception for owner-subscribers the dissent would now recognize. Indeed, when the "deemed employer" statute was first enacted, the Act made no reference at all to "general contractors." Instead, the provision applied only to "subscribers," a general term that included *all* purchasers of workers' compensation insurance.[5] *Id*. Under this 1917 version, the statutory language broadly established, without

[5] It has long been the policy of this State, expressed in every version of the Act, that no subscriber can avoid covering an injured worker merely because he was employed by a subcontractor. The 1917 version of the Act created a "deemed" employer status to address this concern:

> If any subscriber to this Act with the purpose and intention of avoiding any liability imposed by the terms of the Act sublets the whole or any part of the work to be performed or done by said subscriber to any sub-contractor, then in the event any employe[e] of such sub-contractor sustains an injury in the course of his employment he shall be deemed to be and taken for all purposes of this Act to be the employe[e] of the subscriber, and in addition thereto such employe[e] shall have an independent right of action against such sub-contractor, which shall in no way be affected by any compensation to be received by him under the terms and provisions of this Act.

Act of Mar. 28, 1917, 35th Leg., R.S., ch. 103, § 1, Part II, sec. 6, 1917 Tex. Gen. Laws 269, 284–85. In 1983, HB 1852 amended the statute by adding a different provision using the term "prime contractor," defined to mean "the person who has undertaken to procure the performance of work or services." Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6, 1983 Tex. Gen. Laws 5210, 5210–11. Then, in 1989, the last major overhaul of the Act kept the "undertaken to" definition, but substituted the term "prime contractor" for "general contractor" and defined that person with the same language: "a person who has undertaken to procure the performance of work or services, either separately or through the use of subcontractors." Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05, 1989 Tex. Gen. Laws 1, 15. The 1917 "deemed employer" provision remains virtually unchanged in the current Labor Code, except the term "subscriber"

qualification, that any subscriber, even a premises owner-subscriber, could qualify as a statutory employer. When the Legislature added the "written agreement" provision in 1983, definitions for "prime contractor" and "sub-contractor" were also added, but the term "subscriber" and the original "deemed employer" language were retained in the Act verbatim. Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6, 1983 Tex. Gen. Laws 5210, 5210–11. The Act made no distinction between different kinds of entities up and down the contracting chain, for a good reason. For the purposes of the statute, it would be just as bad for owner-subscribers to try to avoid covering workers by subcontracting out the work as it would be for general contractors, subcontractors, or any other subscriber to do the same. The dissent fails to explain why the mere restructuring of this provision in 1983, which left in the old language referring to subscribers, demonstrates a legislative intent to reorder the scope of the Act's coverage, not in a way that is consistent with its purpose of protecting workers by promoting coverage, but instead in a way that carves out an owner-exception from the Act's protection for subscribers. Nor does the dissent attempt to explain why, if such a significant change in long-standing policy was intended, it was done in such an obscure manner.

V

The dissent contends that the Act never covered premises owners in the first place, and that owners were not included within the definition of general contractors in the 1989 amendment. We disagree. The originating statute applied to "any subscriber," which necessarily means that, under the old version of the Act, a subscriber who also happened to be a premises owner would not be permitted

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has been replaced by the term, "person who has workers' compensation insurance coverage." Act of May 12, 1993, 73rd Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987, 1159 (current version at TEX. LAB. CODE § 406.124).

to escape liability to a worker by contracting out the work. By operation of the statute, then, the owner-subscriber who contracted out work to avoid liability for its workers' injuries would nevertheless be considered the employer, the injured worker would be entitled to benefits under the owner's workers' compensation policy, and the owner would be entitled to assert the exclusive remedy defense. *See* Act of Mar. 28, 1917, 35th Leg., R.S., ch. 103, § 1, Part II, sec. 6, 1917 Tex. Gen. Laws 269, 284–85. So while the provision may have been enacted for the purpose of preventing employers from trying to avoid liability, the scope of its application did not exclude premises owners.

In 1983, however, an amendment provided, for the first time, for *voluntary* employer status for upstream entities in the contracting chain through the use of written agreements between parties. Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6, 1983 Tex. Gen. Laws 5210, 5210–11. More specifically, a general contractor was permitted to enter into a written agreement to provide workers' compensation insurance coverage to its subcontractors and its subcontractors employees and, upon doing so, the "prime contractor"[6] would become, by virtue of the statute, the deemed employer of the subcontractors' employees entitled to the exclusive remedy defense. The provisions of the old law survived the amendment[7] so, as before, "all subscribers" remained eligible for deemed employer status, including premises owners. The question that we address today is whether the Legislature, when it amended the statute, intended to exclude premises owners from the class of entities that

[6] "Prime contractor" was later replaced by the current term, "general contractor," but the definition remained substantively verbatim. Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6(c), 1983 Tex. Gen. Laws 5210, 5210–11 *amended by* Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05(a)(2), 1989 Tex. Gen. Laws 1, 15 (current version at TEX. LAB. CODE §406.121(1).

[7] Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6(d), 1983 Tex. Gen. Laws 5210, 5211 (current version at TEX. LAB. CODE § 406.124).

would now be entitled to voluntarily contract for deemed employer status. We conclude that it did not.

There can be no doubt that premises owners can be, and often are, employers who carry workers' compensation insurance. It is also true that owners frequently contract with others to perform work on their premises. But there has never been a requirement that an owner must first engage a general contractor to have work done on its premises. The owner is free to do the work with its own employees, to directly contract with others to do the work, or to do the work using some combination of the two. The dissent says an owner can be an employer, but cannot be a general contractor. However, we can find nothing in the statute specifying that an owner who also wears the hat of a general contractor is disqualified from coverage under the Workers' Compensation Act simply because it chooses to contract directly for work on its premises.

Entergy did the very thing the Legislature has long tried to encourage; that is, Entergy became a subscriber by taking out a workers' compensation policy for the entire work site. It would be an odd result, indeed, if this premises owner, acting as its own general contractor, and further acting in accordance with the State's strong public policy interest of encouraging workers' compensation insurance coverage for workers, was now to be *excluded* from the Act's protections. *See Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 510–16 (Tex. 1995). Whether a premises owner, general contractor, prime contractor, or subcontractor, Entergy is a "subscriber" of a workers' compensation policy and therefore satisfies the Legislature's intent to ensure consistent and reliable coverage to all employees.

VI

The dissent and the court of appeals contend that the only way to qualify as a "general contractor" is to be included in a "tripartite" relationship in which a general contractor in the middle of the transaction has, first, undertaken to perform work for an owner, and second, contracted part of that work to a subcontractor. ___ S.W.3d ___. But the statute is not written so restrictively as to encompass *only* a three-party relationship, for several reasons. First, such a construction ignores the single exception found in the last sentence of the definition: "The term does not include a motor carrier that provides a transportation service through the use of an owner operator." TEX. LAB. CODE § 406.121(1). Here, the inclusion of an "owner operator" in the definition's only exception indicates that the Legislature intended for *some* owners to qualify as general contractors, while carving out only a *narrow* class of owners excluded from the term. *Id.* Since the Legislature clearly specified that the exception apply only to a very narrow class, we decline to read this narrow exception broadly to include *all* premises owners.

Second, the definition is not as restrictive as the dissent supposes because the second sentence of the definition, which specifies types of contractors to be included within the definition, specifically provides that the list is non-exhaustive. *Id.* ("The term includes a 'principal contractor,' 'original contractor,' 'prime contractor,' or other analogous term."). If we held that an "owner contractor" is not analogous to a "principal contractor," "original contractor," or "prime contractor," we would essentially be strictly construing a sentence that is *explicitly* non-exhaustive, as even the dissent concedes. ___ S.W.3d ___. Inasmuch as we have been instructed that "'[i]ncludes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration," TEX. GOV'T CODE §

311.005(13), we are restrained from circumventing Legislative intent by excluding from a non-exhaustive list a term as similar as "owner contractor." This is especially true since the original version of the Act, which shared the common purpose of encouraging coverage of subcontractors' employees, did not define any of these disputed terms, but rather utilized a single term, "subscriber." *See* Act of Mar. 28, 1917, 35th Leg., R.S., ch. 103, § 1, Part II, sec. 6, 1917 Tex. Gen. Laws 269, 284–85. Since Entergy is a subscriber of a workers' compensation policy, we cannot read such a non-exhaustive list to evince the Legislature's intent to remove Entergy from a category in which it would have been included under previous versions of the same act.

Additionally, such a reading renders meaningless the part of the definition that qualifies *how* a general contractor "undertakes to procure the performance of work." TEX. LAB. CODE §406.121(1) (a general contractor "undertakes to procure the performance of work or a service, *either separately or through the use of subcontractors*") (emphasis added). A reasonable reading of the words, "either separately or through the use of subcontractors," recognizes the distinction between the owner who takes it upon himself "separately" to procure the performance of work from subcontractors, and the owner who undertakes with a middleman "general contractor" to procure the performance of work "through the use of subcontractors." *See id.*; *see also* BLACK'S LAW DICTIONARY 1099 (7th ed. 2000) ("Separate" is defined as "individual; distinct, particular; disconnected"). Certainly, one can hire a bricklayer, electrician, or cabinet maker to remodel his own office building—thereby acting "separately"—or, he can hire a general contractor to do the same thing—thereby acting "through the use of subcontractors." This qualifier suggests that the Legislature at least contemplated the existence of a premises owner who may want to act as its own general contractor—an outcome that is by no

means uncommon.[8] The dissent's reading would have us read out this qualifier entirely, but we do not interpret a statute in a manner that renders parts of it meaningless. *See Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 8 (Tex. 2000) (citing *City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995).

Finally, we address *Williams v. Brown & Root, Inc.*, the case relied on by the court of appeals in reaching its conclusion that a premises owner is excluded from the Act's definition of "general contractor." 947 S.W.2d 673 (Tex. App.—Texarkana 1997, no writ). In *Williams*, a premises owner, Eastman, contracted with Brown & Root to provide occasional construction services. *Id.* at 675. Brown & Root subcontracted part of the work to Tracer. *Id.* Tracer's employee, Williams, was injured on Eastman's jobsite, so he applied for and received benefits from Eastman's workers' compensation policy covering Tracer. *Id.* After Williams sued Eastman and Brown & Root for his injuries, the trial court granted summary judgment for both defendants, in part because the exclusive remedy was workers' compensation insurance, which had already been provided. *Id.* On appeal, the

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[8] *See*, *e.g.*, *CLDC Mgmt. Corp. v. Geschke*, 72 F.3d 1347, 1349 (7th Cir. 1996) (noting that "the Geschkes chose to act as their own general contractor on the job"); *Milwaukee & Southeast Wisconsin Dist. Council of Carpenters v. Rowley-Schlimgen, Inc.*, 2 F.3d 765, 767–68 (7th Cir. 1993) ("[T]he Board held that Church's Fried Chicken . . . functioned as its own general contractor in the 'continuing operation of building stores.'"); *Applewood Landscape & Nursery Co., Inc. v. Hollingsworth*, 884 F.2d 1502, 1503 (1st Cir. 1989) (noting that appellant who built house for himself "decided to act as his own general contractor, at least in respect to landscaping"); *Lazar Bros. Trucking, Inc. v. A & B Excavating, Inc.*, 850 N.E.2d 215, 217 (Ill. App. Ct. 2006) (noting that appellee "sought to develop land it owned" and "decided to act as its own general contractor for the project"); *1000 Va. Ltd. P'ship v. Vertecs Corp.*, 146 P.3d 423, 426 (Wash. 2006) (noting that partnership, "acting as its own general contractor, built an apartment complex"); *Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42, 47 (Tenn. Ct. App. 2004) (noting that appellant "church, acting as its own general contractor, began constructing a 9,000-square-foot general purpose building in back of its existing building"); *Mortenson v. Leatherwood Constr., Inc.*, 137 S.W.3d 529, 531 (Mo. Ct. App. 2004) (noting that school district "acted as its own general contractor" on project to construct addition to school); *Wheeler v. T.L. Roofing, Inc.*, 74 P.3d 499, 501 (Colo. Ct. App. 2003) (noting that, on roofing job, "[p]laintiff acted as his own general contractor"); *Cuero v. Ryland Group, Inc.*, 849 So.2d 326, 329 (Fla. Dist. Ct. App. 2003) ("Ryland undertook to develop its own property acting as it own general contractor."); *Harris v. Rio Hotel & Casino, Inc.*, 25 P.3d 206, 207–08 (Nev. 2001) (holding that landowner could be deemed a statutory employer entitled to workers' compensation immunity).

court of appeals rejected the argument that the predecessor to this section of the Act[9] did not contemplate granting immunity to more than one general contractor. *Id.* at 676–77. Instead, the court of appeals held that Brown & Root qualified as a general contractor because it procured Tracer's services, adding that even if the statute protected only one general contractor, that party was Brown & Root because "[a] general contractor is any person who contracts directly with the owner." *Id.* at 677 (internal citations and quotations omitted). "Arguably," the court observed, "because Eastman did not contract with the owner, but instead was the owner, Eastman was not protected [by the statute]." *Id.* Not only was the court's observation here unnecessary to the decision in the case, it was also erroneous. The court erred by subordinating the statute's specific definition of "general contractor" in favor of a generic definition outside the statute. *Id.* at 677 ("A general contractor is any person who contracts directly with the owner . . . .") (internal citations and quotations omitted)). Since the Legislature provided its own definition for "general contractor," we elevate the Legislature's substituted meaning even when it departs from the term's ordinary meaning. TEX. GOV'T CODE § 311.011(b).

VII

We granted rehearing to address several supplemental arguments made by the respondent and by a number of amici, many of which urge us to address the issue before us by going beyond the statutory text and looking to extrinsic aides such as the Act's legislative history. But we have been clear that we do not resort to such extrinsic aides unless the plain language is ambiguous. *See, e.g.*,

[9] Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05, 1989 Tex. Gen. Laws 1, 15, *repealed by* Act of May 22, 1993, 73rd Leg., R.S., ch. 269, §5, 1993 Tex. Gen. Laws 987, 1273 (current version at TEX. LAB. CODE § 406.121).

Nash, 220 S.W.3d at 917 ("If a statute is clear and unambiguous, we apply its words according to their common meaning without resort to rules of construction or extrinsic aides."); *Sheshunoff*, 209 S.W.3d at 652 n.4.

Even if we assume the definition of "general contractor" is ambiguous, the legislative history of the bill's passage favors Entergy, not Summers. The legislative history that supports Summers' outcome is apparent only in bills that *failed* to pass,[10] yet "we attach no controlling significance to the Legislature's failure to enact [legislation]," *Texas Employment Comm'n v. Holberg*, 440 S.W.2d 38, 42 (Tex. 1969), for the simple reason that "[i]t is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process." *Dist. of Columbia v. Heller*, 128 S.Ct. 2783, 2796 (2008); *see also Dutcher v. Owens*, 647 S.W.2d 948, 950 (Tex. 1983) (discerning legislative intent from failed bills would be mere "inference" that "would involve little more than conjecture").[11]

As for the legislative history of what *did* pass, the 1989 overhaul of the Workers' Compensation Act amended the statutory definition of "subcontractor." Under the pre-1989 definition, a subcontractor was defined as "a person who has contracted to perform all or any part of the work or services which a prime contractor has contracted *with another party* to perform." Act of

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[10] Summers and amici point to nine failed bills as evidence the Legislature has "repeatedly" rejected efforts to let premises owners assert the exclusive remedy defense. Chronologically, the bills are HB 2279 from the 74th Legislature (1995), HBs 2630 and 3024 from the 75th Legislature (1997), SB 1404 from the 76th Legislature (1999), HBs 3120 and 3459 from the 77th Legislature (2001), HB 2982 and SB 675 from the 78th Legislature (2003), and HB 1626 from the 79th Legislature (2005).

[11] Even if we were to consider failed bills, these cited bills were not only unsuccessful but, with one possible exception, unrelated to this case. *See* SB 1404 from the 76th Legislature (1999) (amending "general contractor" to include "an owner or lessor of real property").

May 28, 1983, 68th Leg. R.S., ch. 950, § 1, 1983 Tex. Gen. Laws 5210, 5210, *amended by* Act of Dec. 11, 1989, 71st Leg., 2d C.S., ch.1, § 3.05(a)(5), 1989 Tex. Gen. Laws 1, 15 (emphasis added). The Act, as amended, deleted "with another party," which is the very phrase that Summers argues *prevents* a premises owner from also being the general contractor. *See Wilkerson v. Monsanto Co.*, 782 F. Supp. 1187, 1188–89 (E.D. Tex. 1991) (interpreting "contracted with another party" in the pre-1989 definition to mean the prime contractor and premises owner must be distinct entities). We give weight to the deletion of the phrase "with another party" from the amended definition since we presume that deletions are intentional and that lawmakers enact statutes with complete knowledge of existing law. *See Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). It is, of course, axiomatic that the deletion of language better indicates the Legislature's intent to remove its effect, rather than to preserve it. Thus, the removal of the phrase "with another party" from the subcontractor definition favors, rather than argues against, an interpretation allowing premises owners to act as their own general contractors for the purpose of workers' compensation laws. TEX. LAB. CODE § 406.121(5). Enforcing the law as written is a court's safest refuge in matters of statutory construction, and we should always refrain from rewriting text that lawmakers chose, but we should be particularly unwilling to reinsert language that the Legislature has elected to delete. *See Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920) ("Courts must take statutes as they find them.").

Amici cite to statements by some lawmakers that the Act, and particularly the 1989 amendment, was never intended to provide statutory employer status to premises owners. Just as we decline to consider failed attempts to pass legislation, we likewise decline consideration of lawmakers' post-hoc statements as to what a statute means. It has been our consistent view that

"[e]xplanations produced, after the fact, by individual legislators are not statutory history, and can provide little guidance as to what the legislature collectively intended." *In re Doe*, 19 S.W.3d 346, 352 (Tex. 2000) (citations and quotations omitted). At bottom, at least some of the amici seem to argue that the workers' compensation scheme is itself inadequate, and that an injured employee should have remedies available apart from the benefits offered by the Act, including the ability to sue a negligent premises owner. As a judicial question, this argument lacks merit because the availability and adequacy of workers' compensation benefits is a purely legislative matter.

VIII

Excluding a premises owner who acts as a general contractor also fails to serve the public policy of encouraging workers' compensation coverage for all workers. *See Wingfoot Enters. v. Alvarado,* 111 S.W.3d 134, 140, 142 (Tex. 2003); *Garcia*, 893 S.W.2d at 521. As noted, the Act offers incentives to general contractors to provide workers' compensation coverage broadly to work site employees. In exchange, the Act specifically protects general contractors—who are not direct employers of subcontractors' employees—by allowing them to assert as a statutorily deemed employer the exclusive remedy defense. In light of this statutory protection, it would seem to be contrary to the state's public policy to read out of the Act's protections those premises owners who have otherwise qualified under the Act by purchasing workers' compensation coverage for their work site employees, but who have chosen to act as their own general contractor.

In the dissent's view, a premises owner who, in complying with the Act, enters into a written agreement to provide workers' compensation coverage to all contractors and contractors' employees at its work site would be the only contractor-employer in the contracting chain not afforded the exclusive remedy defense. Presumably, in that event all the downstream contractors would be considered subscribers under the premises owner's OPIP, thereby qualifying as statutory employers by virtue of their written agreements. *See* TEX. LAB. CODE § 406.123(a). But the dissent would disqualify the premises owner—the one who secured and actually paid for the policy—from being a statutory employer of his subcontractors' employees. As a result, the premises owner's own employees, working side-by-side with the other contractors' employees, would be limited to workers' compensation benefits for their injuries while the other contractors' employees injured in the same accident would be permitted to seek tort remedies against the premises owner in addition to the workers' compensation benefits provided by the premises owner. Unless the statute directs such a result, it makes no sense to read the statute in such an unreasonable manner. The dissent contends that this outcome is a policy choice made by the Legislature, but we interpret the statute in the context of a policy that *encourages* the provision of workers' compensation coverage to all workers on a given work site, not *discouraging* it by denying the statute's protections to the owner who enters into just such a plan.

IX

We conclude that Entergy qualifies under the Act's definition as a "general contractor" and, as a statutory employer, is entitled to assert the exclusive remedy defense. TEX. LAB. CODE § 408.001. The judgment of the court of appeals is reversed and a take-nothing judgment is rendered in favor of Entergy.

_____
Paul W. Green
Justice

OPINION DELIVERED: April 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 05-0272

ENTERGY GULF STATES, INC., PETITIONER,

v.

JOHN SUMMERS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued October 16, 2008

JUSTICE HECHT, concurring.

I think the Court's construction of the statutory text is reasonable, but so is the dissent's (though I disagree with much of its analysis), which means that the provisions are ambiguous and can be understood correctly only in the context of the Texas Workers' Compensation Act as a whole. I join in all but Part VII of the Court's opinion and write separately to explain my reasons for doing so, which come down to this: the Act encourages coverage, as does the Court's construction, but the dissent's does not.

I

Ascertaining the meaning of a statutory text (or any text for that matter) begins with the language used, and if that language is plain enough, absent some obvious error or an absurd result,

that is where the task ends.[1] It matters not what someone thinks the text may have meant to say or now hopes or wishes it said.[2] To look beyond the plain language risks usurping authorship in the name of interpretation. Construing statutes is the judiciary's prerogative; enacting them is the Legislature's. To prevent trespass, this Court and others have repeatedly stressed that statutory construction must be faithful to the plain language of the text.

But that principle is undermined when it is invoked where it does not apply — that is, when the language of the text is not, in fact, plain. To find plain meaning where it is missing suggests at best that the investigation is insincere or incompetent, at worst that the search is rigged, that the outcome, whatever it is, will always come out to be "plain". Fidelity to plain meaning is important only if the word "plain" has itself a plain meaning.

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[1] *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920) ("Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms. But they must find its intent in its language, and not elsewhere. They are not the law-making body. They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as the words of the law in their plain sense fairly sanction and will clearly sustain."), quoted in *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997), *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985), and *Texas Highway Comm'n v. El Paso Bldg. & Constr. Trades Council*, 234 S.W.2d 857, 863 (Tex. 1950); *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999) ("These specific, unambiguous statutes are the current law and should not be construed by a court to mean something other than the plain words say unless there is an obvious error such as a typographical one that resulted in the omission of a word, *see City of Amarillo v. Martin*, 971 S.W.2d 426, 428 n.1 (Tex. 1998), or application of the literal language of a legislative enactment would produce an absurd result, *see id.* (citing *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 135 (Tex. 1994) (Hecht, J., concurring)).").

[2] *See Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 29 (Tex. 1990) (Hecht, J., dissenting) (rejecting a "Cartesian theory" for construing insurance policies — "'I believe, therefore I am insured'").

I fear the phrase "plain language" has been overworked to the point of exhaustion. It has appeared in published Texas cases more often in the past decade than in the prior fifteen,[3] usually as the basis for resolving a dispute over meaning, though it can hardly be said that the prevalence of plain language is increasing, let alone exponentially. I detect no waning in the power of the curse at Babel. To the contrary, more and more this Court is called upon to construe statutes which opposing parties insist are unambiguous and mean very different things. A dispute over meaning does not render a text ambiguous;[4] many disputes lack substance. But when language is subject to more than one reasonable interpretation, it is ambiguous.[5] That is the plain meaning of ambiguous. Of course, reasonable people "will sometimes disagree about what reasonable people can disagree about",[6] but even so, it is difficult to maintain that language is plain in the face of a substantial, legitimate dispute over its meaning.[7]

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[3] My Westlaw research reveals 1,501 cases in the past ten years, and 1,464 in the prior 153 years, an increase on average from less than ten cases a year to more than 100 cases a year. Not all are statutory construction cases, but plain language is important in other textual construction. I offer the results only as a very general indication of how the use of the phrase has multiplied.

[4] *American Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003); *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 465 (Tex. 1998).

[5] *In re Missouri Pac. R.R. Co.*, 998 S.W.2d 212, 217 (Tex. 1999) ("The language of the statute could support more than one reasonable interpretation and therefore is ambiguous.").

[6] *City of Keller v. Wilson*, 168 S.W.3d 802, 828 (Tex. 2005).

[7] *See, e.g.*, *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 484 (Tex. 2001) (Hecht, J., dissenting) ("The Court touts its view as the 'plain meaning' of the 'unambiguous language' of the statute. In other words, the split in the circuits is not really a serious dispute; the Second, Third, and Fourth Circuits simply cannot (or perhaps will not) read plain English.").

Only every so often do we come right out and brand a text with the a-word,[8] as if it were a mark of shame. It seems nicer to call a statute unclear[9] or better yet, just leave that implication.[10] But the truth is that the meaning of statutory language is often reasonably disputed and therefore ambiguous to some extent, and resolving reasonable disputes with reason, rather than by denying their reasonableness, would result in a sounder jurisprudence. Two great evils attend this course. One is that judges will use analysis of reasonable disagreements over meaning as a guise for substituting their own preferences in place of the legislature's. This would trespass upon the boundary between judicial and legislative spheres that is fundamental to our structure of government. The other is that in the search for the meaning of a statutory provision, courts will grasp at all sorts of statements made before, during, and after the process of enactment, whether by legislators or others, as relevant or even authoritative. The Legislature does not speak through individuals — even its members — in committee hearings, in bill analyses and reports, in legislative debate, or in pre- and post-enactment commentary; it speaks through its enactments.

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[8] I recall four instances in the past twenty years. *Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006) ("[T]he words 'sue and be sued', standing alone, are if anything, unclear and ambiguous."); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 701 (Tex. 2003) ("The statute's ambiguity precludes our finding an unmistakable Legislative intent to waive sovereign immunity."); *In re Missouri Pac. R.R. Co.*, 998 S.W.2d at 217; *Stracener v. United Servs. Auto Ass'n*, 777 S.W.2d 378, 383 (Tex. 1989) ("We find that this separation of the clause [with a comma] creates an ambiguity . . . .").

[9] *E.g.*, *TXU Elec. Co. v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 275, 286 (Tex. 2001) (Owen, J., concurring and stating the opinion of the Court) ("We conclude . . . that the PURA is unclear . . . .").

[10] *E.g.*, *City of Corpus Christi v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 231, 261 (Tex. 2001) (Owen, J., concurring and stating the opinion of the Court) ("[W]hen faced with an ambiguous code provision, we give some deference to the Commission's interpretation when it is reasonable . . . . Under the circumstances presented here, we cannot say that the Commission's interpretation . . . is an unreasonable one . . . .").

Rather than struggle to understand and explain a difficult text, it might seem easier to fall back on a simple insistence that all language have a plain meaning, but doing so risks leaving the impression that the court is not being entirely honest. Courts must scrupulously guard against both evils, but in doing so, cannot ignore a statute's context that may illumine its meaning. Years ago Special Chief Justice Samuels[11] wrote for this Court:

> A statute should not be construed in a spirit of detachment as if it were a protoplasm floating around in space. The historical treatment to which a statute may be subjected is aptly set forth in Travelers' Insurance Co. v. Marshall, 124 Tex. 45, 76 S.W.2d 1007, 1012 . . . [1934], where it is said: 'Generally it may be said that in determining the meaning, intent, and purpose of a law or constitutional provision, the history of the times out of which it grew, and to which it may be rationally supposed to bear some direct relationship, the evils intended to be remedied, and the good to be accomplished, are proper subjects of inquiry.'[12]

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[11] Special Chief Justice Sidney L. Samuels of Fort Worth was designated by Governor Ross Sterling in January 1932 to sit for Chief Justice Cureton under a statute now codified as section 22.005 of the Texas Government Code. The case involved a private claim against the State to lands in the once-disputed "Alsace-Lorraine" region along the 100th meridian from the Red River to the 36° 30' parallel dividing Texas and the Indian territories that later became Oklahoma. The United States Supreme Court finally held in *Oklahoma v. Texas*, 272 U.S. 21 (1926), that the region belonged to Texas. Chief Justice Cureton was disqualified because he had represented Texas' interests in the dispute. The Court took just nine years to decide the case. Interestingly, James V. Allred had also represented Texas' interests while Attorney General, and when the case was decided, had served two terms as Governor and been nominated to serve as a federal judge, all the while being shown as counsel for the State in the case. (The most famous exercise of the designation power was surely Governor Pat Neff's appointment of a Special Supreme Court consisting of three women, Mrs. Hortense Ward, Special Chief Justice, and Miss Ruth Virginia Brazzil and Miss Hattie L. Henenberg, Special Associate Justices, to hear and determine the issues in *Johnson v. Darr*, 272 S.W. 1098 (Tex. 1925).)

[12] *Wortham v. Walker*, 128 S.W.2d 1138, 1150 (Tex. 1939); *see also* TEX. GOV'T CODE § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision."); *id*. § 312.005 ("In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy.").

II

The Workers' Compensation Act provides that a general contractor who agrees to furnish workers' compensation insurance coverage to a subcontractor and its employees becomes their employer for purposes of the Act — their statutory employer, if you will — so that their exclusive remedy against the general contractor for on-the-job injuries is compensation benefits. Specifically, the relevant provisions of the Labor Code state:

> A general contractor and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor.[13]
>
> "General contractor" means a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors. The term includes a "principal contractor," "original contractor," "prime contractor," or other analogous term. The term does not include a motor carrier that provides a transportation service through the use of an owner operator.[14]
>
> "Subcontractor" means a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform.[15]
>
> An agreement under this section makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of this state.[16]
>
> Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against

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[13] TEX. LAB. CODE § 406.123(a).

[14] *Id*. § 406.121(1).

[15] *Id*. § 406.121(5).

[16] *Id*. § 406.123(e).

> the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.[17]

The question is whether a person who subcontracts work to be done on his own property is a general contractor for purposes of these provisions. In the Court's first opinion, we all thought from the "plain and ordinary meaning" of the provisions the answer was clearly yes.[18] On rehearing, after reargument and a number of amicus briefs, three MEMBERS of the Court now disagree and think that the statutory language "seems clear"[19] and "compels the conclusion"[20] that the answer is no. The difficulty is this: while it is true, as the Court contends, that a person who engages subcontractors to work on his own property is often said to act as his own general contractor and certainly performs that function, more often, as the dissent contends, a general contractor is thought of as a person who works for someone else, like a property owner, subcontracting parts of a job to others as appropriate. On the face of it, either reading of the statute seems reasonable. The text, it must therefore be said, is ambiguous.

Scrutinizing the text does not resolve the difficulty. The statutory definition of "general contractor" has three components. The first is this prescription: "'General contractor' means a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors." A premises owner who undertakes to procure the performance of work

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[17] *Id.* § 408.001(a).

[18] 50 Tex. Sup. Ct. J. 1140, 1143 (Aug. 31, 2007) ("Construing the statute according to its plain and ordinary meaning, Entergy is a general contractor because it '[undertook] to procure the performance of work' from IMC." (brackets in original)).

[19] *Post* at ___.

[20] *Post* at ___.

or service on his property would appear to fit this definition of general contractor. A premises owner can undertake to procure work or service for himself, through subcontractors for example, or he may employ someone else to procure the work or service — the subcontractors — for him. Nothing in the statute's use of the word "undertakes" suggests any difference in its ordinary meaning.

The second component of the statutory definition is a non-exclusive list of examples: "The term includes a 'principal contractor,' 'original contractor,' 'prime contractor,' or other analogous term." The dissent asserts that "we have for decades defined a contractor as 'any person who, in the pursuit of an independent business, undertakes to do a specific piece of work *for other persons* . . . .'", quoting a 1942 decision of this Court, *Industrial Indemnity Exchange v. Southard*,[21] which in turn quoted a 1924 decision of the commission of appeals, *Shannon v. Western Indemnity Co.*[22] But the issue in *Southard* was whether the claimant was an *independent* contractor, and the quoted passage addresses that issue, as is clear from its context:

> Many definitions of what is meant by the term 'independent contractor' have been given. They all rest substantially on the same basic principle. In the case of Shannon v. Western Indemnity Co., Tex. Com. App., 257 S.W. 522, 524, this Court announced, as the basis for the opinion rendered in that case, the following definition: 'A contractor is any person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details.'[23]

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[21] 160 S.W.2d 905, 907 (Tex. 1942).

[22] 257 S.W. 522, 524 (Tex. Comm'n App. 1924, judgm't adopted).

[23] 160 S.W.2d at 907.

The issue was the same in *Shannon*, a case decided by the commission of appeals. Certainly, a person could not act as his own independent contractor; his independence would be severely compromised. But nothing in either case suggests that an owner cannot act as his own general contractor. The dissent points out correctly that the Legislature has sometimes used "general contractor" in a way that excludes a premises owner.[24] But the Court cites instances in which a person who hires subcontractors directly is said to act as his own general contractor, suggesting that it is a common expression.[25] One cannot be sure from the text alone whether the Legislature meant for owners to be, or not to be, general contractors.

The list of examples is specifically non-exclusive but obviously intended to illustrate similarities.[26] The dissent argues that a premises owner cannot be a general contractor because the 1979 edition of *Black's Law Dictionary* defined a "contractor" as "a person who, in the pursuit of any independent business, undertakes to do a specific piece of work for other persons".[27] But the rest of the definition is not so restrictive:

> This term is strictly applicable to any person who enters into a contract, but is commonly reserved to designate one who, for a fixed price, undertakes to procure the performance of works or services on a large scale, or the furnishing of goods in large quantities, whether for the public or a company or individual. Such are generally

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[24] *Post* at ___.

[25] *Ante* at ___.

[26] *See Hilco Elec. Coop. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003) ("[T]he rule of *ejusdem generis* . . . provides that when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation.").

[27] BLACK'S LAW DICTIONARY 295 (5th ed. 1979).

> classified as general contractors (responsible for the entire job) and subcontractors (responsible for only portion of job; *e.g.* plumber, carpenter).[28]

The definitions describe someone who might or might not be the owner of the jobsite. The same dictionary gives this definition of "general contractor":

> One who contracts for the construction of an entire building or project, rather than for a portion of the work. The general contractor hires subcontractors (*e.g.* plumbing, electrical, etc.), coordinates all work, and is responsible for payment to subcontractors. Also called "prime" contractor.[29]

It defines "prime contractor" thusly:

> The party to a building contract who is charged with the total construction and who enters into sub-contracts for such work as electrical, plumbing, and the like. Also called "general contractor."[30]

Neither of these definitions excludes a jobsite owner from acting as his own general contractor. Other dictionaries are similarly inconclusive.[31] The second component does not clearly indicate whether a jobsite owner is or is not to be treated as a general contractor.

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[28] *Id.*

[29] *Id.* at 615.

[30] *Id.* at 1072.

[31] BLACK'S LAW DICTIONARY 350 (8th ed. 2004) ("**contractor. 1.** A party to a contract. **2.** More specif., one who contracts to do work or provide supplies for another."); *id.* at 351 ("***general contractor.*** One who contracts for the completion of an entire project, including purchasing all materials, hiring and paying subcontractors, and coordinating all the work. — Also termed *original contractor*; *prime contractor*."); THE OXFORD ENGLISH DICTIONARY 837 (2d ed. 1989) ("One who contracts or undertakes to supply certain articles, or to perform any work or service (*esp.* for government or other public body), at a certain price or rate; in the building and related trades, one who is prepared to undertake work by contract."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1981) ("**contractor** . . . **1 a:** one that contracts **:** a party to a bargain **:** one that formally undertakes to do something for another **b:** one that performs work (as a printing job) or provides supplies on a large scale (as to troops) according to a contractual agreement at a price predetermined by his own calculations **c:** one who contracts on predetermined terms to provide labor and materials and to be responsible for the performance of a construction job in accordance with established specifications or plans — called also *building contractor*").

The third component of the statutory definition is an exclusion: "The term does not include a motor carrier that provides a transportation service through the use of an owner operator." The Court argues that expressing only one exclusion suggests that no others exist.[32] The dissent offers this tautological explanation of the exclusion: "the Legislature likely expressly excluded motor carriers from the general-contractor definition to make it clear that, even though they might otherwise fit the general-contractor construct, they are to be treated differently."[33] I dare say that it was not merely likely but absolutely certain that by excluding motor carriers, the Legislature meant to make clear they are to be treated differently. But the dissent misses the Court's point: if the Legislature intended to make clear who should not be treated as a general contractor, as we all think it did, and it listed motor carriers but not premises owners, then premises owners should be treated as general contractors.

The statutory definition of "subcontractor" — "a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform" — does not help clarify the matter. A premises owner may be a general contractor who "undertake[s] to perform" work by contracting with subcontractors.

Examined with precision, the statutory text can reasonably be read to provide that a person who undertakes to procure work or service is no less a general contractor because he also happens to own the premises where the job is to be done, and no less a statutory employer when he provides workers' compensation insurance coverage for subcontractors and their employees. That, of course,

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[32] *Ante* at ___.

[33] *Post* at ___.

is why the Court was unanimous in its first opinion. The dissenters too quickly dismiss a position they so recently embraced unreservedly; sometimes wrong, they are never in doubt. But their basic argument has weight: general contractor often refers to someone who works for the job owner. This reading of the statute is a reasonable one, in my view, but it is not the only reasonable one.

III

The disagreement in this case is not over words and cannot be resolved with dictionaries. It is over consequences and can only be settled by examining how the statutory provisions fit in the context of the Workers' Compensation Act as a whole. The issue for the Court is not whether it is good policy to treat a person who arranges for work to be done on his property as a general contractor, something we cannot decide, but whether such treatment is most consistent with the policies embedded in the Act. For four reasons, I believe it is.

First: The Act's "decided bias" is for coverage.[34] Although employees and employers can opt out, an employee has only a limited time frame in which to do so,[35] and an employer is penalized for doing so by loss of his common law defenses to an employee's claim of injury.[36] The Act's

[34] *Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 140 (Tex. 2003) ("And in examining the Labor Code's overall scheme for workers' compensation and for protecting workers, we conclude that the Act's decided bias in favor of employers electing to provide coverage for their employees supports our conclusion that the Act permits more than one employer for workers' compensation purposes." (footnote omitted)).

[35] TEX. LAB. CODE § 406.034(b) ("An employee who desires to retain the common-law right of action to recover damages for personal injuries or death shall notify the employer in writing that the employee waives coverage under this subtitle and retains all rights of action under common law. The employee must notify the employer not later than the fifth day after the date on which the employee: (1) begins the employment; or (2) receives written notice from the employer that the employer has obtained workers' compensation insurance coverage if the employer is not a covered employer at the time of the employment but later obtains the coverage.").

[36] *Id.* § 406.033(a) ("In an action against an employer who does not have workers' compensation insurance coverage to recover damages for personal injuries or death sustained by an employee in the course and scope of the employment, it is not a defense that: (1) the employee was guilty of contributory negligence; (2) the employee assumed

encouragement of coverage is furthered by incentivizing general contractors to provide workers' compensation coverage for subcontractors and their employees.[37] No one questions that the Act does this by providing such general contractors the protection of the exclusive remedy. To refuse the incentive when the general contractor happens to own the jobsite would discourage coverage, contrary to the policy of the Act. The dissent responds that because the Act is in derogation of common law rights, it should not be "applied to cases not clearly within its purview".[38] But it has long been "the settled policy of this State to construe liberally the provisions of the [Act] in order to effectuate the purposes for which it was enacted."[39] Coverage is a fundamental purpose of the Act.

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the risk of injury or death; or (3) the injury or death was caused by the negligence of a fellow employee."); *Kroger Co. v. Keng*, 23 S.W.3d 347, 349 (Tex. 2000) ("To encourage employers to obtain workers' compensation insurance, section 406.033 penalizes nonsubscribers by precluding them from asserting certain common-law defenses in their employees' personal-injury actions . . . ."). Still, about a third Texas employers choose not to subscribe to the workers' compensation system. BIENNIAL REPORT OF THE TEXAS DEPARTMENT OF INSURANCE TO THE 81ST LEGISLATURE – DIVISION OF WORKERS' COMPENSATION 3 (Dec. 2008).

[37] *Wingfoot Enters.*, 111 S.W.3d at 142 ("[S]ection 406.123 (covering general contractors and subcontractors), like other workers' compensation provisions in the Code, encourage[s] employers to obtain workers' compensation insurance coverage by providing benefits to the employer, including the exclusive remedy provision, if coverage is obtained.").

[38] *Energy Serv. Co. of Bowie, Inc. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 n.17 (Tex. 2007) (quoting *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969)).

[39] *Huffman v. S. Underwriters*, 128 S.W.2d 4, 6 (Tex. 1939) (quoted in *In re Poly-America, L.P.*, 262 S.W.3d 337, 350 (Tex. 2008)); *see Millers' Mut. Cas. Co. v. Hoover*, 235 S.W. 863, 864 (Tex. Comm'n App. 1921, judgm't adopted) ("It has been thought, inasmuch as the [Act] is in derogation of the common law, that it should be given a strict construction, but the courts have very generally held that a spirit of liberality should characterize its interpretations, for the reason that it is to be classed as remedial legislation." (quotation omitted)); *Southern Sur. Co. v. Inabnit*, 1 S.W.2d 412, 413-414 (Tex. Civ. App.–Eastland 1927, no writ) ("The leading authorities . . . agree that Workmen's Compensation Laws came into existence in response to a general acceptation of the broad economic theory that industrial accidents should properly be chargeable as a part of the overhead expenses of the industries. These laws are remedial in their nature, and should be liberally construed with the view of promoting their objects. The early tendency of our courts to construe them strictly because they were thought to be in derogation of common law has long since given place to a liberal rule of construction. The rule now prevailing prevents the restriction of the scope of the laws by exceptions and exact definitions not in harmony with their spirit.").

Second: Since 1917, the Act has expressly prohibited a subscriber from using a subcontractor to circumvent coverage.[40] To prohibit a subscriber who owns the jobsite from engaging subcontractors to avoid paying compensation benefits, while at the same time discouraging the subscriber from providing compensation benefits by denying the exclusive remedy protection, would be a perverse result indeed. The dissent dismisses the policy of discouraging avoidance of coverage, contained in the Act since 1917, as "irrelevant",[41] but there is simply no reason to think that the Act has ever beckoned with one hand and shunned with the other.

Third: Since 1963, the Act has provided that a subscribing employer may agree in writing, before a worker has been injured, to assume a third party's liability for the injury.[42] Such agreements

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[40] Act approved Mar. 28, 1917, 35th Leg., R.S., ch. 103, § 1, Part II, § 6, 1917 Tex. Gen. Laws 269, 284-285 ("If any subscriber to this Act with the purpose and intention of avoiding any liability imposed by the terms of the Act sublets the whole or any part of the work to be performed or done by said subscriber to any sub-contractor, then in the event any employe[e] of such sub-contractor sustains an injury in the course of his employment he shall be deemed to be and taken for all purposes of this Act to be the employe[e] of the subscriber, and in addition thereto such employe[e] shall have an independent right of action against such sub-contractor, which shall in no way be affected by any compensation to be received by him under the terms and provisions of this Act."); renumbered § 6(d) by Act of May 28, 1983, 68th Leg., R.S., ch. 950, 1983 Tex. Gen. Laws 5210, 5210-5211; amended by Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05(h), 1989 Tex. Gen. Laws 1, 16, formerly TEX. REV. CIV. STAT. ANN. art. 8308, § 3.05(h) ("If a person who has workers' compensation insurance coverage subcontracts all or part of the work to be performed by the person to a subcontractor with the purpose and intent to avoid liability as an employer under this Act, an employee of the subcontractor who sustains a compensable injury in the course and scope of the employment shall be treated as an employee of the person for purposes of workers' compensation and shall also have a separate right of action against the subcontractor, which right of action does not affect the employee's right to compensation under this Act."); codified by Act of May 12, 1993, 73rd Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987, 1159, as TEX. LAB. CODE § 406.124 ("If a person who has workers' compensation insurance coverage subcontracts all or part of the work to be performed by the person to a subcontractor with the intent to avoid liability as an employer under this subtitle, an employee of the subcontractor who sustains a compensable injury in the course and scope of the employment shall be treated as an employee of the person for purposes of workers' compensation and shall have a separate right of action against the subcontractor. The right of action against the subcontractor does not affect the employee's right to compensation under this subtitle.").

[41] *Post* at ___.

[42] Act of May 20, 1963, 58th Leg., R.S., ch. 437, § 1, 1963 Tex. Gen. Laws 1132, formerly TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (1925); amended by Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, 1989 Tex. Gen. Laws 1, 32-33, formerly TEX. REV. CIV. STAT. ANN. art. 8308-4.04; and codified by Act of May 12, 1993, 73rd Leg., R.S., ch.

appear to be common among contractors on construction jobsites.[43] If the employer is a subcontractor and the third party is a general contractor who has provided coverage for the worker, the worker's exclusive remedy against both is limited to compensation benefits. If the general contractor were not afforded the same protection because he owned the jobsite, the worker could recover common law damages against him, and he in turn could require the subcontractor to assume the liability, thereby defeating the protection of the exclusive remedy to the worker's own employer, even though he and the general contractor both provided compensation benefits. In this case, Entergy had just such an indemnity agreement with IMC.[44] If Summers can recover common law

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269, § 1, 1993 Tex. Gen. Laws 987, 1235, now TEX. LAB. CODE § 417.004 ("In an action for damages brought by an injured employee, a legal beneficiary, or an insurance carrier against a third party liable to pay damages for the injury or death under this chapter that results in a judgment against the third party or a settlement by the third party, the employer is not liable to the third party for reimbursement or damages based on the judgment or settlement unless the employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability.").

[43] Brief of Amicus Curiae ABC of Texas, Inc. at 5.

[44] The agreement between Entergy and IMC contained these provisions:

"18. Indemnity

"18.1 To the fullest extent allowed by applicable law, the Contractor agrees that it will indemnify and hold harmless the Entergy Companies, their affiliated and associated companies and any of their agents, officers, directors, shareholders, employees, successors and assigns from any and all claims, losses, costs, damages, expenses, including attorneys fees, and liability by reason of property damage, personal injury (including death), or both such damage and injury of whatsoever nature or kind arising out of or as a result of any negligent or wrongful act or omission in connection with the performance of the Work by the Contractor, its employees, agents, and subcontractors. THE PARTIES EXPRESSLY AGREE THAT THIS INDEMNITY SHALL APPLY EVEN IN THE EVENT OF THE CONCURRENT NEGLIGENCE OF THE ENTERGY COMPANIES.

"18.2 Further, with respect to Contract Orders being performed by Contractor as an independent contractor with sole rights to direct the Work performed by its employees, the Contractor shall be solely responsible for and shall indemnify and hold harmless the Entergy Companies, their affiliated and associated companies and any of their agents, officers, directors, shareholders, employees, successors or assigns from and against any and all claims, liability, losses, costs, damages and expenses, including attorney fees, on account of the death of or injury to the Contractor or any subcontractors, or to any employees or agents of the Contractor or any subcontractor, caused by, arising out of, or in any way connected with the Work to be performed hereunder, or while the Contractor or any such subcontractors, employees or agents are on or near any of the Sites or Owners' premises, WITHOUT REGARD TO WHETHER ANY

damages from Entergy (having already received compensation benefits, of course), Entergy can require reimbursement by IMC, Summers' direct employer. In this situation, the workers' compensation system provides nothing to any employer, even though all employers have agreed to provide compensation benefits to all employees, which the injured worker himself requested and received. This would be an even more perverse disruption of the policies of the Act. The dissent argues that the economic effect of indemnity agreements is minimal because an employer can obtain compensation coverage at a reduced cost through owner-provided policies like Entergy's and can buy general liability insurance for the increased risk of damages not limited by providing compensation coverage. But compensation insurance that provides no protection is no bargain, however reduced the cost, and having to buy two policies for an increased risk when one policy for a limited risk should do is perverse. The fact that employers often do so, the dissent says, shows they know they must, but all it shows for sure is an unwillingness to put too much trust in the fairness of the law. Anyway, according to the dissent, the problem is "a policy choice the Legislature made."[45] I would not blame the Legislature for a problem that can be avoided by a reasonable construction of the Act.

SUCH DEATH OR INJURIES ARE ALLEGED TO HAVE BEEN CAUSED BY OR ARE ATTRIBUTABLE IN WHOLE OR IN PART TO THE NEGLIGENCE OF THE ENTERGY COMPANIES, THEIR EMPLOYEES OR AGENTS, THE CONDITIONS OF THE PREMISES, OR OTHERWISE, AND NOTWITHSTANDING ANY OTHER PROVISIONS HEREIN CONTAINED TO THE CONTRARY."

[45] *Post* at ___.

Fourth: The Act creates a comprehensive system,[46] and treating similarly situated contractors and employers differently would disrupt that system unnecessarily. There is no apparent reason why a premises owner should have the exclusive remedy protection when he provides workers' compensation insurance covering his own employees engaged in particular work but not when he provides the same coverage for his subcontractors and their employees, retained to do the same work.[47] The dissent's only response is that whimsy is a legislative prerogative.

The Act, first passed in 1913, provides an injured worker guaranteed but limited wage and medical benefits quickly and without regard to fault, in exchange for which the worker foregoes common law damage claims against his employer.[48] Not long ago, we wrote: "The [A]ct, which was

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[46] *Woolsey v. Panhandle Ref. Co.*, 116 S.W.2d 675, 676 (Tex. 1938) ("The law [the Workers' Compensation Act] is comprehensive in its terms . . . .")

[47] *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 795-796 (Tex. 2001) (Hecht, J., concurring) ("The hire for a subscribing independent contractor presumably includes the cost of providing workers' compensation coverage related to the work, and the contractor's employer who pays it should have the same protection from extra liability for job-related injuries to the contractor's employees that the contractor has. The employer thus has the same economic incentive the contractor has to minimize job-related risks to workers. The employer is not like a product manufacturer or other stranger to the work relationship who has not born any part of the cost of compensation and therefore is not immune from liability for injury to the contractor's employees. Imposing liability on the employer for the contractor's negligent injury of its employee is simply inconsistent with the 'bedrock principle' that workers' compensation is an employee's exclusive remedy and full compensation for job-related injuries." (footnotes omitted) (citing *Monk v. Virgin Is. Water & Power Auth.*, 53 F.3d 1381, 1392 (3d Cir. 1995); *Anderson v. Marathon Petrol. Co.*, 801 F.2d 936, 941 (7th Cir. 1986))).

[48] *Kroger Co. v. Keng*, 23 S.W.3d 347, 349-350 (Tex. 2000) ("The Texas Legislature enacted the Act in 1913 in response to the needs of workers, who, despite escalating industrial accidents, were increasingly being denied recovery. The Act allowed injured workers, whose employers subscribed to workers' compensation insurance, to recover without establishing the employer's fault and without regard to the employee's negligence. In exchange, the employees received a lower, but more certain, recovery than would have been possible under the common law." (citation omitted)); *Texas Workers' Compensation Com'n v. Garcia*, 893 S.W.2d 504, 511 (Tex. 1995) ("Employees injured in the course and scope of employment could recover compensation without proving fault by the employer and without regard to their or their coworkers' negligence. In exchange, the employer's total liability for an injury was substantially limited." (citation omitted)); *Edmunds v. Highrise, Inc.* 715 S.W.2d 377, 379 (Tex. App.–Houston [1st Dist.] 1986, writ ref'd) ("The theory behind the exclusive remedy provision of the Workers' Compensation Act is that in cases where the employee is merely injured, he be given the opportunity to relinquish common law remedies for lesser benefits which are paid more quickly and efficiently, and without proof of fault.").

part of a nationwide compensation movement, was perceived to be in the best interests of both employers and employees."[49] Much earlier, we said:

> Workmen's compensation laws have become part of our public policy. The object of the laws was to do away with the issues of negligence, unavoidable accident, assumed risk, contributory negligence, and other like issues, and to fix the amount recoverable free of any uncertainty. The old system of settling disputes was unsatisfactory, and modern business methods demanded that compensation for injuries to employees be not controlled by the fault or negligence of the employee, but should rest upon broader, more humane, and more certain rules.[50]

An owner-run jobsite is not uncommon. No one has suggested a reason why a general contractor who works for an owner can submit to the obligations and protections of the workers' compensation system as a statutory employer for all the workers on the job, while the owner himself cannot, other than to subvert the system. Of course, the Legislature needs no reason to differentiate between general contractors who do not own the jobsite and those who do. But we are required to presume that the Legislature has acted reasonably,[51] and in any event, the statutory provisions at issue draw no such distinction. While their silence on the subject may be read either way, we should assume that the Legislature intended that the treatment of general contractors be consistent with the Act as a whole. For these reasons, I conclude that of the two constructions of the statutory text, both reasonable on their face, the Court's is stronger.

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[49] *Garcia*, 893 S.W.2d at 511; *see also Kernan v. American Dredging Co.*, 355 U.S. 426, 431-432 (1958) ("[A]s industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the 'human overhead' of doing business. For most industries this change has been embodied in Workmen's Compensation Acts.").

[50] *Woolsey*, 116 S.W.2d at 676.

[51] *See* TEX. GOV'T CODE § 311.021.

IV

The argument is made, however, that the Legislature is not likely to have intended by its definition of "general contractor" to include a person who has work done on his own property because that would have been a major change in the law that would have drawn attention when in fact it was enacted without note. The Court followed the same line of reasoning in *Energy Services Co. of Bowie, Inc. v. Superior Snubbing Services, Inc.*,[52] where we construed an amendment to the statute governing the enforceability of indemnity agreements long used in the oil patch. The industry practice was well-settled, had never been criticized, and continued unchanged after the amendment. We concluded that "[a]bsent any identifiable reason for a substantive change to have been made in the statutory provision, or any extra-textual indication that one was intended, or any resulting change in industry practice, we think the most reasonable construction of [the amended statute] is the same as its . . . predecessors."[53] The problem with the argument in this case is that it has never been clear when a person is considered the statutory employer of a subcontractor or his employees, liable to provide the workers' compensation benefits, and entitled to the exclusive remedy protection of the Act.

Before 1983, the only provision in the Workers' Compensation Act relating to coverage of a subcontractor was article 8307, section 6, which, as noted above, was enacted in 1917 and prohibited a subscriber from subcontracting work "with the purpose and intention" of avoiding the liability for workers' compensation benefits he would have if his own employees were injured doing

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[52] 236 S.W.3d 190 (Tex. 2007).

[53] *Id*. at 195.

the work.[54] In that situation, the subcontractor's injured employee was deemed to be the subscriber's employee and therefore entitled to compensation benefits.

In three consecutive legislative sessions beginning in 1977, six bills were introduced, the ostensible purpose of which was to eliminate section 6's subjective "purpose and intention" trigger and provide greater certainty in determining whether a subscriber should be treated as the statutory employer of his subcontractors and their employees. The premise of the bills was that subscribers were being treated as statutory employers already, but not always predictably or consistently. The bills proposed to amend or replace section 6 and provide, variously, either that coverage extended to subcontractors unless otherwise agreed, that coverage did not extend unless otherwise agreed, or something in between. In brief:

- HB 1584, introduced in 1977, would have amended section 6 and provided simply that "under a bona fide sub-contract made in good faith", workers' compensation coverage was not provided.[55] HB 1584 passed the House[56] but was left pending in the Senate committee.
- HB 1585, also introduced in 1977, would have replaced section 6 altogether and provided that a subscriber's coverage extended to subcontractors and their employees, absent an

[54] Act approved Mar. 28, 1917, 35th Leg., R.S., ch. 103, § 1, Part II, § 6, 1917 Tex. Gen. Laws 269, 284-285, codified as TEX. REV. CIV. STAT. ANN. art. 8307, § 6, text quoted *supra* note 40.

[55] Tex. H.B. 1584, 65th Leg., R.S. (1977).

[56] As HB 1584 passed the House, it stated: "If any subscriber to this law sublets the whole or any part of the work to be performed or done by said subscriber to any sub-contractor under a bona fide sub-contract made in good faith, then in the event the sub-contractor or any employee of such sub-contractor sustains an injury in the course of his employment, he shall be deemed to be and taken for all purposes of this law not to be the employee of the subscriber. A sub-contractor, as that term is used in this Act, means a person, firm or corporation, or any other legal entity recognized under Texas law, contracting with the principal or prime contractor for the performance, in a capacity other than as an employee, of any and all work or services which such principal or prime contractor has contracted to perform."

agreement to the contrary, unless they were already covered.[57] HB 1585 would also have provided that a subscriber could always agree to extend compensation coverage to a subcontractor and his employees and pass the cost through to the subcontractor.[58] HB 1585 was not voted out of committee.

- In 1979, SB 360 was introduced, almost identical to HB 1584, but it was rewritten in committee and passed the Senate. The committee substitute deleted existing section 6 and provided instead that a prime contractor would not be deemed the employer of a subcontractor or his employees without an agreement beforehand, but absent such an agreement, the prime contractor would be required to provide coverage if the subcontractor did not do so, and could pass the cost through to the subcontractor.[59] The House committee

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[57] Tex. H.B. 1585, 65th Leg., R.S. (1977) ("(a) As used in this Act, the term sub-contractor means a person, firm, corporation or any other legal entity recognized under Texas law, contracting with the principal, original or prime contractor for the performance of all or any part of the work or services which such principal, original or prime contractor has contracted to perform. (b) A sub-contractor and employees of the sub-contractor shall be deemed employees of the subscriber for which or for whom such sub-contractor is to perform work or services unless: (i) prior to beginning the performance of any work or services to be performed under such sub-contract, subscriber and sub-contractor have entered into a bona fide written contract expressly providing that sub-contractor undertakes such work or services to be performed thereunder as an independent contractor and not as an employee of the subscriber; or, (ii) sub-contractor has provided workmen's compensation insurance coverages for sub-contractor's employees and/or the sub-contractor during the performance of the sub-contract as evidenced by certificates of insurance issued by sub-contractor's workmen's compensation insurance carrier.").

[58] *Id.* ("(c) Notwithstanding any other provisions of this law, a subscriber may provide workmen's compensation insurance coverages for the sub-contractor's employees and/or the sub-contractor. In the event subscriber elects to provide such workmen's compensation insurance coverages, the insurance contract specifically shall include such sub-contractor's employees and/or the sub-contractor, and the elected coverages shall continue while the subscriber's policy is in effect and while the named sub-contractor is endorsed thereon. The amount of the actual premiums paid or incurred by the subscriber for workmen's compensation insurance coverages on such sub-contractor's employees and/or the sub-contractor shall constitute a legal claim by subscriber against sub-contractor and, having provided such workmen's compensation insurance, subscriber may deduct the amount of the actual premiums paid or incurred in providing such workmen's compensation insurance coverages from the sub-contract price or any other monies due the sub-contractor.").

[59] Tex. S.B. 360, 66th Leg., R.S. (1979) ("(a) As used in this Act, the term 'subcontractor' means a person, firm, corporation, or any other legal entity recognized under Texas law, contracting with the principal, original, or prime contractor for the performance of all or any part of the work or services which such principal, original, or prime contractor has contracted to perform. (b) Neither the subcontractor nor the employees of the subcontractor shall be deemed employees of the principal, original, or prime contractor for whom such subcontractor is to perform work or services unless, prior to beginning the performance of any work or services to be performed under such subcontract, the subscriber and subcontractor have entered into a bona fide written contract expressly providing that the subcontractor or the employees of the subcontractor will perform such work or services as employees of the subscriber. (c) If no contract is made pursuant to Subsection (b) of this section, the original or prime contractor shall provide workers' compensation insurance coverage for the subcontractor's employees or the subcontractor. The amount of the actual premiums paid or incurred by the subscriber for workers' compensation insurance coverage on such subcontractor's employees or the subcontractor may be deducted from the subcontractor's price or any other money due the

amended the bill, reverting to a version something like HB 1584, providing that a general contractor could not be deemed to employ a subcontractor or his employees without agreeing at the outset of the job to provide workers' compensation benefits to the subcontractor and his employees.[60] The cost could be passed through to the subcontractor. The committee substitute was tabled on the floor.

- In 1981, three bills were introduced, SB 629, HB 1662, and SB 1080, all essentially identical to the House committee substitute for SB 360 the prior session. None made it to the floor.

None of these bills defined a general contractor or distinguished between one who owned the jobsite and one who worked for the owner. All seemed to treat any subscriber who engaged a subcontractor as a general contractor, though none specifically said so. Nothing in any of the bills suggested that a subscriber who engaged a subcontractor either could not or should not be allowed to extend coverage to a subcontractor and his employees and thereby become their statutory employer, with the benefit of the exclusive remedy protection.

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subcontractor. (d) In lieu of the foregoing, the subcontractor may provide workers' compensation insurance coverages for the subcontractor's employees or the subcontractor during the performance of the subcontract as evidenced by certificates of insurance issued by subcontractor's workers' compensation insurance carrier and filed with the subscriber.").

[60] The committee substitute read:

"(a) As used in this Act, the term sub-contractor means a person, firm, corporation or any other legal entity recognized under Texas law, contracting with the principal, original or prime contractor for the performance of all or any part of the work or services which such principal, original or prime contractor has contracted to perform.

"(b) Neither the sub-contractor nor the employees of the subcontractor shall be deemed employees of the principal, original or prime contractor for whom such sub-contractor is to perform work or services unless, prior to beginning the performance of any work or services to be performed under such sub-contract, subscriber and sub-contractor have entered into a bona fide written contract expressly providing that the subscriber shall provide workers' compensation benefits to the sub-contractor or the employees of the sub-contractor while performing such work or services as if they were direct employees of the subscriber. The amount of the actual premiums paid or incurred by the subscriber for workers' compensation insurance coverage on such sub-contractor or the employees of the sub-contractor may be deducted from the contract price or any other monies due the sub-contractor.

"(c) If no contract is made pursuant to subsection (b) hereof, neither the sub-contractor nor the employees of the sub-contractor shall be deemed employees of the principal, original or prime contractor for whom such sub-contractor is to perform work or services."

In 1983, HB 1852 as introduced, like the bills the prior session, would have deleted existing section 6 and provided that a prime contractor's workers' compensation insurance coverage would not extend to a subcontractor or his employees except by agreement.[61] But the bill was amended in the House and Senate to restore existing section 6, redesignated 6(d), delete the sentence precluding a prime contractor from being deemed the statutory employer of a subcontractor and his employees, and provide that a prime contractor could agree to extend coverage to a subcontractor and his employees, passing the cost through to the subcontractor. As thus amended, the bill was enacted. The new section 6 had four paragraphs. Section 6(d) retained the 1917 text of section 6, providing that any subscriber who tried to avoid covering a subcontractor's employees would be deemed to be their employer for compensation purposes.[62] Section 6(a) expressly recognized that a prime

[61] Tex. H.B. 1852, 68th Leg., R.S. (1983) ("(a) a subcontractor and the employees of a subcontractor shall not be deemed to be employees of a prime contractor for whom such subcontractor is to perform work or services and there shall be no obligation on the part of a prime contractor for the payment to a subcontractor or to the employees of a subcontractor of workers' compensation under this law. A subcontractor and prime contractor may include in their written contract for the performance of work or services an agreement that the prime contractor will provide workers' compensation benefits to the subcontractor and to employees of the subcontractor. The amount of the actual premiums paid or incurred by the prime contractor for workers' compensation insurance coverage for the subcontractor and employees of the subcontractor may be deducted from the contract price or any other monies owed to the subcontractor by the prime contractor. (b) the term "subcontractor" means a person who has contracted to perform all or any part of the work or services which a prime contractor has contracted with another party to perform. (c) the term "prime contractor" includes "principal contractor" or "original contractor" and means the person who has undertaken to procure the performance of work or services and in connection therewith may engage subcontractors to perform all or any part of the work or services.").

[62] TEX. REV. CIV. STAT. ANN. art. 8307, § 6(d) ("If any subscriber to this law with the purpose and intention of avoiding any liability imposed by its terms sublets the whole or any part of the work to be performed or done by said subscriber to any sub-contractor, then in the event any employe of such sub-contractor sustains an injury in the course of his employment he shall be deemed to be and taken for all purposes of this law to be the employe of the subscriber, and in addition thereto such employe shall have an independent right of action against such sub-contractor, which shall in no way be affected by any compensation to be received by him under the provisions of this law.").

contractor could agree to extend coverage to a subcontractor and his employees.[63] Section 6(c) defined "prime contractor" for the first time as follows:

> The term "prime contractor" includes "principal contractor," "original contractor," or "general contractor" as those terms are commonly used and means the person who has undertaken to procure the performance of work or services. The prime contractor may engage subcontractors to perform all or any part of the work or services.[64]

And section 6(b) defined "subcontractor" to mean "a person who has contracted to perform all or any part of the work or services which a prime contractor has contracted with another party to perform."[65]

By referring to a prime contractor as someone who works for another, the definition of "subcontractor" would exclude an owner. But if the meaning of "prime contractor" defined in section 6(c) is to be informed by the definition of "subcontractor" in section 6(b), it must also be informed by section 6(d), which refers to the person who engages a subcontractor as a subscriber, a term that includes an owner acting as his own general contractor. Section 6(d) applies to all subscribers. If sections 6(a)-(c) were read to address only the situation in which the subscriber and prime contractor is not the owner, no ambiguity in the meaning of "prime contractor" would exist.

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[63] *Id.* § 6(a) ("A subcontractor and prime contractor may make a written contract whereby the prime contractor will provide workers' compensation benefits to the sub-contractor and to employees of the sub-contractor. Notwithstanding the provisions of Section 12(g), Article 8306, Revised Statutes, the contract may provide that the actual premiums (based on payroll) paid or incurred by the prime contractor for workers' compensation insurance coverage for the sub-contractor and employees of the sub-contractor may be deducted from the contract price or any other monies owed to the sub-contractor by the prime contractor. In any such contract, the sub-contractor and his employees shall be considered employees of the prime contractor only for purposes of the workers' compensation laws of this state (Article 8306, Revised Statutes, et seq.) and for no other purpose.").

[64] *Id.* § 6(c).

[65] *Id.* § 6(b).

Section 6(d) would have general application, while the other sections would not. The effect of HB 1852 was to provide greater certainty in one area, even if a comprehensive solution remained beyond reach. But if sections 6(a)-(c) were also of general application and prescribed the requirements for considering any prime contractor to be the statutory employer of subcontractors and their employees, then the ambiguity in the meaning of "prime contractor" would be unavoidable. Moreover, that construction of the statute would raise the question why a prime contractor who owns the jobsite should, like all other prime contractors, be prohibited from trying to avoid liability for workers' compensation benefits, but unlike all other prime contractors, not be allowed to provide such benefits.

In any event, the law regarding statutory employers was not clear before 1983, as evidenced by the variety of efforts to clarify it, and it was not much clearer after 1983.[66] HB 1852, as introduced, amended, and finally enacted, like the six bills in the prior three sessions, never suggested that statutory authorization previously lacking was required for prime contractors to extend workers' compensation coverage to subcontractors and their employees. On the contrary, the one consistent theme in all the bills was the need to clarify *when* coverage was extended, not *whether* it could be. HB 1852, like the others, never attempted to distinguish premises owners from prime contractors, and the definition of "prime contractor" finally enacted could reasonably be read to include a premises owner acting as his own general contractor.

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[66] We have been cited only two cases that have considered whether a jobsite owner can be the statutory employer of subcontractors and their employees. One answered no, but only in dicta, *Williams v. Brown & Root, Inc.*, 947 S.W.2d 673, 677 (Tex. App.–Texarkana 1997, no writ), and the Court's opinion explains why it is not persuasive. The other also answered no, but involved a prior version of the statute at issue. *Wilkerson v. Monsanto Co.*, 782 F. Supp. 1187 (E.D. Tex. 1991).

I do not mean to suggest for a moment that the drafting history of the 1983 statute is relevant in determining the Legislature's intent by enacting it. The various bills and amendments do not reveal even the sponsors intentions, let alone the Legislature's. But the history of the legislation does effectively rebut the argument that the law regarding the extension of workers' compensation coverage to subcontractors and their employees was clear in 1983, and that allowing a person to be the statutory employer of subcontractors working on his property was so significant a change in 1989 that it would not have occurred without comment. The history of the legislation clearly shows that existing law was at all times unclear.

Thus, the argument that the 1989 change in the definition of "subcontractor" was not substantive because it was made without comment could be correct, but it is not clear what the law was before the change. The 1983 definition referred to "work or services which a prime contractor has contracted with another party to perform". The 1989 definition referred to "work or services which a prime contractor has undertaken to perform". The dissent argues that the Legislature used "undertaken" to mean the same thing as "contracted with another party", but it is just as likely that the Legislature used "undertaken" because it was more accurate and removed an ambiguity in the 1983 statute. The point is that the argument that the 1989 change was not substantive because it was not controversial proves nothing because the backdrop against which it appeared was itself unclear.

Finally, a number of bills introduced between 1995 and 2005 would have clarified who is a statutory employer on construction jobsites.[67] The Court explains why failed bills are not indicative

[67] Tex. H.B. 2279, 74th Leg., R.S. (1995); Tex. H.B. 2630, 75th Leg., R.S. (1997); Tex. H.B. 3024, 75th Leg., R.S. (1997); Tex. S.B. 1404, 76th Leg., R.S. (1999); Tex. H.B. 3120, 77th Leg., R.S. (2001); Tex. H.B. 3459, 77th Leg., R.S. (2001); Tex. H.B. 2982, 78th Leg., R.S. (2003); Tex. S.B. 675, 78th Leg., R.S. (2003); Tex. H.B. 1626, 79th Leg.,

of legislative intent. I would also point out that the fact that six bills failed in three sessions before 1983 did not indicate a legislative intent that HB 1852 not be the law.

* * *

Respondent and the amici curiae that support his position argue that the statutory construction urged by petitioner is bad policy. We have no way to judge such matters and do not do so. Underlying many of their arguments is a conviction that the workers' compensation system is basically unfair. That issue also is not ours to judge. We must presume that the system is just and reasonable.[68] The Court's construction of the statutory provisions at issue is most consistent with that system.

Nathan L. Hecht
Justice

Opinion delivered: April 3, 2009

R.S. (2005).

[68] *See* TEX. GOV'T CODE § 311.021 ("In enacting a statute, it is presumed that . . . (3) a just and reasonable result is intended . . . .").

IN THE SUPREME COURT OF TEXAS

NO. 05-0272

ENTERGY GULF STATES, INC., PETITIONER,

v.

JOHN SUMMERS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued October 16, 2008

JUSTICE WILLETT, concurring.

In times of political rancor, vengeful motives are swiftly attributed (and swiftly believed). This is unfortunate, but also unaffecting. The judiciary, rightly understood, is not a political institution but a legal one, meaning we must decide cases on the basis of principled legal points, not political talking points.

This appeal constitutes something of a legal Rorschach test: People see in it what they wish, and one person's commendable restraint is another's condemnable activism. Here, one side (Entergy) contends that judicial restraint requires a plain-language reading of the statute, that the surest manifestation of legislative will is found in legislative text. The other side (Summers) brands such a reading judicial activism, that gleaning intent demands a more holistic and embellished approach.

My view is uncomplicated: The law begins with language, and it smacks of Lewis Carroll when critics, voices raised high in derision, inveigh against "judicial activism" because judges refrain from rewriting the text lawmakers chose. This side of the looking glass, reading a statute as enacted is the nadir of activism, not its zenith. It must be stressed that even one of Summers' amicus supporters concedes the statute can be read in Entergy's favor[1] — a result that, sound and fury aside, "will probably not have a substantial impact on the workers' compensation system as a whole."[2]

I agree with the Court's bottom-line result (and a good deal, though not all, of its analysis), but I write separately because this case raises important issues regarding statutory construction, and the judicial role more generally, that deserve fuller, more head-on treatment.

I. Introduction — Whether Entergy Can Qualify As a "General Contractor"

Today's issue is simply stated but sharply disputed: Can a premises owner qualify as a "general contractor" under the Texas Workers' Compensation Act? Amid the spirited debate, two preliminary matters are unchallenged: (1) premises owners who provide workers' compensation insurance coverage to their own employees are statutorily immune from tort suits over work-related injuries; and (2) general contractors who cover their subcontractors' employees are also immune.

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[1] Written Testimony of the Texas Association of Defense Counsel: Hearing on Interim Charge Number Eight Before the Senate State Affairs Comm., 80th Leg., Interim (April 28, 2008).

[2] According to legislative testimony from this pro-Summers amicus:

> Whatever decision the court ultimately makes in the *Entergy* case will probably not have a substantial impact on the workers' compensation system as a whole. . . . [O]nly relatively large owners or contractors can afford to administer the kinds of insurance programs involved in the case, so we do not expect a sudden shift in this direction.

Id.

Today's case presents a hybrid — whether a premises owner can serve as its own general contractor and assert the same exclusive-remedy defense as a contract employer that it asserts as a direct employer.

Consider: Two employees working side by side at a company-owned workplace, performing the same work when the same accident inflicts the same injuries. One worker is the company's direct employee, the other its contract employee, both having voluntarily elected coverage under the same written, owner-provided workers' compensation policy. If the owner meets the Legislature's elastic definition of "general contractor" — written solely in terms of what contractors *do*, not what they *own* — then its contract employees are bound by the same agreed-to policy that binds its direct employees. Ownership nowhere proscribes what the Act prescribes.

Two things should drive our analysis — the Legislature's language, which is open-ended, and this Court's role, which is not. We must respect policy-laden statutes as written and give wide leeway to the innumerable trade-offs reflected therein. The Act's definition of "general contractor" is sweeping ("a person who undertakes to procure the performance of work") and carves out only one narrow exclusion ("a motor carrier that provides a transportation service through the use of an owner operator"). The wording is inclusive in general but exclusive in particular. The pre-1989 Act used a similarly broad definition (with no exclusion) but a companion definition suggested a premises owner could not serve as its own general contractor. Significantly, the Legislature deleted that explicit dual-hat reference in 1989 as part of a substantive overhaul. Today's Act does not deny the exclusive-remedy defense if the person who procures the work and provides the coverage — the two factors that define "statutory employer" — also owns the jobsite.

I agree with the Court. By "undertak[ing] to procure the performance of work," Entergy meets the Legislature's brief-but-broad definition. This, coupled with Entergy's provision of workers' comp coverage, confers statutory-employer status.

II. The Legislature's Chosen Words Dictate the Outcome

The Act's controlling provisions are straightforward:

- "General contractor": Any "person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors. The term includes a 'principal contractor,' 'original contractor,' 'prime contractor,' or other analogous term."[3]

- "Subcontractor": Any "person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform."[4]

- Statutory employer: A general contractor "may enter into a written agreement [with a subcontractor] under which the general contractor provides workers' compensation" coverage to the subcontractor and the subcontractor's employees,[5] and such an agreement "makes the general contractor the employer of the subcontractor and the subcontractor's employees . . . for purposes of the workers' compensation laws."[6]

- Exclusive remedy: Workers' compensation benefits are a covered employee's "exclusive remedy" against an employer for work-related injuries.[7]

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[3] TEX. LAB. CODE § 406.121(1).

[4] *Id.* § 406.121(5).

[5] *Id.* § 406.123(a).

[6] *Id.* § 406.123(e).

[7] *Id.* § 408.001(a).

A. Legislative intent is revealed by legislative language

There is one building-block principle this Court has declared repeatedly and emphatically: the "surest guide" to what lawmakers intended is what lawmakers enacted.[8] We are interpreting words, and where those words are not doubtful, even though their wisdom may be, we are bound to honor them. Accordingly, since intent is driven by text, we must not accept the peculiar view that construing the Act's definition of "general contractor" by its terms would subvert legislative intent.[9] Indeed, it is displacing the concreteness of what was actually said with the conjecture of what was allegedly meant that invites activism, a mischievous way for courts to put a finger on the scale (or in the wind) and thus substitute judicial intent for legislative intent. Our place in the constitutional architecture requires fidelity to what lawmakers actually passed.

Consequently, we must focus on what a statute says and, just as attentively, on what it does not say, taking care to honor substantive changes, both additions and deletions, made over the years, and always presuming that the Legislature chose its language carefully.[10] As for what the Act *includes*, its definition of "general contractor" is notable for two things: (1) a solitary description ("undertakes to procure the performance of work"), including a non-exhaustive list of synonyms ("'principal contractor,' 'original contractor,' 'prime contractor,' or other analogous term"); and (2)

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[8] *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008) (quoting *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex. 1999)).

[9] Many observers, including lawyers, often conflate legislative intent with legislative history. They are distinct. Under our cases, determining intent is the objective, and where text is clear, text is determinative. Legislative history is a device some judges use to discern intent when text is unclear.

[10] *See Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981); *Eddins-Walcher Butane Co. v. Calvert*, 298 S.W.2d 93, 96 (Tex. 1957).

a solitary exclusion ("a motor carrier that provides a transportation service through the use of an owner operator"). Any entity that falls inside the former and outside the latter is shielded from tort liability if it provides workers' compensation coverage to its contractors' employees. As for what the Act *excludes*, we must give effect to the Legislature's deletion in 1989 of a provision ("contracted with another party") that contemplated a general contractor contracting upstream with a premises owner.

B. The court of appeals disregarded the Act's key provisions

1. *it ignored the specific definition of "general contractor"*

The court of appeals held "Entergy did not establish it had undertaken to perform work or services and then subcontracted part of that work to IMC, as a general contractor would have done."[11] To reach this conclusion, the court relied on *Williams v. Brown & Root, Inc.*, a 1997 court of appeals decision stating that "[a] general contractor is any person who contracts directly with the owner."[12] The *Williams* court reasoned an entity that "did not contract with the owner, but instead was the owner" arguably fell outside the definition.[13] The *Williams* court, as the Court today notes,[14] committed a fundamental error, disregarding the Labor Code's specific definition of "general

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[11] __ S.W.3d __.

[12] *Id.* (quoting *Williams v. Brown & Root, Inc.*, 947 S.W.2d 673, 677 (Tex. App.—Texarkana 1997, no writ)) (internal quotation marks omitted) (alteration in original).

[13] *Williams*, 947 S.W.2d at 677.

[14] __ S.W.3d __.

contractor"[15] in favor of a more generic definition.[16] The Legislature often supplies its own dictionary, and where it provides a precise definition, courts must honor that substituted meaning.[17] Importantly, this admonition holds true even if the Legislature's technical definition departs from the term's ordinary meaning.[18] So while a general contractor may *ordinarily* be thought to contract with the premises owner — even though, as the Court observes, an owner serving as its own general contractor is "by no means uncommon"[19] — that construction must give way to the Act's specific definitions.[20]

Contrary to the suggestion in *Williams* that an owner cannot double as a general contractor because it cannot contract with itself, the statute does not blanketly exclude premises owners who otherwise meet the Act's undemanding criteria.[21] Nothing in the Act dictates that a premises owner who procures the work and provides the coverage, the only two factors that confer statutory-

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[15] The *Williams* court quoted the then-applicable statutory definition of "general contractor," 947 S.W.2d at 676, which is virtually identical to the current definition.

[16] *Id.* at 677 ("A general contractor is any person who contracts directly with the owner, the phrase not being limited to one undertaking to complete every part of the work.") (quoting 17 C.J.S. *Contracts* § 11 (1963)) (internal quotations omitted).

[17] TEX. GOV'T CODE § 311.011(b).

[18] *See Tijerina v. City of Tyler*, 846 S.W.2d 825, 827 (Tex. 1992).

[19] __ S.W.3d __.

[20] The 1983-1989 definition of "prime contractor" made clear it was using the term, and similar terms, "as those terms are commonly used." *See* Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6(c), 1983 Tex. Gen. Laws 5210, 5210 *amended by* Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05(a)(2), 1989 Tex. Gen. Laws 1, 15. This "commonly used" admonition was deleted during the 1989 rewrite, and the current Act uses "or other analogous term." TEX. LAB. CODE § 406.121(1).

[21] *See* TEX. LAB. CODE § 406.121(1).

employer status, lack the same comp-bar immunity granted someone who performs the very same actions but lacks title to the worksite.[22]

The legal test for determining whether Entergy can invoke the exclusive-remedy defense is not whether the statute explicitly includes "owners." The test is a simple one: Does Entergy meet Chapter 406's eligibility criteria? The record shows clearly that Entergy "[undertook] to procure the performance of work" from IMC.[23] Deposition testimony established that Entergy hired IMC to "supplement the Entergy employee workforce" and help perform maintenance, including "water and turbine-related, generator-related work," at its Sabine plant. Summers' own summary-judgment response concedes that Entergy "entered into a contract with [IMC] for IMC to perform various maintenance work at Entergy's plant in Bridge City, Texas." Entergy undeniably "under[took] to procure the performance of work," thus meeting the Act's broad definition, and because it also

[22] The Court is not alone in holding that a premises owner can act as its own general contractor for purposes of a workers' compensation statute. The Supreme Court of Tennessee in *Brown v. Canterbury Corp.*, 844 S.W.2d 134 (Tenn. 1992), considered whether an owner may nonetheless qualify as a principal contractor under the Tennessee workers' compensation statute (which like ours does not mention "owner"). *See* TENN. CODE ANN. § 50-6-113. The court acknowledged that earlier cases "created a distinction between an owner of property and a general contractor, holding that an entity could be considered a principal contractor within the meaning of the workers' compensation act only if it performed work 'for another.'" *Brown*, 844 S.W.2d at 137. The court rejected these older cases, noting that "more recent decisions" allowed an owner to act as its own principal contractor. *Id*. Tennessee revisited the issue more recently in *Rucker v. Rockwood Electric Utilities*. No. 03S01-9511-CH-00127, 1996 WL 626292, at *3 (Tenn. Oct. 30, 1996) (not designated for publication). Pursuant to Tennessee Supreme Court Rule 4(A)(3), an opinion of the Special Workers' Compensation Appeals Panel is not published unless a majority of the Tennessee Supreme Court votes for it to be published. In that case, the Special Workers' Compensation Appeals Panel of the Supreme Court found that Rockwood Electric Utilities, an owner, was acting as a statutory employer. *Id.* The Panel relied on an earlier Tennessee Supreme Court opinion that specifically rejected a third-party requirement. *Id*. (citing *Stratton v. United Inter-Mountain Tel. Co.*, 695 S.W.2d 947 (Tenn. 1985)). Similarly, the Supreme Court of Florida recognizes that a premises owner is entitled to comp-bar immunity "where an owner assumes the role of contractor and employer and, consequently, the duty to provide workers' compensation benefits." *Ramos v. Univision Holdings, Inc.*, 655 So.2d 89, 90 (Fla. 1995).

[23] "Procure" means "to obtain by care or effort, to acquire." OXFORD AMERICAN DICTIONARY 533 (1980).

provided the workers' compensation policy under which Summers recovered, Entergy is his statutory employer.

2. *it utilized a long-discarded definition of "subcontractor"*

The court of appeals in this case (and the *Williams* court) also erred in relying on *Wilkerson v. Monsanto Co.*, a federal district court decision holding that a premises owner cannot be a statutory employer (because it cannot be a general contractor).[24] Here, too, the mistake concerns a misused statutory definition. *Wilkerson*, unlike today's case, was governed by the pre-1989 definition of "subcontractor": "a person who has contracted to perform all or any part of the work or services which a prime contractor has *contracted with another party* to perform."[25] The *Wilkerson* court interpreted "contracted with another party" to mean the prime contractor and premises owner must be distinct entities.[26] The court said this phrase, the law from 1983 until 1989,[27] meant a general contractor was necessarily an intermediary that contracts both upstream with the premises owner and downstream with the subcontractor. As the owner's contracts in *Wilkerson* were all downstream, he could not be a statutory employer.[28]

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[24] 782 F. Supp. 1187, 1188 (E.D. Tex. 1991).

[25] *Id*. at 1189 (emphasis added) (relying on Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6(b), 1983 Tex. Gen. Laws 5210, 5210 (previously codified at TEX. REV. CIV. STAT. art. 8308-3.05)).

[26] *Id*. at 1188–89.

[27] Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6(b), 1983 Tex. Gen. Laws 5210, 5210 *amended by* Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, sec. 3.05(a)(5), 1989 Tex. Gen. Laws 1, 15, *codified as* TEX. LAB. CODE § 406.121(5).

[28] Another distinction between *Wilkerson* and this case: In *Wilkerson*, the contract between the owner and the plaintiff's direct employer affirmatively disclaimed any employment relationship between the owner and the contractor's employees, 782 F. Supp. at 1188, while in this case, the contract language explicitly identifies Entergy as the "principal employer" and reserves to Entergy the right to assert statutory-employer status against contract employees' personal-

Assuming *Wilkerson* was correctly decided, it lacks any interpretive force today, for a simple reason: *Wilkerson* turned entirely on four words the Legislature removed during its 1989 substantive rewrite.[29] Here are the pre- and post-overhaul definitions that, construed together, control our decision:

	prime/general contractor	subcontractor
pre-1989	"the person who has undertaken to procure the performance of work or services" and "'prime contractor' includes 'principal contractor,' 'original contractor,' or 'general contractor' as those terms are commonly used"[30]	"a person who has contracted to perform all or any part of the work or services which a prime contractor has contracted with another party to perform"[31]
current	"a person who undertakes to procure the performance of work or a service . . . . The term includes a 'principal contractor,' 'original contractor,' 'prime contractor,' or other analogous term. The term does not include a motor carrier that provides a transportation service through the use of an owner operator"[32]	"a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform"[33]
key change	current definition excludes a single class of otherwise eligible persons: certain motor carriers, nobody else	current definition no longer imposes an "upstream contract" condition on general contractors

injury suits.

[29] *See* Act of May 28, 1983, 68th Leg. R.S., ch. 950, § 1, sec. 6(b), 1983 Tex. Gen. Laws 5210, 5210 (amended 1989).

[30] *See* Act of May 28, 1983, 68th Leg. R.S., ch. 950, § 1, sec. 6(c), 1983 Tex. Gen. Laws 5210, 5210, *amended by* Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, sec. 3.05(a)(2), 1989 Tex. Gen. Laws 1, 15.

[31] *See* Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6(b), 1983 Tex. Gen. Laws 5210, 5210 (amended 1989).

[32] TEX. LAB. CODE § 406.121(1).

[33] *Id*. § 406.121(5). Today's definition of "subcontractor" was tweaked slightly (and nonsubstantively) as part of the 1993 codification of the Labor Code. Act of May 12, 1993, 73rd Leg., R.S., ch. 269, § 1, sec. 406.121(5), 1993 Tex. Gen. Laws 987, 1158. It is derived almost verbatim from the 1989 overhaul's definition. Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05(a)(5), 1989 Tex. Gen. Laws 1, 15.

As seen above, the 1989 reform bill deleted "contracted with another party," the critical upstream-contract phrase that anchored *Wilkerson* and suggested a premises owner could not wear the hat of general contractor. The before-and-after comparison is difficult to brush aside. While the 1983-1989 Act indicated that a contractor undertook action on behalf of someone else (the owner), the Legislature in 1989 removed that upstream inference. Our cases require us to treat such omissions as meaningful and not meaningless,[34] a principle even more prudent when deletions occur, as here, within a substantive overhaul that constitutes the lone piece of legislation that lawmakers are considering.[35] *Wilkerson* remains instructive only to underscore that statutory construction must honor statutory definitions.

Summers urges a construction rooted in now-repealed language. While conceding that "contracted with another party" appears nowhere in the current statute, Summers insists the upstream-contract notion was not deleted but transplanted, subsumed now by the phrase "undertakes to procure" in the definition of "general contractor." This contention — that the upstream-contract condition was moved but not removed — is facially counterfactual, betrayed by this inconvenient truth: "undertake[ ] to procure" also appeared in the pre-1989 definition. Even though this phrase predated the 1989 overhaul, Summers argues it became implicitly freighted with what was once explicitly stated (in a different definition). This argument is unpersuasive. Updated criteria require

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[34] *See In re Ament*, 890 S.W.2d 39, 41 (Tex. 1994) (per curiam); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981). In a sense, Entergy hired IMC to help Entergy fulfill an upstream obligation, a statutory one at that: to "furnish service, instrumentalities, and facilities that are safe, adequate, efficient, and reasonable." *See* TEX. UTIL. CODE § 38.001.

[35] We presume that lawmakers enact statutes "with complete knowledge of the existing law and with reference to it," *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990), and that any omissions are intentional, *Cameron*, 618 S.W.2d at 540.

updated analysis. It is untenable that the four words so important in *Wilkerson* were, though deleted, imported into three words that predated *Wilkerson*. Summers' argument would reinsert what lawmakers took out and declare this part of a massive modernization bill — the part that anchors the precedent upon which Summers relies most — wholly nonsubstantive and merely aesthetic.[36]

We cannot treat the upstream-contract language in the 1983-1989 Act as mere surplusage and its 1989 deletion a nullity. Nor does the dissent pivot on Summers' argument that "undertakes to procure" necessarily implies an upstream obligation and must be read as "undertakes to procure *for someone else*." The deletion of something explicit means more than the retention of something implicit. Indeed, several Texas statutes use "undertake" to describe a person acting to benefit himself.[37] More to the point, when lawmakers have in mind an entity doing something on another's behalf, they have no difficulty saying so explicitly, often using "undertakes" in tandem with clear third-party language like "for another person."[38] In such instances, including elsewhere in the Labor

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[36] One amicus, citing the Sherlock Holmes story of the dog that did not bark, Sir Arthur Conan Doyle, *Silver Blaze*, THE MEMOIRS OF SHERLOCK HOLMES (1894), argues it is more likely the Legislature intended to change a statute by *adding* words than by *deleting* them: "That is because the deletion of words is more likely to have been done by mistake and deletions are more difficult for legislators to recognize during the legislative process than added words." Unlike Holmes, we are not studying the import of conspicuous silence, but the import of conspicuous deletion. The Legislature in 1989 affirmatively removed words indicating an upstream contract. It may well be true, as the amicus asserts, that "omitted language is less likely to come to the consciousness of legislators in the often chaotic process of legislating," but chaotic or not, Texas law requires us to accept that lawmakers acted intentionally, not inadvertently. However clamorous the Capitol was in 1989, our cases forbid any presumption that the Legislature was inattentive.

[37] *See, e.g.*, TEX. AGRIC. CODE § 12.040(d)(3)(C) ("a long-term plan outlining the steps the community will undertake to maintain its desirability . . . ."); TEX. INS. CODE § 751.002(b) (". . . the department or commissioner . . . may undertake market analysis or market conduct action . . . ."); TEX. LOC. GOV'T CODE § 232.093(e) ("Before a planning commission member undertakes the duties of the office . . . ."); TEX. TRANSP. CODE § 454.001(b)(1) ("A municipality . . . may undertake research, development, and demonstration projects . . . ."); TEX. UTIL. CODE § 52.256(b)(3) (". . . the telecommunications utility will undertake to achieve each of these initiatives . . . .").

[38] *See, e.g.*, TEX. OCC. CODE § 1702.108 ("A person acts as a guard company . . . if the person . . . undertakes to provide . . . for another person . . . ."); TEX. LOCAL GOV'T CODE § 176.001(1) ("'Agent' means a third party who undertakes . . . for another person . . . ."); TEX. GOV'T CODE § 27.006(a)(1) ("A justice commits an offense if the justice:

Code, the Legislature has done more than imply a third-party obligation; it has stated one outright, something lawmakers in 1989 did not do, instead choosing to scrap preexisting third-party language.[39]

The Act as written bars Summers' claim, and it merits mention that even certain counsel supporting Summers concede the statutory text can be read in Entergy's favor: "Based on statutory language alone, reasonable persons may differ on whether a premises owner may also act as a general contractor in the procurement of work and provision of workers' compensation coverage, thus receiving the exclusive remedy protection from third party actions."[40] Thus, we are directed to arguments that look beyond the statute itself.

III. Settled Precedent Bars Summers' Extratextual Arguments

Summers and his aligned amici contend that several factors outside the Act's actual language support a more flexible statutory reading. The Court correctly rejects these arguments, and notably the dissent implicitly does likewise.

. . . undertakes . . . for another . . . ."); TEX. LAB. CODE § 21.002(9)(A) ("'Employment Agency' means a person . . . who regularly undertakes . . . to procure: (A) employees for an employer . . . .").

[39] Summers and some of his aligned amici advance a safety-related argument, predicting the "complete destruction of the incentive to make the workplaces safe" if Summers loses. But whether one scheme promotes workplace safety over the other is a legislative call, not ours. In any case, the record shows that Entergy employees work alongside IMC employees, and the Act gives those protected by the exclusive-remedy defense concrete incentives to minimize job-related risks. *See* TEX. INS. CODE. §§ 2053.001-.054; *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 795 (Tex. 2001) (Hecht, J., concurring) (a contractor's employer "has the same economic incentive the contractor has to minimize job-related risks to workers"). Premiums are tied to accident records, and rates are higher for unsafe employers. Also, regulations from the Occupational Safety and Health Administration cover Entergy's direct workers just as fully as they cover Entergy's contract workers. *See* 29 U.S.C. § 654. Finally, nothing in the record suggests the exclusive-remedy defense has spurred employers to care less about preventing jobsite accidents than those who face common-law liability.

[40] Written Testimony of the Texas Association of Defense Counsel: Hearing on Interim Charge Number Eight Before the Senate State Affairs Comm., 80th Leg., Interim (April 28, 2008).

A. Failed bills predating and postdating the Act's 1989 overhaul carry no interpretive force

Summers and various amici exhort us to construe language that passed in light of language that failed to pass. As the Court makes clear, we cannot. Precedent from both the United States Supreme Court and from this Court counsel against supplanting unequivocal enacted text with equivocal unenacted inferences drawn from failed legislation.

First, counsel supporting Summers direct us to the 1989 overhaul effort itself. It is undisputed that the 71st Legislature was consumed with the task of restructuring the State's then-76-year-old workers' compensation system.[41] The regular 140-day session failed to produce a reform bill, and Governor Clements immediately called a special session. Summers places great weight on the fact that during this first of two special sessions, House members once considered an omnibus bill that used "owner or general contractor" in section 406.123's predecessor. House-Senate negotiations collapsed, reportedly over two unrelated issues,[42] and lawmakers adjourned and went home for several months. Later that year, Governor Clements called a second special session, and in its final hours the Legislature passed Senate Bill 1, which did not expressly include the word "owner," a fact Summers views as dispositive.

This argument is unavailing, as the United States Supreme Court recently explained: "It is always perilous to derive the meaning of an adopted provision from another provision deleted in the

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[41] *See* Jill Williford, Comment, *Reformers' Regress: The 1991 Texas Workers' Compensation Act*, 22 ST. MARY'S L.J. 1111, 1124–25 (1991).

[42] *See* JOHN T. MONTFORD ET AL., A GUIDE TO TEXAS WORKERS' COMP REFORM 3 (1991) (reporting that conferees agreed on fourteen of sixteen chapters in the bill, "but there were colossal differences in the dispute resolution and benefits proposals").

drafting process."[43] The word's momentary presence during Special Session No. 1 and absence several months later during Special Session No. 2 suggests nothing that can override the express terms of the enacted statute.[44] Under Summers' position, we must assign great meaning to never-enacted language ("owner") that appeared in a prior session's bill draft but no meaning to once-enacted language ("contracted with another party") that the Legislature affirmatively removed from an on-the-books statute. We cannot bestow all significance on proposed alterations in failed bills while ignoring enacted alterations to the statute itself. Settled law requires the opposite approach, respecting changes to actual statutes and discounting changes to would-be statutes.

Second, counsel supporting Summers ask us to examine post-1989 legislative efforts and conclude that intent to bar premises owners from invoking statutory-employer immunity is implicit in the Legislature's consideration, but not adoption, of various bills since 1989 related to premises-owner liability.[45] Summers sees the failure of these measures as tantamount to a legislative command to exclude premises owners from asserting the exclusive-remedy defense.

We cannot draw such an inference for two reasons. First, the Act itself controls, and its definitions include no such exclusion. Far more probative than proposed legislation is passed legislation, what the people's elected representatives actually enacted as a collective body. The Legislature's "broad definition, narrow exception" approach to "general contractor" and deletion of

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[43] *District of Columbia v. Heller*, 128 S.Ct. 2783, 2796 (2008).

[44] Nothing in the amendment itself defined "owner," and despite what one amicus describes as "hundreds of hours of hearings that led to the 1989 overhaul," not a single word was devoted to this single word. The legislative record lacks any signal as to what even one lawmaker thought about expressly including owners, whether it was thought ill-advised or redundant or even thought about at all.

[45] *See* __ S.W.3d __.

the upstream-contract language constitute dual reasons for not barring dual roles for those meeting the Act's liberal definitional criteria.

Second, we eschew guesswork, and a bill's failure to pass sheds no light because, as even casual Capitol observers know, bills fall short for countless reasons, many of them "wholly unrelated" to the bill's substantive merits or "to the Legislature's view of what the original statute does or does not mean."[46] Bills rise and fall for reasons both incalculable and inscrutable, and

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[46] *Tex. Employment Comm'n v. Holberg*, 440 S.W.2d 38, 42 (Tex. 1969) ("we attach no controlling significance to the Legislature's failure to enact the proposed amendment"); *see also El Chico Corp. v. Poole*, 732 S.W.2d 306, 314 (Tex. 1987); *Dutcher v. Owens*, 647 S.W.2d 948, 950 (Tex. 1983) (warning against gleaning legislative intent from failed bills: "Any such inference would involve little more than conjecture.").

Nor, as the Court stresses, __ S.W.3d __, can post-hoc statements by legislators shed light on what a statute means. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (disregarding such statements about an earlier-passed statute: "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). The Legislature is composed of 181 diverse members representing diverse areas with diverse priorities; one lawmaker's perspective may be radically different than that of his or her 180 colleagues. *See AIC Mgmt. v. Crews*, 246 S.W.3d 640, 650 (Tex. 2007) (Willett, J., concurring) ("The statute itself is what constitutes the law; it alone represents the Legislature's singular will, and it is perilous to equate an isolated remark or opinion with an authoritative, watertight index of the collective wishes of 181 individual legislators, who may have 181 different motives and reasons for voting the way they do."); *Gen. Chem. Corp. v. De la Lastra*, 852 S.W.2d 916, 923 (Tex. 1993) ("[T]he intent of an individual legislator, even a statute's principal author, is not legislative history controlling the construction to be given a statute."). This explains our consistent view — reinforced by the U.S. Supreme Court, *see, e.g.*, *Heller*, 128 S.Ct. at 2805 — that post-passage actions and comments are immaterial:

> [C]ourts construing statutory language should give little weight to post-enactment statements by legislators. Explanations produced, after the fact, by individual legislators are not statutory history, and can provide little guidance as to what the legislature collectively intended.

In re Doe, 19 S.W.3d 346, 352 (Tex. 2000) (quoting *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 328-29 (Tex. 1994) (Hecht, J., concurring and dissenting) (citations omitted)). The very notion of "subsequent legislative history" is oxymoronic. After-the-fact comments may constitute history, and they may concern legislation, but they are not part of the legislative history of the original enactment. *See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1082 (5th Cir. 1980). Judge Posner offers a grave caution: Judges who credit "subsequent expressions of intent not embodied in any statute may break rather than enforce the legislative contract." RICHARD A. POSNER, THE FEDERAL COURTS 270 (1985). Judges also risk getting snookered. *See, e.g.*, *Am. Hosp. Ass'n v. NLRB*, 899 F.2d 651, 657 (7th Cir. 1990) ("Post-enactment legislative history . . . is sometimes a sneaky device for trying to influence the interpretation of a statute, in derogation of the deal struck in the statute itself among the various interests represented in the legislature. Courts must be careful not to fall for such tricks and thereby upset a legislative compromise.") (citations omitted). Finally, even proponents of legislative history, even those proponents willing to consider legislators' post-enactment comments, disregard statements from legislators who did not hold office when the disputed statute was enacted.

courts' reluctance to draw inferences from subsequent legislative inaction is deeply rooted, as explained by the United States Supreme Court a half-century ago: "Such non-action by Congress affords the most dubious foundation for drawing positive inferences. . . . Whether Congress thought the proposal unwise . . . or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of the Congress to act."[47] We, too, reject searching for confirmation or contradiction in later sessions' unsuccessful bill drafts.[48] As non-adoption infers nothing authoritative about an earlier statute's meaning, we do not consult failed bills to divine what a previous Legislature intended.

Even if our precedent allowed us to conflate inaction with intention, the bills, as the Court notes, were not only unsuccessful but immaterial. The bill that comes closest, Senate Bill 1404 from the 76th Legislature in 1999, would have amended "general contractor" to include "an owner or lessor of real property."[49] Any relevance ends there. Senate Bill 1404 would have let general contractors (whether owners or not) invoke the exclusive-remedy defense either by providing coverage directly or "by entering into a written agreement with another person under which the other person provides the coverage."[50] Today's question differs significantly: whether a premises owner who meets every current statutory-employer criteria is nonetheless excluded. So while some bills

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[47] *United States v. Price*, 361 U.S. 304, 310-11 (1960). *See also Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999) ("deductions from congressional inaction are notoriously unreliable").

[48] *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000) ("If possible, we must ascertain the Legislature's intent from the language it used in the statute and not look to extraneous matters for an intent the statute does not state.").

[49] *See* Tex. S.B. 1404, 76th Leg., R.S. (1999).

[50] *Id*.

over time would have extended comp-bar immunity to owners (1) who merely require coverage (Senate Bill 1404),[51] (2) who directly provide coverage but do not also act as their own general contractors (House Bills 2279 and 3024),[52] (3) who are a parent or subsidiary corporation of an entity that provides coverage (House Bill 3120, House Bill 3459, and Senate Bill 675),[53] or (4) who are engaged in construction or building with a general contractor and a subcontractor where one of them provides coverage (House Bills 2982 and 1626),[54] those expansions of immunity are committed to the Legislature's broad policymaking discretion. They are not today's case, which examines whether Entergy is disqualified under existing law despite meeting every applicable criteria.

As for Senate Bill 1404, the legislative record is completely bare as to the individual sponsor's (or anyone else's) objective. The bill was referred to committee and then left pending; no hearing, no testimony, no bill analysis, no action whatsoever. Even if the bill were on all fours, a single bill — filed the day before the filing deadline[55] and never heard from again — hardly constitutes the Legislature "repeatedly reject[ing]" the notion of a premises owner acting dually as a general contractor under the Workers' Compensation Act. In fact, even if there were a failed bill that added "owner" to the existing definition and nothing else, it would be immaterial. Lawmakers may have thought such a bill unwise, or maybe unnecessary. Who knows? Either way, it is

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[51] *Id*.

[52] *See* Tex. H.B. 2279, 74th Leg., R.S. (1995); Tex. H.B. 3024, 75th Leg., R.S. (1997).

[53] *See* Tex. H.B. 3120, 77th Leg., R.S. (2001); Tex. H.B. 3459, 77th Leg., R.S. (2001); Tex. S.B. 675, 78th Leg., R.S. (2003).

[54] *See* Tex. H.B. 2982, 78th Leg., R.S. (2003); Tex. H.B. 1626, 79th Leg., R.S. (2005).

[55] *See* Tex. S. Rule 7.07(b), Tex. S. Res. 14, 81st Leg., R.S., 2009 S.J. of Tex. 21, 23.

imprudent for courts to draw forensic truths from legislative machinations, ascribing intent and motivations based on nothing more than a judge's hunch as to what 181 autonomous lawmakers collectively had in mind. As Judge Easterbrook observes, "Intent is elusive for a natural person, fictive for a collective body."[56]

B. Neither purposive analysis nor off-the-mark representations regarding legislative history can trump the Legislature's enacted text

On a related front, amici supporting Summers exhort us to throw off our interpretive "shackles" and embrace a "thorough" and "expansive methodology" that relies on various interpretive tools that look beyond the Legislature's chosen language. Given the lack of textual ambiguity, I reject this eclectic approach.[57] The text that lawmakers passed is the truest index of legislative will, and the Legislature defines "general contractor" in terms of what a contractor *does*, not in terms of what a contractor *owns*. The definition uses the word "owner" exactly one time, to make clear that motor carriers that use owner operators to provide transportation services are excluded. There is indeed an owner-related exclusion in the Act, but it is specific, not general.

Notably, the dissent, while siding with Summers, also declines this nontextual approach. True, we periodically consult external materials when text is nebulous and susceptible to varying

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[56] Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994).

[57] As the Court reaffirms today, if the Legislature's words are not ambiguous, they are not only the best evidence of legislative intent but the exclusive evidence. __ S.W.3d __. Even if we accepted the invitation to utilize extratextual aids to divine a more embellished meaning, it would make little difference here. The record surrounding the Act's adoption and the nine failed post-1989 bills lacks any indication that lawmakers meant to disqualify owners from acting as their own general contractors under the Act.

interpretations, but even then, we proceed "cautiously,"[58] mindful that such materials conflict as often as they converge and that our goal is "to solve, but not to create, an ambiguity."[59] Even in rare cases where we mine secondary sources to help clarify ambiguity, judges, while not limited *to* the text, should always be limited *by* the text.[60]

Indeed, this case demonstrates vividly the perils of uncritical reliance on legislative history. It is distressing that those citing the legislative record in this case sometimes do so:

- inaccurately: misstating when key legislative changes to the draft Act occurred;[61]

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[58] *Alex Sheshunoff Mgmt. Servs. v. Johnson*, 209 S.W.3d 644, 652 n.4 (Tex. 2006).

[59] *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932) (quoting *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899)).

[60] Justice Frankfurter cautioned against what he called "loose judicial reading": "Loose judicial reading makes for loose legislative writing. It encourages the practice illustrated in a recent cartoon in which a senator tells his colleagues 'I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means.'" Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545 (1947).

[61] For example, one amicus curiae mistakenly asserts the Legislature deleted the upstream-contract language during the 1993 nonsubstantive codification. This misstep matters, as the amicus argues from this false premise that since "contracted with another party" — a phrase the amicus bolds and labels "enlightening" — was omitted in 1993, its absence cannot aid Entergy since "the Legislature intended *no substantive change* to the law by its 1993 codification." Thus, since lawmakers wanted to maintain the status quo, we must read back into the Act a critical phrase the Legislature deleted. One problem: the upstream-contract provision, which is indeed "enlightening," was deleted not during the 1993 nonsubstantive codification but during the 1989 substantive overhaul, when lawmakers enacted a raft of major changes. *See* Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6(b), 1983 Tex. Gen. Laws 5210, 5210 (amended 1989). Interestingly, this amicus apparently realized its error because its supplemental brief acknowledges that "contracted with another party" was deleted during the 1989 reform when "subcontractor" was rewritten, "though not extensively," the amicus now insists.

Another amicus brief contains at least two factual missteps in recounting the Legislature's 1989 deliberations. First, the brief inaccurately states, "In the draft bill considered during the regular session, immunity was extended to owners, as well as general contractors." The word "owner" never appeared during the regular session; it appeared in a House revision during the first-called special session. Tex. S.B. 1, 71st Leg., 1st C.S. (1989); *see also* H.J. of Tex., 71st Leg., 1st C.S. 76 (1989). The brief then errs again, stating "in the subsequent special session [the Legislature] removed premises owners from the list of actors granted immunity." Nobody in either chamber removed "owner" in the first-called special session; just the opposite, "owner" was momentarily *added* during this special session (and was absent from the bill adopted during the next session several months later). *Id.* Unless challenged by opposing counsel, such inaccuracies, however inadvertent, carry real potential to mislead judges and skew judicial decisionmaking.

- selectively: playing up friendly snippets that they believe reinforce a wished-for interpretation and ignoring snippets that subvert it;[62]

- misleadingly: mischaracterizing the import of legislative actions;[63]

And then, when confronted with a tidbit from the record that can be spun Entergy's way, Summers dismisses it as something uttered mistakenly.[64]

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[62] *See infra* note 64. It is unsurprising that advocates accentuate the positive and eliminate the negative. Such cherry-picking, as Judge Harold Leventhal famously observed, is "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

[63] As noted above, *supra* note 61, one brief states the Legislature "removed premises owners from the list of actors granted immunity." This suggests the Legislature took targeted action to eliminate "owner" from a pending draft. The legislative record belies this suggestion. Nobody "removed" the word "owner" during the second special session, because no bill that session ever *included* the word "owner." You cannot remove what does not exist, subtracting what is not there. The locution implies that lawmakers in 1989 took proactive steps to strip "owner" from a pending bill, but "removed" is not the same as "not included." Nothing in the record shows specific action to remove "owner" from any bill during that final special session. The word was absent altogether, though the record contains nothing to suggest why.

Another brief follows suit, stating that during the first special session, after the House passed a bill that contained "owner," the Senate "refused to concur in the House amendments." While literally true — the Senate did in fact reject House changes — it suggests senators balked specifically at "owner." Not exactly. After the Senate passed Senate Bill 1, the House struck everything below the enacting clause, substituted an earlier House-passed version (which differed markedly from the Senate version) and sent it back across the rotunda. *See* H.J. of Tex., 71st Leg., 1st C.S. 76 (1989). Nothing suggests the Senate refused to concur because of "owner." In fact, a treatise (co-authored by the lead Senate sponsor) states the Senate's refusal rested on entirely separate issues. *See* MONTFORD, *supra* note 42, at 3 (noting consensus stalled due to "colossal differences in the dispute resolution and benefits proposals"). Still another brief asserts that "efforts in prior drafts to include the term 'owner' were rejected." This wording suggests multiple targeted efforts to erase "owner" from pending drafts, but the lone mention of "owner" came in the first special session, in a bill that died over unrelated issues. The brief states a House amendment "specifically included the word 'owner'" and the Senate "refused to concur in the House amendment, and the bill failed." The inference is misleading: the House amendment was not a rifle-shot inclusion of "owner" but a wholesale substitution of its earlier bill, with all the "colossal differences" noted by Senator Montford.

[64] Just before final passage, Senator Dickson, who opposed tort immunity for general contractors, attached a floor amendment stating that a subcontractor's workers could bring a "third party action . . . against said general contractor." Senator Dickson contended that, absent his amendment, a refinery owner would be immune if an accident killed a subcontractor's employees: "Yes sir it seems to me . . . [that] no matter how negligent, no matter how much at fault that operator was, and no matter how many people he killed, he wouldn't be liable." Debate on Tex. S.B. 1 on the Floor of the Senate, 71st Leg., 2d C.S. 17 (Nov. 20, 1989) (transcript available from Senate Staff Services Office).

> Senator Edwards: So in a case like the Phillips refinery explosion, if Phillips had been negligent and your amendment wasn't law, even though dozens of people were killed, Phillips wouldn't be liable in any way for their negligence?"

Laws exist to guide behavior, and by resting on statutory language rather than embarking on a scavenger hunt for extratextual clues prone to contrivance,[65] we ensure that everyday Texans struggling to decode the law and manage their affairs consistent with it can rely on a statute "to mean what it says,"[66] without having to hire lawyers to scour the legislative record for unexpressed (and often contradictory) indicia of intent. As we recently held, if text is not hazy, we must resist morphing statutory construction into statutory excavation and instead "take the Legislature at its word and not rummage around in legislative minutiae."[67]

> Senator Dickson: He would be immune. Would not be liable according to Senator Glasgow's construction and my reading of this new statute.

Id. Senator Dickson's pro-plaintiff amendment was later removed. This colloquy did not address whether "general contractor" included owners, but it is notable that Senator Edwards's hypothetical presumed the owner and the general contractor were one and the same. If that contradicted the Senate's collective intent, no senator rose to correct it. As Senator Dickson described his own amendment, it was to ensure that an owner's injured contract worker would not be limited to comp benefits. Summers says Senator Dickson was "simply confused" and later "got sort of educated" that the bill did not contemplate owners doubling as general contractors. The floor transcript reveals no such enlightenment.

While this discussion is not dispositive (or even relevant) — Senator Dickson's view is merely his alone, not fairly attributable to his 180 colleagues — it posed the issue presented here: a premises owner acting as a general contractor. If Senator Dickson was off-target because the Legislature never intended to let owners claim general-contractor status, no senator called it to the Senate's attention. The only reason I mention it is to stress how manipulable legislative history can be (by lawyers and judges alike), and that its indeterminacy is only made worse by the selectivity with which it is utilized.

[65] It is not hard to imagine a legislator voting for a bill she actually opposes and then reading into the record a restrictive interpretation that aims to blunt the bill's real-world impact. Looking at today's case specifically, a crafty lawmaker who wanted "general contractor" construed narrowly could file a bill that explicitly *added* the word "owner" to the definition, then quietly urge that the bill stay buried in committee so a future litigant can cajole a judge into believing that the Legislature's failure to pass the bill evinces legislative rejection of an owner-included definition.

[66] *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex. 1999).

[67] *Alex Sheshunoff Mgmt. Servs. v. Johnson*, 209 S.W.3d 644, 652 n.4 (Tex. 2006).

C. The Act is not "absurd" if injured *deemed* employees receive the same relief as injured *direct* employees

Summers insists we must adopt a relaxed interpretation more consonant with fairness because reading "general contractor" to limit contract workers to the same recovery that direct workers receive would render the term "meaningless and absurd."[68] While a looser reading is warranted when a straight-up reading produces a patently nonsensical result (not merely an unpleasant one), this is not such a case.

Under Summers' reading, a separate contractor would escape tort liability, but a premises owner who performs every contracting-related chore the separate contractor would perform would not. More to the point, a general contractor that oversees work on its *own* property could not qualify as a general contractor under the Act. That was perhaps true in the 1983-1989 Act, as *Wilkerson* held, but the Legislature's top-to-bottom rewrite amended the law.

One can complain that current comp benefits are inadequate, but it is unpersuasive to equate equality — direct and contract employees receiving the same benefits when the employer owns the jobsite — with absurdity.[69] There is nothing nonsensical (or even uncommon[70]) about a premises

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[68] We enforce the Legislature's words as written unless such a reading would produce absurd results. *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

[69] Summers argues the Court's ruling would work an absurdity by opening up workers' compensation benefits to a neighborhood child who rakes your leaves. The Act expressly contradicts that argument, speaking directly to "a person employed as a domestic worker or a casual worker engaged in employment incidental to a personal residence." TEX. LAB. CODE § 406.091(a)(1). The Act exempts such employees from coverage, though it allows employer-homeowners to voluntarily accept the rights and responsibilities of providing such coverage. *Id*. § 406.091(b). It would be curious to brand legally "absurd" something the statute itself permits. Comp-covered lawnboys are possible under the Act because the Legislature, not this Court, explicitly says so.

[70] __ S.W.3d __.

owner serving as its own general contractor or a reading of the Act that results in expanded jobsite coverage by urging premises owners to secure coverage for their subcontractors' workers.[71] The comp system quid pro quo — exchanging uncertain tort recovery for no-fault medical and income benefits — has been the embedded public policy of Texas since Woodrow Wilson became President, and wider coverage — that is, *more* injured workers receiving such compensation — only advances that policy.

D. Judges have no authority to second-guess the myriad policy judgments codified in the Workers' Compensation Act

The 1989 restructuring of the Texas workers' compensation scheme — labeled "the most divisive legislative endeavor in contemporary Texas politics"[72] — consumed the 71st Legislature for one regular and "two special sessions fraught with obstinacy and emotion."[73] What emerged embodied innumerable and quintessential legislative judgments. The recovery of workers' comp benefits is dictated by the Legislature's definitions, not by this Court's declarations. We must refrain from rewriting the text lawmakers chose, here by reinserting third-party language the Legislature deleted.[74]

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[71] One side point: While recovery of workers' compensation benefits is a covered worker's (or his legal beneficiary's) exclusive remedy in the event of a work-related injury or death, TEX. LAB. CODE § 408.001(a), the very next subsection makes clear that a worker's surviving spouse or heirs may sue for exemplary damages if the death "was caused by an intentional act or omission of the employer or by the employer's gross negligence," *id*. § 408.001(b).

[72] MONTFORD, *supra* note 42, at 1.

[73] Williford, *supra* note 41, at 11-12.

[74] Our precedent reaching back a century demands judicial modesty, and for such modesty to take root, "[c]ourts must take statutes as they find them. More than that, they should be willing to take them as they find them." *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920).

Laid bare, Summers' core complaint is that benefits under the Act are too stingy. We are ill-equipped to assess this charge. The Act, whatever its alleged shortcomings, embodies century-old public policy, and courts must read the Legislature's words as enacted, not revise them as desired. "The wisdom or expediency of the law is the Legislature's prerogative, not ours"[75] — a fundamental point we recently reaffirmed: "arguments that the statute is unwise or unfair must be addressed to the Texas Legislature."[76]

It may be correct that lawmakers in 1989 did not intend to permit a dual-hat role for premises owners. Workers' comp reform was a Herculean, multiple-session undertaking, one made tougher with short deadlines for drafting and short fuses for drafters. Heaven knows laws sometimes pass quickly amid urgent circumstances with scant discussion, yielding untoward ramifications over time. Recent examples of voting-without-reading abound, including the newly passed $789,000,000,000 (and 1,073-page) American Recovery and Reinvestment Act of 2009, which provided "a rare window into the mad cookery of complex legislation" — the final draft "filled with hand-written copy-editing marks, insertions scrawled in the margins, deletions of whole paragraphs boxed with

[75] *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995) (quoting *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968)).

[76] *In re Jorden*, 249 S.W.3d 416, 424 (Tex. 2008). We sometimes weigh the Legislature's *power* to enact a statute, but, heeding Justice Holmes's admonition, we never weigh its *prudence*: "We fully understand . . . the very powerful argument that can be made against the wisdom of the legislation, but on that point we have nothing to say, as it is not our concern." *Noble State Bank v. Haskell*, 219 U.S. 575, 580 (1911).

X's slashing through them, and a variety of curious hash marks and other annotations."[77] Even Evelyn Wood would struggle mightily to read the bill, much less cast an informed vote.

Even when laws *are* meticulously drafted and thoughtfully debated, legislative handiwork must often bend to a still more powerful force: the law of unintended consequences.[78] To be sure, people are inventive at finding ways to confound lawmakers' wishes rather than conform to them. But even if we suspected lawmakers intended to retain a third-party requirement despite deleting third-party language, we could not judicially reinsert the requirement, however desirable as a policy matter.

Legislative text is often elastic, like the "general contractor" definition in this case, but the judicial role is not. When divining what lawmakers intended to do, we must focus on what they in fact did do and presume they meant what their words mean. Where language is not unclear, a judge's doctrinal toolbox is limited. I do not share the view that reliance on text is pretext, that

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[77] Posting of David M. Herszenhorn to the Caucus: The Politics and Government Blog of the Times, http://thecaucus.blogs.nytimes.com/2009/02/13/ final-draft-on-stimulus-bill-complete-with-last-minute-edits/ (Feb. 13, 2009, 9:52 EST). *See also* Mark Lander, *New Terrain For Arbiters Of a Bailout*, N.Y. TIMES, Nov. 4, 2008, at B1 (describing the no-time-for-reading dynamic surrounding passage of the October 2008 federal financial rescue package). Another classic federal example is the 1989 Budget Reconciliation Act, which consisted of a thousand-plus, unnumbered, and unindexed pages bound together with rope. *See* Rep. Christopher Cox, *Why Congress Doesn't Work, Part I*, Lecture #406 (Sept. 11, 1992) (reprinted at http://www.heritage.org/research/governmentreform/ HL406.cfm):

> There was no other copy for any member to look at or read, other than what was in this box. Now I will allow, while I was not able to read it, I was permitted to walk down into the well and gaze upon it from several angles, and even to touch it. When we voted on that bill, at about four o'clock in the morning, not a single member of the House had read it; not a single member of the Senate had read it.

[78] One example is the federal luxury tax, imposed in 1990 on everything from furs to yachts. Proponents saw it as a pain-free, palatable and progressive way to raise tax revenue, but the impact was staggering. The boat-building industry was capsized, throwing thousands of blue-collar workers out of work, in turn straining public welfare and unemployment budgets as dislocated workers sought relief. Congress swiftly repealed the tax. Phil Hampton, *Boating Casts Off Bad Times, Sales Swell After Luxury Tax Drowns*, USA TODAY, Aug. 19, 1994, at 01B.

reading laws as written is mere figleafing to disguise judicial willfulness aimed at imposing ideologically congenial results. Purposive decisionmaking is achieved more readily (and easily) by straying from text than by sticking to it, and hewing to the Legislature's as-written language has repeatedly led me to results I strongly dislike.

Obviously, if lawmakers in 2009 (or later) dislike the Court's interpretation of the words their 1989 predecessors chose — or believe their predecessors drafted with imprecision — the remedy, and it is a simple one, rests wholly with them. This is precisely how the separation of powers works among co-equal branches of government. The presumption that lawmakers intended what they enacted is not just required and well-settled but desired and well-founded. It is an accommodation rooted in carefulness, not certitude. The Legislature can easily reinsert an upstream-contract provision if it believes our interpretation is wooden legalism that honors the letter of the law but not its spirit, thus letting premises owners slip through an unintended loophole.

IV. A Brief Take on the Dissent

The Court briefly addresses the dissent's arguments, but more can be said. The dissent's chief contention is that lawmakers "expressly tethered" general contractor to other terms that are "commonly understood to mean a person who has contracted with an owner"[79] — like "'principal contractor,' 'original contractor,' and 'prime contractor' . . . all terms that envision a tripartite relationship" among an owner, a general contractor, and subcontractors.[80] The dissent acknowledges

[79] __ S.W.3d __ (O'Neill, J., dissenting).

[80] *Id.* at __.

the listed terms "are not exhaustive" but concludes, rather conclusorily, that the notion of an owner-contractor "is simply not analogous."[81]

Like the Court, I find the dissent's argument unpersuasive, for several reasons. First, the dissent cites the "common usage" provision of the Code Construction Act[82] in urging a "commonly understood" reading of general contractor. However, the Act's very next provision stresses that "common usage" must yield to specific legislative definitions.[83] Thus, "ordinary meanings should be applied only to undefined terms."[84] The Legislature enacted a specialized definition of general contractor, and in 1989 deleted not only the upstream-contract condition, but also the injunction to interpret the synonyms for general contractor "as those terms are commonly used."[85] If a statute defines a term, "a court is bound to construe that term by its statutory definition only,"[86] deference that seems especially warranted where, as here, the statute omits an earlier directive to apply common usage. In any case, given the ordinariness of premises owners acting as their own general contractors,[87] I fail to understand the dissent's outright rejection of "owner contractor" as dissimilar.

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[81] *Id.* at __.

[82] *Id.* at __ (citing TEX. GOV'T CODE § 311.011(a)).

[83] TEX. GOV'T CODE § 311.011(b) ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.").

[84] *Tijerina v. City of Tyler*, 846 S.W.2d 825, 827 (Tex. 1992).

[85] *See supra* note 20.

[86] *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002); *see also Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 274 (Tex. 1995) ("[w]e are bound to construe these terms in accordance with their statutory definitions").

[87] *See* __ S.W.3d __.

Second, the dissent looks for support in statutory definitions of "contractor" outside the Workers' Compensation Act that explicitly mention a third-party requirement.[88] However, none of these cited provisions define *general* contractor. There exists in Texas statutory law only one definition of this term, Labor Code section 406.121, the provision at issue today. The Act nowhere defines "contractor," though "independent contractor," the term most analogous to the non-Act "contractor" provisions cited by the dissent, *is* defined (immediately below the definition of "general contractor") as someone "who contracts to perform work or provide a service *for the benefit of another*."[89] The definition by its terms requires an upstream relationship, something the "general contractor" definition does not. If anything, the provisions cited by the dissent, and the "independent contractor" definition in the Act itself, only strengthen the Court's position, showing that the Legislature is adept at including explicit third-party language when it chooses. The fact that the Legislature did not add third-party language here — even more, it *subtracted* such language — only fortifies the Court's interpretation.

Third, the dissent relies on two of our prior cases to assert we have "recognized for almost a century that a contractor" has a third-party requirement.[90] A careful examination of these cases, however, shows that both cases concern whether an injured worker is an employee or an independent

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[88] __ S.W.3d __ (O'Neill, J., dissenting).

[89] TEX. LAB. CODE § 406.121(2) (emphasis added).

[90] __ S.W.3d __ (O'Neill, J., dissenting) (citing *Indus. Indem. Exch. v. Southard*, 160 S.W.2d 905, 907 (Tex. 1942); *Shannon v. W. Indem. Co.*, 257 S.W. 522, 524 (Tex. Comm'n App. 1924, judgm't adopted)).

contractor and not whether a premises owner can qualify as a general contractor.[91] Together, the two cases use the phrase "independent contractor" nineteen times and the phrase "general contractor" none at all. The cases are simply inapposite, though again, by focusing on "independent contractor," they draw attention to the Act's current definition of that term, one that on its face requires a third-party relationship, unlike the "general contractor" definition that immediately precedes it.

Finally, the absence of "owner contractor" from a list the dissent concedes is nonexhaustive[92] (something we must construe liberally) is less notable than the absence of "premises owner" from the Act's exclusion (something we must construe strictly). The analogous terms seem of a kind and interchangeable, which makes the motor-carriers exclusion seem markedly out of place, suggesting that the definition was otherwise broad enough to capture them. Stated differently, there seemed an awareness that entities beyond the listed terms could fall within the broad definition, but only this narrow class was carved out.

V. A Brief Take on JUSTICE HECHT's Concurrence

If my understanding is correct, the dissenters reject their original view of the case and now insist a premises owner has never been entitled to statutory-employer status by providing comp coverage to subcontractors and their employees. Conversely, the Court and JUSTICE HECHT apparently believe that access to the exclusive-remedy defense by providing such coverage has been available perhaps since 1917, when a provision was added that is now section 406.124 of the Labor

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[91] *Southard*, 160 S.W.2d at 906; *Shannon*, 257 S.W. at 522-23.

[92] TEX. GOV'T CODE § 311.005(13) ("'Includes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.").

Code, and is certainly available today. My position, detailed above, is that the defense was made available in 1989, when lawmakers removed third-party language from the Act.

The Court's and JUSTICE HECHT'S attention to section 406.124 and its earlier enacted versions is unhelpful (and unnecessary in my view given the deletion in 1989 of the upstream-contract language). Section 406.124 currently provides that if a "person" hires a "subcontractor," not for any legitimate reason but instead "with the intent to avoid liability" under the workers' compensation laws, the scheme will fail because the worker will be deemed the person's employee. This provision earlier applied to "subscribers" rather than "persons," but in any case it has always applied to all statutory employers subject to the workers' compensation laws.

Section 406.124 is a rarely employed subterfuge provision intended to thwart sham attempts by an employer to mischaracterize an employee as a subcontractor and thereby avoid comp liability. It says as much — applying to all statutory employers and targeting efforts to evade liability. The general-contractor provision at issue in today's case, currently section 406.123, addresses the separate matter of extending statutory-employer status to a general contractor who retains a legitimate, independent subcontractor and wishes to cover the subcontractor's employees. The general-contractor provision was added in 1983, and substantively rewritten in 1989, as I discuss above.

I essentially agree with JUSTICE O'NEILL on this point. None of the parties rely on section 406.124, and it is irrelevant to the key inquiry: whether a premises owner can be a general contractor under section 406.123. The latter provision has never applied to all subscribers, but is limited to

general contractors. Today's issue is whether a premises owner can fall within the definition of "general contractor," a subset of all subscribers.

So while I agree with the Court's result and most of its reasoning, I part company with the Court and JUSTICE HECHT on the relevance of the subterfuge provision and its history, even though the changes to this provision and the eventual enactment of the general-contractor provision share a common legislative ancestry to some extent. In short, I see less ambiguity than JUSTICE HECHT does in the general-contractor and subcontractor definitions. (Interestingly, he attaches no significance to the Legislature's 1989 deletion of "contracted with another party.") If anything, his meticulous effort to lay out the history of sections 406.123 and 406.124 and their interplay convinces me, more than ever, that we should focus on the text as enacted (and amended) and resist entreaties to meditate on the varying motives and atmospherics that may have spurred the thousand-plus Texas legislators who have dealt with workers' compensation over the past ninety-six years. I simply do not share JUSTICE HECHT's "ambiguity" diagnosis,[93] though I certainly share his aversion to divorcing text, plain or not, from context.[94]

For the reasons discussed in Parts I-IV above, I disagree that the Act can be read either way and thus requires a gestalt examination of a near-century of legislative machinations for whatever

[93] __ S.W.3d __ (Hecht, J., concurring).

[94] *City of Rockwall v. Hughes*, 246 S.W.3d 621, 632 (Tex. 2008) (Willett, J., dissenting) ("The import of language, plain or not, must be drawn from the surrounding context, particularly when construing everyday words and phrases that are inordinately context-sensitive.").

authoritative lessons can be gleaned from that odyssey, interesting though it may be.[95] Again, I would hold that the general-contractor provision, unlike its pre-1989 version, does not forbid a premises owner from acting as its own general contractor.

VI. Conclusion

Courts are charged with exercising judgment, not will,[96] and judicial judgment — awareness of the line between adjudication and legislation and refusing to cross it — means giving wide berth to legislative judgment. On policy matters, we must aim for utter disinterestedness, meaning we must interpret the Act as it is written, not as we might have written it. The Texas Workers' Compensation Act is replete with countless policy trade-offs, and our confined role, one defined chiefly by limits and duties, not by powers, is to construe statutes as we find them, not to second-guess or refine them.

The Court has reached the correct result, and for the reasons discussed above, I join all but Parts IV, V, and VIII of its decision.

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Don R. Willett
Justice

OPINION DELIVERED: April 3, 2009

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[95] Besides finding little useful in the history of section 406.124, I also disagree with the notion that our decision should turn on a rule that construes statutory ambiguities in favor of workers' comp coverage and against common-law tort liability. I do not believe we can say the Legislature, actually many different Legislatures, urges a comp-over-tort rule whenever uncertainly arises. The Legislature of course could expressly incorporate such a preference into the Act, but it has not done so. The Workers' Compensation Act and the common law of negligence are both comprehensive, time-honored systems of compensating injured individuals. While I would reject any suggestion from Summers and his aligned amici that workers' compensation is a disfavored remedy, likewise I cannot agree that in all cases of doubt the Legislature would have us elevate the statutory system over the common-law system and apply the statutory remedy whenever statutory coverage is unclear.

[96] *See* THE FEDERALIST No. 78 (Alexander Hamilton).

IN THE SUPREME COURT OF TEXAS

NO. 05-0272

ENTERGY GULF STATES, INC., PETITIONER,

v.

JOHN SUMMERS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued October 16, 2008

JUSTICE O'NEILL, dissenting, joined by CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA.

The Court today concludes that premises owners who pay (and recoup) their subcontractors' workers' compensation premiums are, *and have always been*, entitled to the Workers' Compensation Act's exclusive-remedy defense against their subcontractors' injured employees. The Court pins its analysis on a 1917 provision that was designed to prevent "subscribers" from creating sham subcontractor relationships in order to avoid covering their own injured employees. Remarkably, neither the parties nor the dozens of amici curiae in this case have proffered such an interpretation. Although the Court concludes that the law in this regard has remained essentially the same since 1917, the Legislature first afforded a general contractor that "ha[d] contracted with another party to

perform" work the right to voluntarily assume statutory employer status in 1983. Had all "subscribers" always been statutory employers of subcontractors' employees, this statutory revision and its 1989 iteration would make no sense.

The parties and amici appear to agree, as do I and Justice Willett, that before 1989 premises owners were not "general contractors" under the Act. The appropriate inquiry, then, is not whether the 1989 "general contractor" definition *excludes* premises owners, as the Court posits, but whether the Legislature intended to change prior law by expanding the definition to *include* premises owners when it rewrote the Act in 1989 and expressly tethered the term to others commonly understood to mean a person who has contracted with an owner. Had the Legislature intended to change the law in 1989 and for the first time afford premises owners the exclusive-remedy defense against subcontractors and their employees, it would surely have been simpler to say so by using the broader term "subscriber," or by including the term "owner contractor" in the description of analogous terms that define a general contractor.

A few points bear noting at the outset. First, whether workers' potential recovery is greater under the common law or the Workers' Compensation Act, and whether one scheme promotes workplace safety over the other, is a legislative call, not ours. Second, one cannot contract into the Act's protections if the Legislature did not intend to allow it; accordingly, that Entergy reserved any right it might have to assert a statutory-employer defense against IMC's employees, or that Summers accepted workers' compensation benefits paid for by Entergy (and deducted from the contract price), does not inform the statutory analysis. And finally, whether premises owners *should* be afforded the

Act's protections by paying their general contractor's workers' compensation premiums, as general contractors are by paying the premiums of their subcontractors, is a policy choice we are not at liberty to make.

As the Court notes, this case has drawn much attention since our initial opinion, and numerous amici have weighed in. When this case was first presented, Summers' emphasis was on Entergy's proof regarding the existence of a written agreement and mistaken reliance on the Legislature's 1993 nonsubstantive recodification of the Labor Code. On rehearing, a more focused analysis of the applicable statutory text convinces me that the Legislature, in rewriting the Act in 1989, did not intend to change the general-contractor definition to include premises owners; to the contrary, it tied the definition to terms commonly understood to mean a person who has contracted with an owner. It might well represent sound policy to allow premises owners to become statutory employers of their contractors' employees by providing workers' compensation coverage, potentially expanding the number of employees eligible to receive benefits under the Act.[1] Whether such an expansion would require an adjustment to premiums, benefits, or other provisions of the Act is something only policymakers can decide. Our job is to discern what the Legislature intended. And that body has restricted the option to parties analogous to "principal contractor[s]," "original contractor[s]," and "prime contractor[s]," entities that contract to perform work for third parties and

[1] Interestingly, Entergy's agreement to provide coverage for IMC's employees swept no additional employees into the workers' compensation system in this case. Before it was amended, the contract between Entergy and IMC required IMC to provide workers' compensation coverage for IMC employees. The availability of this type of contractual arrangement, coupled with contractual indemnity provisions, may explain the dearth of case law arising under section 406.123(a).

who face no premises liability in the absence of control of the premises. Based on the statute's language and appropriate statutory construction principles, I do not agree that the Legislature intended the term "general contractor" to encompass premises owners within the Act's protections. Accordingly, I respectfully dissent.

I.

A. The Statutory Text

Under section 406.123 of the Act, "a general contractor and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor." TEX. LAB. CODE § 406.123(a). If such an agreement is reached and properly filed, the general contractor may deduct premiums from the amount owed the subcontractor without incurring penalties under section 415.006 of the Act, which prohibits employers from collecting premiums or benefits from their employees.[2] *Id.* § 406.123(d), (f). More importantly, the agreement makes the general contractor the statutory employer[3] of the subcontractor and the subcontractor's employees, shielded from tort liability by the Act's exclusive-remedy provision. *Id.* §§ 406.123(e), 408.001(a). The Act defines a general contractor as

[2] The Court insists that Entergy "paid for" workers' compensation insurance covering IMC's employees. ___ S.W.3d at ___. It may be technically true that Entergy directly paid the insurance premiums, but it is undisputed that Entergy procured the insurance in exchange for a reduction in the cost of its contract. Thus, under the Court's construct, Entergy bought immunity from suit at no additional cost to itself.

[3] The Act does not use that term, but I use it for ease of reference. Under the Act, "[a]n agreement under [section 406.123] makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of this state." TEX. LAB. CODE § 406.123(e).

> a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors. The term includes a "principal contractor," "original contractor," "prime contractor," or other analogous term. The term does not include a motor carrier that provides a transportation service through the use of an owner operator.

Id. § 406.121(1). A subcontractor, in turn, is "a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform." *Id.* § 406.121(5). A close analysis of these definitions, particularly viewed in light of controlling statutory construction principles, compels the conclusion that the Legislature did not intend to allow a premises owner to assume general-contractor status and assert the Act's exclusive-remedy defense against subcontractors and their employees at no additional cost to itself.

In construing a statute, our overarching purpose is to determine and effectuate the Legislature's intent. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (citing *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003)). The surest guide to that intent is, of course, the plain and common meaning of the language the Legislature has employed. *City of Houston v. Clark*, 197 S.W.3d 314, 318 (Tex. 2006) (citing *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003)). Treating premises owners who provide workers' compensation coverage to subcontractors and their employees as "general contractors" is inconsistent with the common meaning associated with the terms to which the definition is tied.

Throughout Texas statutory and common law, a contractor is generally understood to be a person or entity that enters into a contract with another for compensation. In interpreting the Act and its predecessors, we have for decades defined a contractor as "'any person who, in the pursuit of an

independent business, undertakes to do a specific piece of work *for other persons* . . . .'" *Indus. Indem. Exch. v. Southard*, 160 S.W.2d 905, 907 (Tex. 1942) (quoting *Shannon v. W. Indem. Co.*, 257 S.W. 522, 524 (Tex. Comm'n App. 1924, judgm't adopted)) (emphasis added).[4] While the precise issue before us in *Shannon* was whether a party seeking workers' compensation benefits was an *independent* contractor as opposed to an employee, we articulated a broader principle, *i.e.*, that a contractor is someone who performs work for someone else. Our Legislature has repeatedly echoed that understanding. *See, e.g.*, TEX. PROP. CODE § 28.001(1) ("'Contractor' means a person who contracts with an owner . . . ."); TEX. PROP. CODE § 53.001(7) ("'Original contractor' means a person contracting with an owner . . . ."); TEX. ELEC. CODE § 274.022(d) ("'[C]ontractor' means a newspaper or statewide association with which the secretary of state contracts under this section."); TEX. EDUC. CODE § 51.776(3) ("'[C]ontractor' in the context of a contract for the construction, rehabilitation, alteration, or repair of a facility means . . . [a] legal entity that assumes the risk for constructing, rehabilitating, altering, or repairing all or part of the facility at the contracted price."); TEX. GOV'T CODE § 2166.2511(2) ("'Contractor' in the context of a contract for a project means a . . . legal entity that assumes the risk for constructing, rehabilitating, altering, or repairing all or part of the project at the contracted price.").

[4] Both the Court and Justice Willett recite the principle that we do not apply the ordinary meaning of a term if the Legislature has adopted a specialized definition, then promptly cast it aside by looking to the ordinary meaning of the words the Legislature used within the "general contractor" definition. This is necessary, of course, because we cannot determine whether a premises owner is "analogous" to the types of contractors listed in section 406.121(1) or what "undertakes to procure" means without examining how those terms are commonly understood.

The illustrative language the Legislature included in the Workers' Compensation Act's "general contractor" definition is consistent with that general understanding: "principal contractor," "original contractor," and "prime contractor" are all terms that envision a tripartite relationship in which one entity enters into a contract to perform work for another and then retains subcontractors or independent contractors to do all or part of the work. *See, e.g.*, TEX. PROP. CODE § 53.001(7), (13) ("'Original contractor' means a person contracting with an owner either directly or through the owner's agent," and "'[s]ubcontractor' means a person who has furnished labor or materials to fulfill an obligation to an original contractor or to a subcontractor to perform all or part of the work required by an original contract."); *Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 611–12 (Tex. 2004) (using the term "prime contractor" interchangeably with "general contractor" in discussing pass-through claims); *Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 721–22 (Tex. 2003) (using the term "general contractor" interchangeably with "original contractor" in interpreting chapter 53 of the Property Code);[5] *see also* Op. Tex. Att'y Gen. No. DM-300 (1994) (ruling that university that hired independent contractors to provide work such as carpet installation and window repair did not act as a "hiring contractor" under section 406.141 of the Act because it did "not act even as a 'contractor' as that term is commonly understood," relying in part on section 406.121(1)'s general-contractor definition). While I acknowledge that the categories listed in the

[5] While attaching some significance to a string of inapposite out-of-state cases, Justice Willett gives these examples no weight because some of them discuss a party's status as a "contractor" or an "independent contractor," rather than a "general contractor." But the person or entity at issue must first be a contractor before being further classified as an independent contractor, a subcontractor, or a general contractor. Moreover, several of these examples define terms that the Legislature has expressly deemed analogous to "general contractor" in section 406.121(1), including "original contractor" and "prime contractor."

second sentence of section 406.121(1)'s "general contractor" definition are not exhaustive, the Legislature did make clear that *only* analogous entities are to be treated as general contractors. *See* TEX. LAB. CODE § 406.121(1). A premises owner is simply not analogous.[6]

The Court insists that the statutory definition controls over what it tacitly acknowledges is the commonly understood meaning of the term "general contractor." But the Legislature itself has mandated that "[w]ords and phrases shall be . . . construed according to . . . common usage," and that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." TEX. GOV'T CODE § 311.011(a), (b). In this instance, common usage, the common law, and a host of legislative pronouncements are contrary to the meaning the Court attaches to the term. More importantly, the statutory language itself comports with, and is tied to, the general understanding of the term's meaning. When the Legislature enacted section 406.121, we had long defined a contractor as one who "'undertakes to do a specific piece of work *for other persons* . . . .'" *Southard*, 160 S.W.2d at 907 (quoting Shannon, 257 S.W. at 524 (emphasis added). And Black's Law Dictionary, at the time the Legislature adopted the general-contractor definition, similarly defined a contractor as "a person who, in the pursuit of any independent business, undertakes to do a specific piece of work *for other persons* . . . ." BLACK'S LAW DICTIONARY 295 (5th ed. 1979). It also stated that "[t]his term is strictly applicable to any

[6] The commonly understood difference between general contractors and premises owners may explain why Entergy failed to raise the statutory-employer defense until nearly two years after the suit was initially filed. Even then, the defense was the last of the ten defenses Entergy raised, after contributory negligence, failure to mitigate damages, and several others.

person who enters into a contract, but is commonly reserved to designate *one who, for a fixed price . . . undertakes to procure the performance of works or services* . . . for the public or a company or individual." *Id*. (emphasis added). In other words, a contractor is someone who receives payment for performing work for another. Section 406.121(1) precisely tracks these definitions by describing a general contractor as one who "undertakes to procure the performance of work or a service, either separately or through the use of subcontractors." TEX. LAB. CODE § 406.121(1). In light of this longstanding commonly understood usage, the Legislature could easily have defined "general contractor" to include premises owners if that was its intent, but it did not. Had the Legislature intended the term to be as conceptually broad as the Court and Justice Hecht today say it is, it could simply have written that "a subscriber and a subcontractor may enter into an agreement," but again, it did not.

The Court attaches a similarly strained meaning to the term "separately" within the general-contractor definition. ("'General contractor' means a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors.") *Id.* That is, the Court says that a premises owner acts "separately" when it engages subcontractors directly rather than through a general contractor. ___ S.W.3d at ___. But "separately" far likelier alludes to independent contractors, as opposed to subcontractors, terms which the Legislature defined differently in the same bill that introduced the "separately" language. *See* Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05, 1989 Tex. Gen. Laws 1, 15 (codified at TEX. LAB. CODE § 406.121(2)).

B. The Statutory Revision

Significantly, the Legislature used almost identical "undertake to procure" language in the prior version of the statute when conferring statutory-employer status on prime contractors who provided workers' compensation coverage to their subcontractors. Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, 1983 Tex. Gen. Laws 5210, 5210, *amended by* Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05(a)(5), 1989 Tex. Gen. Laws 1, 15. The prior statute equated the term "prime contractor" with "general contractor," and defined it to mean "the person who has undertaken to procure the performance of work or services." *Id.* The definition of "subcontractor" in the same legislation left no doubt that the language embraced the commonly understood meaning of a contractor as one who has agreed with another to perform work or services in exchange for compensation. "[S]ub-contractor" was defined as a person who has contracted to perform all or part of work or services that "a prime contractor *has contracted with another party to perform*." *Id.* (emphasis added). Despite the clarity of that language, the Court and Justice Hecht conclude that the 1983 general-contractor definition could be read to encompass premises owners who have not contracted with other persons to perform work. Apparently, they believe only third-party language within the general-contractor definition itself would demonstrate legislative intent to exclude premises owners.

Justice Willett, and the Court to some extent, make much of the Legislature's omission in 1989 of the third-party language, concluding that the Legislature meant to abolish the "'upstream contract' condition." It is hard to fathom that such a sweeping and deliberate change in the law

would be so subtly effected. But if that had been the Legislature's intent, it would not have substituted "undertaken to perform" language that had long been recognized in the general-contractor definition as imposing a third-party obligation. The Legislature's use of the same language in the old and new general-contractor definitions strongly indicates it intended the same meaning in each version.

Reliance on omission of the third-party language in the subcontractor definition is misplaced for yet another reason. It is true that the Legislature is presumed to act with knowledge of existing laws, *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990), and that deletions in existing laws are presumed to be intentional. *In re Ament*, 890 S.W.2d 39, 42 (Tex. 1994). But the 321-page workers' compensation bill enacted in 1989 did not merely amend prior laws, it massively overhauled the entire workers' compensation scheme. While portions of the bill amending the Insurance Code, the Government Code, and other measures related to workers' compensation indicated deletions with bracketed strikeouts, articles 1 through 11 of the bill comprising the Workers' Compensation Act itself contained no such indications of omissions. *See* Tex. S.B. 1, art. 1-11, 71st Leg., 2d C.S. (1989) (codified as amended at TEX. LAB. CODE, Title 5, Subtitle A); *see also Tex. Legislative Council Drafting Manual* 35–36 (2008), *available at* http://www.tlc.state.tx.us/legal/dm/draftingmanual.pdf. Thus, omission of the third-party language from the subcontractor definition does not merit the weight the Court and Justice Willett afford it. Because "contract[ing] with another party" is inherent in the nature of general contractors and analogous terms, and because the concept had been subsumed in the definition of "prime contractor"

and "general contractor" as "the person who has undertaken to procure the performance of work or services," the third-party language in the subcontractor definition was most likely not included in the new Act to conform the two definitions.

Giving virtually no effect to the Legislature's restriction of "general contractor" to terms analogous to "principal contractor," "original contractor," and "prime contractor," the Court and Justice Willett attach great significance to the sentence excluding motor carriers that provide transportation services through the use of owner-operators. But when that exclusion is viewed in the context of the entire statutory scheme and other law applicable to motor carriers, the reason for the exclusion becomes clear: in the 1989 rewrite of the Act, the Legislature made some, but not all, of section 406.123 applicable to motor carriers. Like general contractors and subcontractors, motor carriers and owner-operators (which are deemed independent contractors under section 406.121(4)) may enter into an agreement under which the motor carrier provides workers' compensation coverage to an owner-operator and its employees. TEX. LAB. CODE § 406.123(c). And like a general contractor, a motor carrier that provides workers' compensation coverage to its independent contractor may deduct the premium from the contract price without incurring penalties under section 415.006 of the Act. *Id.* § 406.123(d). But unlike general contractors, a motor carrier that provides coverage to its independent-contractor owner-operator does not become the statutory employer of the owner-operator or the owner-operator's employees — there is no provision equivalent to section 406.123(d) that applies to motor carriers. This differing treatment of motor carriers is consistent with section 5.001(a)(2) of the Transportation Code, which restricts the ability of common carriers

to limit their common law liability. It may also be attributable to the heightened standard of care imposed upon common carriers in light of their potential impact on public safety and their highly regulated status. *See Speed Boat Leasing, Inc. v. Elmer*, 124 S.W.3d 210, 212 (Tex. 2003); *S. States Transp., Inc. v. State*, 774 S.W.2d 639, 642 (Tex. 1989) (GONZALEZ, J., dissenting). One could argue that motor carriers are analogous to general contractors, in that they frequently contract with third parties to provide transportation services and then subcontract with owner-operators to actually perform those services. Thus, the Legislature likely expressly excluded motor carriers from the general-contractor definition to make it clear that, even though they might otherwise fit the general-contractor construct, they are to be treated differently.

C. Justice Hecht's Policy-Based Interpretation

Noting that a property owner *may* act as its own general contractor, but acknowledging that the term is more generally understood to mean one who contracts with a property owner and then subcontracts parts of the job to others, Justice Hecht concludes that we just can't tell from the statutory language what the Legislature meant. Finding the text elusive, Justice Hecht discerns "policies embedded in the Act" which he believes tip the scales in favor of treating a premises owner as a general contractor. There are several problems with this approach. First, while the definition of a "general contractor" as one who "undertakes to procure the performance of work" may in isolation appear open-ended, the definition's second sentence ties the term to its commonly understood meaning. Second, if indeed the text is ambiguous as Justice Hecht claims, we have clearly said that statutes in derogation of common law rights should not be "'applied to cases not

clearly within [their] purview.'" *See Energy Serv. Co. of Bowie, Inc. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 n.17 (Tex. 2007) (quoting *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969)). And third, the "policies" that Justice Hecht identifies and perceives would be thwarted if premises owners are not treated as general contractors have never been applied in this context and beg a question that is exclusively within the Legislature's realm, not ours.

The first policy that Justice Hecht believes sweeps premises owners into the general-contractor definition is the Act's "decided bias" for coverage. *See Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 140 (Tex. 2003). But the Act's bias is in favor of employers electing to provide coverage for their employees; we have never read a bias into the Act that would confer its protections on third parties absent clear statutory authorization or any indicia of an employer/employee relationship. The Act's general policy that favors employers covering employees cannot expand the category of persons considered "general contractors" beyond the statutory definition; invoking that policy here is particularly unwarranted when the Legislature could so easily have defined the term as expansively as the Court and Justice Hecht do today.

The second policy Justice Hecht cites is the sham-subcontractor provision. *See* TEX. LAB. CODE § 406.124. If the Act prohibits subscribers from utilizing subcontractors to avoid coverage, he posits, it surely would not discourage coverage by denying subscribers the exclusive-remedy defense. But the sham-contractor provision was never intended to impute coverage to true third parties as Justice Hecht seems to imply; it simply prohibits a person who has workers' compensation coverage from subcontracting the work with the intent and purpose of avoiding liability as an

employer. *See id.* In other words, an employer cannot designate its employee a subcontractor in order to avoid paying benefits under the Act. No one claims that IMC was hired by Entergy as a sham to avoid paying its own employees workers compensation benefits; the provision is simply irrelevant to analysis of the general-contractor definition.

Justice Hecht next charges that my reading of the statute would have "perverse" results because the contractual indemnity allowed under section 417.004 and provided for in Entergy's contract with IMC would permit Summers to recover common law damages from Entergy, which Entergy could in turn recoup from IMC. Justice Hecht suggests that in such a scenario, "the workers' compensation system provides nothing to any employer." Of course the pre-1989 Act, at least according to my reading (and that of the litigants, amici and Justice Willett), had the same effect, which is a policy choice the Legislature made. The question is whether in 1989 the Legislature intended to change that policy. In addition, several factors undermine Justice Hecht's point. One, while Entergy paid IMC's premiums for Summers' benefits under its owner-provided insurance plan (OPIP), that cost was deducted from the contract price paid to IMC, so Entergy effectively paid nothing for the additional protection Justice Hecht's reading would afford Entergy. Two, owners receive significant economic benefits from OPIPs like Entergy's apart from tort immunity. OPIPs allow owners to secure coverage for all their contractors at a lower overall price than the cost of workers' compensation insurance that subcontractors would normally incorporate into their contract prices, thereby lowering owners' overall costs. Howrey LLP, *Owner Controlled Insurance Programs (OCIPs): Why Owners Like Them and Why Contractors May Not*,

CONSTRUCTION WEB LINKS, July 14, 2003, http://www.constructionweblinks.com/Resources/Industry_Reports__Newsletters/July_14_2003/ocip.htm. In turn, the cost of the premium deducted from IMC's contract price was likely lower than the premium IMC would have otherwise paid. Consequently, both Entergy and IMC benefitted from the insurance arrangement in this instance irrespective of tort immunity. Three, that indemnity agreements like that between Entergy and IMC are widespread in the industry is some indication that premises owners do not perceive the Act's statutory-employer provision to protect them from common law claims, else there would be no need for such agreements. And four, any tort damages that Summers might recover would likely be paid from the commercial general liability policy that Entergy required IMC to obtain as a condition under the parties' contract, and the workers' compensation carrier would be subrogated to Summers' recovery under section 417.001 of the Act. The "perverse result" that Justice Hecht envisions simply does not exist.

The fourth policy reason Justice Hecht cites is that the Act was intended to be comprehensive. But again, it can only be comprehensive to the extent that the Legislature intended, and there is nothing in the 1989 revision that would indicate the Legislature's intent suddenly changed. Underlying Justice Hecht's analysis is an apparent assumption that Summers might recover a windfall against Entergy on his common law claims. But if Entergy is not Summers' employer under the Act, it retains the full panoply of defenses available to it under the common law, and Summers shoulders the burden of establishing the company's negligence with the consequent uncertainties of litigation. Should Summers prevail on his common law claims, which is far from

certain, he would forfeit any benefits that he has received under the Act. Irrespective of the workers' compensation system's relative merits, which is not ours to decide, it has operated this way at least until the statutory revision in 1989; there is nothing to indicate the Legislature's revision was intended to effect a change.

D. Statutory Construction Principles

As I read the statutory language, it seems clear that the Legislature did not intend to transform premises owners who contract for third-party services into general contractors entitled to assert the Act's exclusive-remedy defense. But even if the language were less than clear, well-established statutory construction principles lead to the same conclusion. In a decision issued a week before the Court's original opinion in this case, we considered whether an indemnification agreement between a subscribing employer and another party could be enforced by that party's contractor even though the contractor had not executed the agreement. *Superior Snubbing*, 236 S.W.3d 190. The statute had formerly required only that such an agreement be "'executed by the subscriber'" to be enforceable, but in 1989 the Legislature changed the statutory language to require a written agreement "'executed . . . with the third party.'" *Id.* at 191 (quoting TEX. LAB. CODE § 417.004). Although the revision appeared to require the signature of both parties, we concluded that the Legislature intended no change in the law and that the nonsignatory contractor could seek indemnification as an intended beneficiary of the agreement. *Id.* at 195. In concluding that the Legislature intended no substantive change in the law, despite the change in the statute's language, we relied largely on two statutory construction principles. First, we noted that the common law

allows the intended beneficiary of a contract to enforce it, and that statutes in derogation of common law rights "'will not be extended beyond [their] plain meaning or applied to cases not clearly within [their] purview.'" *Id.* at 194 n.17 (quoting *Satterfield*, 448 S.W.2d at 459). Second, we applied the Legislature's directive that in interpreting a statute, courts must "'consider at all times the old law, the evil, and the remedy.'" *Id.* (quoting TEX. GOV'T CODE § 312.005). Because we could identify no practical motivation for a change, or any extra-textual indication that the Legislature's amendment of the statute was intended to be substantive, we concluded that the third-party beneficiary could seek indemnity. *Id.* at 195.

The application of those same principles in this case demonstrates that the Legislature did not intend to expand the class of contractors entitled to claim statutory-employer status to include premises owners when it rewrote the Act in 1989. Nothing in the Act's legislative history suggests that the Legislature perceived an "evil" in the then-existing requirement that a person must have contracted to perform services for another to be a general or prime contractor. *See* Joint Select Committee on Workers' Compensation Insurance, *A Report to the 71st Legislature* (1988); *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 512– 13 (Tex. 1995) (discussing report). And to the extent the statute's language does not plainly entitle premises owners to assume statutory-employer status under these circumstances, *Superior Snubbing* counsels against that construction, as it would be in derogation of Summers' common law rights. 236 S.W.3d at 194 n.17; *see also Kroger Co. v. Keng*, 23 S.W.3d 347, 349 (Tex. 2000) ("[I]t would be injudicious to construe the statute in a manner that supplies by implication restrictions on an employee's rights that are not

found in section 406.033's plain language.") (citing *Miears v. Indus. Accident Bd.*, 232 S.W.2d 671, 675 (Tex. 1950)).

The Court may perceive that it has managed to blur the inconsistency between its decision today and *Superior Snubbing* by proclaiming that the law has remained unchanged since 1917. ___ S.W.3d at ___. But its own analysis shows how hollow that statement is. The Court acknowledges that an entirely new provision was introduced in 1983, and then amended in 1989. And the Court attaches some significance to the omission of the phrase "with another party" from the subcontractor definition in 1989. ___ S.W.3d at ___. In *Superior Snubbing*, the Court concluded that the Legislature's *insertion* of a phrase failed to demonstrate legislative intent to change the law absent a showing of any specific motivation. Here, the record is similarly devoid of any showing of an "evil" in need of remedy, yet the Court concludes that the *omission* of the "with another party" language effected a sweeping change in the law.

Justice Hecht recognizes the tension between today's decision and *Superior Snubbing*, but brushes it aside because "it has never been clear when a person is considered the statutory employer of a subcontractor or his employees . . . ."[7] He reaches that conclusion by focusing on a series of

[7] The sham contractor provision, now codified as section 406.124 of the Labor Code, the only source of statutory -employer status prior to 1983, appears to have been the subject of only eight cases since its enactment in 1917. *See Hatfield v. Anthony Forest Prods. Co.*, 642 F.2d 175 (5th Cir. 1981); *Turnbough v. United Pac. Ins. Co.*, 666 S.W.2d 489 (Tex. 1984); *All-Tex Roofing, Inc. v. Greenwood Ins. Group, Inc.*, 73 S.W.3d 412 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); *Commercial Standard Ins. Co. v. White*, 423 S.W.2d 427 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.); *Houston Fire & Cas. Ins. Co. v. Farm Air Serv., Inc.*, 325 S.W.2d 860 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.); *Tex. Employers' Ins. Ass'n v. Harper*, 249 S.W.2d 677 (Tex. Civ. App.—Dallas 1952, writ ref'd n.r.e.); *U.S. Fid. & Guar. Co. v. Hall*, 224 S.W.2d 268 (Tex. Civ. App.—Austin 1949, writ dism'd); *Fort Worth Lloyds v. Mills*, 213 S.W.2d 565 (Tex. Civ. App.—Galveston 1948, writ ref'd n.r.e.).

failed bills — all of which ultimately made clear that a general or prime contractor is someone who has agreed to perform work for a third party — and the fact that the 1983 legislative forerunner to the sections at issue today originated in a bill that would have eliminated the sham-subcontractor provision of the Act. Following this circuitous route, Justice Hecht concludes that "the definition of 'prime contractor' finally enacted could reasonably be read to include a premises owner acting as his own general contractor." ___ S.W.3d at ___. That view (voiced by none of the litigants or amici) is simply contrary to the statute's terms; before 1989, the subcontractor definition made it unmistakably clear that a general contractor was someone who had "contracted with another party to perform work." Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, 1983 Tex. Gen. Laws 5210, 5210, *amended by* Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05(a)(5), 1989 Tex. Gen. Laws 1, 15. Moreover, to the extent Justice Hecht's interpretation of the Act is informed bills that were never adopted by both houses of the Legislature, it is worth noting that the House committee substitute for Senate Bill 1, the source of sections 406.121 and 406.123, would have specifically allowed premises owners to secure statutory-employer status, but that version of the bill was rejected in its entirety by the Senate. *See* H.J. of Tex., 71st Leg., 1st C.S. 76 (1989). In any event, I agree with Justice Willett that failed legislation is an unsound guide to legislative intent.

The Court's conclusion that premises owners are subsumed within the general-contractor definition is also inconsistent with another statutory construction principle we have frequently employed. Just four months ago, we analyzed section 101.022(b) of the Texas Civil Practice and Remedies Code to determine whether loose gravel on a road amounted to a special defect. *Tex.*

Dep't of Transp. v. York, ____ S.W.3d ____ (Tex. 2008). The statute we evaluated imposed a heightened duty on governmental units to warn of special defects "such as excavations or obstructions on highways, roads, or streets" of which they should have been aware. TEX. CIV. PRAC. & REM. CODE § 101.022(b). We explained that while the statute did not define "special defect," it did give examples:

> Thus, "[u]nder the ejusdem generis rule, we are to construe 'special defect' to include those defects of the same kind or class as [excavations or obstructions]." . . . While these specific examples "are not exclusive and do not exhaust the class," the central inquiry is whether the condition is of the same kind or falls within the same class as an excavation or obstruction.

York, ___ S.W.3d at ___. Because loose gravel did not share the characteristics of an obstruction or excavation, we held that it was not a special defect. *Id.* at ___. The application of *York*'s principles in this case demonstrates that the Legislature did not intend to include premises owners within the Act's general-contractor definition. As already explained, a premises owner who is not performing work for another does not share the characteristics of a general contractor, a principal contractor, an original contractor, or a prime contractor. *See also U.S. Fid. & Guar. Co. v. Goudeau*, ___ S.W.3d ___, ___ (Tex. 2008) ("Under the traditional canon of construction *noscitur a sociis* ('a word is known by the company it keeps'), each of the words here must be construed in context.").

In support of its construction, the Court posits two workers injured in the same industrial accident receiving different compensation. The Court apparently considers it anomalous that a worker employed by the premises owner working side-by-side with a subcontractor's employee might be limited to workers' compensation benefits, while another employed by an independent

contractor would be able to seek the full range of damages under the common law. First, to the extent such an anomaly exists under my reading of the statute, it is the result of policy choices made by the Legislature that long pre-existed the 1989 revision. Moreover, in implying that the result is somehow unfair to the premises owner's injured employee, the Court overlooks the option the Act provides employees of subscribing employers to elect not to be covered by workers' compensation. TEX. LAB. CODE § 406.034. It also overlooks the quid pro quo, being the relinquishment of uncertain common law recovery in exchange for the prompt receipt of defined benefits, that has insulated the Act from constitutional challenge under the Open Courts provision of the Texas Constitution. *Garcia*, 893 S.W.2d at 521.

II.

Because I do not believe that the Legislature in the 1989 Act intended to change prior law and confer statutory-employers status on premises owners, I respectfully dissent.

_____

Harriet O'Neill
Justice

OPINION DELIVERED: April 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 05-0303

THOMAS GRABER AND HOPKINS & SUTTER, PETITIONERS,

v.

RICHARD L. FUQUA, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued January 26, 2006

JUSTICE GREEN delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE O'NEILL, and JUSTICE JOHNSON joined.

JUSTICE WAINWRIGHT filed a dissenting opinion, in which JUSTICE BRISTER, JUSTICE MEDINA, and JUSTICE WILLETT joined.

The question in this case is whether a state malicious prosecution claim is preempted by the federal bankruptcy regime simply because the claim arose out of the filing of an adversary action in a bankruptcy proceeding. We hold that under the facts of this case, Congress did not intend for such a claim to be preempted.

In a Texas trial court, Richard Fuqua alleged that Thomas Graber and Hopkins & Sutter had committed the common law tort of malicious prosecution by initiating an adversary proceeding in Fuqua's federal bankruptcy case. The petitioners argue that federal bankruptcy statutes express

Congress's intent to preempt Fuqua's claim and others like it. But to hold as the petitioners suggest would require us to extract the requisite intent from congressional *silence*, an inference that our preemption jurisprudence does not allow. The petitioners further argue that permitting Fuqua's state malicious prosecution claim would impermissibly threaten the uniformity of federal bankruptcy law. Yet we can identify no such risk. Until Congress clearly says otherwise, preemption of Fuqua's malicious prosecution claim is not warranted. Fuqua's suit should have survived Graber's plea to the jurisdiction.

I

In 1988, Fuqua filed a voluntary Chapter 7 bankruptcy petition in federal bankruptcy court. Several months later, Graber and Hopkins & Sutter (collectively Graber) initiated an adversary proceeding against Fuqua on behalf of their client, Sunbelt Savings, F.S.B. Graber argued that Fuqua had conspired with others to defraud Sunbelt in a previous real estate transaction. According to Fuqua, Graber obtained information in the adversary proceeding and forwarded it to the Justice Department, resulting in a criminal investigation of Fuqua. The bankruptcy judge stayed the adversary proceeding during the investigation. Fuqua was indicted for bank fraud and tax fraud, the case went to trial, and Fuqua was found not guilty on all charges. After the completion of Fuqua's criminal trial, the adversary proceeding resumed. The bankruptcy court granted Fuqua's motion for a directed verdict and entered judgment in his favor. Graber, on behalf of Sunbelt, appealed the judgment to the federal district court, which dismissed the appeal in 1998. No further appeals were taken.

In 2000, Fuqua sued Graber alleging both a claim of civil malicious prosecution based on Graber's filing of the adversary proceeding and a claim of criminal malicious prosecution based on the later criminal indictment. With respect to the criminal malicious prosecution claim, the trial court granted summary judgment in favor of Graber because the statute of limitations had run. Fuqua did not appeal that order. With respect to the civil malicious prosecution claim, Graber filed a plea to the jurisdiction, arguing that the court lacked jurisdiction because federal bankruptcy law preempted Fuqua's claim. Without a response from Fuqua, the trial court granted Graber's plea. Fuqua appealed and the court of appeals reversed, rejecting Graber's argument for preemption and remanding the case to the trial court. 158 S.W.3d 635. We granted Graber's petition for review.

II

When Congress has not expressly commanded preemption, courts recognize two categories of implied preemption: (1) when Congress sufficiently evidences its intent to exclusively "occupy the field," and (2) when the state law conflicts with the federal law by making simultaneous compliance impossible or by creating an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *accord Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001). But because "the categories of preemption are not 'rigidly distinct,'" these semantic categories do not always control. *Crosby*, 530 U.S. at 372 n.6 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)). "'The purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

Graber does not argue this case as one where the federal jurisdictional statutes have stripped state courts of jurisdiction. Unlike "cases under [the Bankruptcy Code]," over which federal courts possess exclusive jurisdiction, state and federal courts share concurrent jurisdiction over "all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code]." 28 U.S.C. § 1334(a)–(b). Indeed, a malicious prosecution claim predicated on conduct in an adversary proceeding does not fall within the federal courts' exclusive section 1334(a) jurisdiction. *See Wood v. Wood* (*In re Wood*), 825 F.2d 90, 92 (5th Cir. 1987) ("The [section 1334(a)] category refers merely to the bankruptcy petition itself, over which district courts (and their bankruptcy units) have original and exclusive jurisdiction."). Graber argues that the trial court lacks subject matter jurisdiction because federal law completely preempts the substance of Fuqua's malicious prosecution claim. No matter how categorized, Graber's argument for preemption is reducible to two propositions: (1) Congress intended to occupy the field of regulating abuses of the bankruptcy process, and purposefully chose to exclude state malicious prosecution claims; and (2) state malicious prosecution claims will impermissibly disrupt the uniformity of bankruptcy law. We disagree with both.[1]

In all preemption cases, our analysis must begin with a presumption that Congress did not preempt state law. *Great Dane Trailers*, 52 S.W.3d at 743; *see also Medtronic*, 518 U.S. at 485 ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). The presumption applies not

[1] Because we conclude that federal law does not preempt Fuqua's claim, we express no opinion on the separate question of whether preemption would operate to deprive the trial court of subject matter jurisdiction.

only to *whether* Congress preempted state law at all, but also to the *scope* of preemption. *Medtronic*, 518 U.S. at 485; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992). As noted by the United States Supreme Court:

> Under our constitutional system, there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction . . . . States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.

Kelly v. Wash. ex rel. Foss Co., 302 U.S. 1, 10–11 (1937) (internal quotations omitted). Thus, Congress's intent to preempt must be "clear and manifest" to overcome this presumption. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Beginning with this presumption, we address Graber's two arguments.

A

In general, federal law does not preempt a state malicious prosecution claim predicated on conduct occurring in standard federal civil actions. *See, e.g.*, *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 388–94 (3d Cir. 2002). But of course, the claim made in this case is not predicated on a normal suit—it is predicated on conduct occurring in bankruptcy. Thus, the determinative question here is simple: Did Congress intend to produce an exceptional preemption result when it enacted the Bankruptcy Code? Graber argues that the Bankruptcy Code's remedial scheme

evidences Congress's intent to exclusively occupy the field of regulating abuses of the bankruptcy process. But as an initial matter, Graber frames the scope of our inquiry too broadly. The relevant inquiry is not whether Congress contemplated remedies for abuses of the bankruptcy process generally, for that kind of blanket analysis ignores relevant distinctions between various bankruptcy processes, and it undervalues the presumption against preemption. Instead, we must determine the extent to which Congress contemplated remedies for abuse of a bankruptcy adversary proceeding, the particular action on which Fuqua based his malicious prosecution claim.[2]

Bankruptcy Code remedial provisions must be interpreted with reference to their source because Congress enacted the bankruptcy statutes according to two very different methods: some parts were essentially custom-built, others were not. In some places, Congress envisioned the need for unique processes without analogs in general federal litigation. For those areas, Congress created new processes for the specific purpose of bankruptcy. *See*, *e.g.*, 11 U.S.C. § 362 (2000) (automatic stay); *id.* § 301 (voluntary petitions); *id.* § 303 (involuntary petitions). But in many other places, Congress saw no need to treat bankruptcy any differently from general federal litigation. For those areas, Congress either imported existing federal rules or enacted almost identical provisions. *See, e.g.*, FED. R. BANKR. P. 7001–7087 (adversary proceeding rules). Bankruptcy remedies for abuse of process reflect this same dichotomy. When Congress created unique procedures, it simultaneously

[2] The adversary proceeding deserves specific preemption analysis because it is a principal bankruptcy process, separate from the remainder of a bankruptcy case. *See generally* 9 AM. JUR. 2D *Bankruptcy* §§ 22–24, 87, 706, 1229, 3782 (2006); 1 DANIEL R. COWANS, BANKRUPTCY LAW AND PRACTICE §§ 3.15, 3.18 (7th ed. 1998).

created unique remedial provisions. *See*, *e.g.*, 11 U.S.C. § 362(k)[3] (debtor's remedies for violation of automatic stay); *id.* § 303(i) (debtor's remedies for dismissed involuntary petitions). And when Congress merely imported general federal procedures, it simultaneously imported federal law's existing remedial schemes. *See* FED. R. BANKR. P. 9011 (mirroring Federal Rule of Civil Procedure 11); 1 COWANS, *supra*, § 3.15 ("The Bankruptcy Rules covering litigation were not made up specially for bankruptcy. They lean heavily upon the Federal Rules of Civil Procedure.").[4]

Therefore, the question of whether Congress intended to produce an exceptional preemption result when it enacted the Bankruptcy Code produces two answers. In the areas where Congress custom-built bankruptcy law, preemption is more likely because when Congress crafted new, unique provisions, it probably contemplated whether or not to exclude overlapping state law remedial schemes. But in the areas where Congress merely imported existing federal law without any significant change, preemption is improbable because such borrowing does not evidence an intent to change well-settled preemption law.

The issue in this case—remedies for abuse of an adversary proceeding—belongs to the latter category of imported remedial schemes. Graber and the dissent cite Federal Rule of Bankruptcy Procedure 9011 and Bankruptcy Code section 105(a) as evidence that Congress considered the need to remedy abuse of adversary proceedings and decided to exclude state actions for malicious prosecution. But the opposite is true. Congress said very little about remedies for abuse of an

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[3] The 2005 amendments to the Bankruptcy Code moved this provision from section 362(h) to section 362(k). Pub. L. No. 109–8, § 305(1)(B), (C), 119 Stat. 41 (2005). However, the substance is the same.

[4] "In general, adversary proceedings are more formal and grow ever closer to the litigation mode in other federal courts." 1 COWANS, *supra*, § 3.15.

adversary proceeding, and what little it said in Rule 9011 and Section 105(a) represents an implicit acceptance of state malicious prosecution claims like Fuqua's.

Bankruptcy Rule 9011, like Federal Rule of Civil Procedure 11, addresses the signing of papers and representations to bankruptcy courts and provides standards for the imposition of sanctions upon both attorneys and parties. *See* FED. R. BANKR. P. 9011; FED. R. CIV. P. 11. Because Rule 9011 is almost identical to Rule 11, courts often merge their substantive analysis of the rules. *See, e.g.*, *Citizens Bank & Trust Co. v. Case* (*In re Case*), 937 F.2d 1014, 1022–23 (5th Cir. 1991); *In re Commonwealth Sec. Corp.*, No. 06-30746-SGJ-7, 2007 WL 309942 (Bankr. N.D. Tex. Jan. 25, 2007). It is well settled that the Federal Rules of Civil Procedure, including Rule 11, do not preempt malicious prosecution claims predicated on federal civil actions. *See, e.g.*, *U.S. Express Lines*, 281 F.3d at 393; *Cohen v. Lupo*, 927 F.2d 363, 365 (8th Cir. 1991); *Tarkowski v. County of Lake*, 775 F.2d 173, 175 (7th Cir. 1985); *McShares, Inc. v. Barry*, 970 P.2d 1005, 1014 (Kan. 1998) ("Rule 11 can not abridge the substantive state law of malicious prosecution, nor was it adopted to serve as a surrogate for an action based upon a claim of malicious prosecution resulting from frivolous, harassing, or vexatious litigation."); *Del Rio v. Jetton*, 63 Cal. Rptr. 2d 712, 716–17 (Cal. Ct. App. 1997) ("Nothing in [R]ule 11 indicates an intent to occupy the entire field of groundless suits brought for malicious purpose, nor is there any conflict between Rule 11 and a damages action for such malicious prosecution."). As the Rule 11 advisory committee observed, "Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. . . . *Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process*." FED. R. CIV. P. 11 advisory committee's note (emphasis added). Thus, the

United States Supreme Court is "confident that district courts will resist the temptation to use [Rule 11] sanctions as substitutes for tort damages." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc*, 498 U.S. 533, 553 (1991).

Despite the fact that Rule 9011 mirrors Rule 11, and that Rule 11 does not preempt malicious prosecutions in normal federal civil actions, Graber still argues that Rule 9011 is evidence of Congress's intent to preempt malicious prosecutions in bankruptcy. The argument must assume that by taking Rule 11—a generic rule of civil procedure that Congress did not intend to have preemptive power, and which the cases hold does not—and placing it in the bankruptcy context, Congress somehow clearly evidenced its intent to give an old rule new preemptive status. This cannot be the case when neither Rule 9011 nor the bankruptcy rules as a whole bear evidence of such a changed intent. Congress did not custom-build this part of bankruptcy law. Instead, the opposite is true—it intended to import the federal rules framework at large. As the Advisory Committee itself said:

> These [Adversary Proceedings] rules are based on the premise that to the extent possible practice before the bankruptcy courts and the district courts should be the same. These rules either incorporate or are adaptations of most of the Federal Rules of Civil Procedure.

FED. R. BANKR. P. 7001 advisory committee's note. Because Rule 11 does not preempt state malicious prosecution claims normally, and because Congress intended to replicate that framework in bankruptcy adversary proceedings, Rule 9011 does not evidence Congress's intent to preempt malicious prosecution claims. Its importation militates, instead, directly against preemption. *See Bates*, 544 U.S. at 449 ("If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."); *Standard Oil Co. of N.J.*

v. United States, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.").

Likewise, Bankruptcy Code section 105(a) does not evidence Congress's intent to preempt malicious prosecution claims predicated on conduct in an adversary proceeding. *See* 11 U.S.C. § 105(a). Section 105(a) is another example of where, instead of custom-building a bankruptcy rule, Congress imported general federal law that does not preempt, and said nothing to change that result. Section 105(a) is located in the "General Provisions" chapter of the current Bankruptcy Code. U.S.C., tit. 11, ch. 1. The substance of this section has existed since at least 1898. *See* Laura B. Bartell, *Contempt of the Bankruptcy Court – A New Look*, 1996 U. ILL. L. REV. 1, 3–4 & n.15 (1996).[5] The section gives bankruptcy courts broad, general police powers:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

The United States Supreme Court recognized in *Chambers v. NASCO, Inc.* that federal courts hearing general civil actions possess this same power inherently. 501 U.S. 32, 43–46 (1991). And like Bankruptcy Rule 9011, which Congress imported from federal procedural law at large, section 105(a) is also a direct import. *See Jones v. Bank of Santa Fe* (*In re Courtesy Inns, Ltd., Inc.*), 40

[5] The 1898 Act gave the power to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act." Bartell, *supra*, at 4 n.15.

F.3d 1084, 1089 (10th Cir. 1994) ("We believe, and hold, that § 105 intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in *Chambers.* ") (citation omitted). The broad *Chambers* power does not preempt malicious prosecution claims in normal litigation, and the mere fact that Congress codified that power for bankruptcy cases did nothing to change its preemptive effect. For the same reasons that merely importing Rule 11 does not evidence Congress's intent to create an exceptional preemption result, importing the power recognized by *Chambers* does not either.

In addition to Rule 9011 and Section 105(a), Graber, the dissent, and cases like *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 915–916 (9th Cir. 1996), cite various other Bankruptcy Code provisions in support of preemption. These provisions do not evidence the requisite intent because they address custom-built areas of bankruptcy law, not adversary proceedings, and because they fall far short of evidencing the intent to occupy the *entire field* of sanctions for abuse of adversary proceedings that preemption requires.

Bankruptcy Code section 303 governs the use of involuntary petitions—a unique procedure that allows a person to initiate bankruptcy proceedings without the debtor's consent. 11 U.S.C. § 303(a)–(b). If an involuntary petition is filed in good faith, but dismissed, section 303(i) allows the court to award costs and fees to the debtor. *Id.* § 303(i)(1). If an involuntary petition is filed in bad faith and dismissed, section 303(i) allows the court to award costs, fees, and damages to the debtor. *Id.* § 303(i)(2). Graber and the dissent cite several cases holding that section 303(i) preempts malicious prosecution claims predicated on the filing of an involuntary petition. Indeed, the involuntary petition process is a custom-built area of bankruptcy that Congress crafted anew. *See*

Miles v. Okun (*In re Miles)*, 430 F.3d 1083, 1089–91 (9th Cir. 2005). Thus, it is more likely that Congress considered the need to deter misuse of the unique involuntary petition process it created, and more likely that it intended section 303(i) to be the exclusive remedy. But the process of filing the initial bankruptcy petition is very different from an adversary proceeding. By its own terms, section 303(i) applies only to the filing of an involuntary petition—it cannot apply to the initiation of an adversary proceeding. *See* 11 U.S.C. § 303. Congress did not custom-build the adversary proceeding rules like it did the involuntary petition process. Instead, for purposes of adversary proceedings, Congress merely imported the existing federal scheme, which allows state malicious prosecution claims.

Bankruptcy Code section 362 establishes another custom-built procedure: bankruptcy's automatic stay, which halts almost all types of creditor's actions against the debtor or the debtor's property. 11 U.S.C. § 362. For willful violations of the automatic stay, section 362(k) mandates the recovery of actual damages in cases of good faith, and punitive damages in "appropriate circumstances." *Id.* § 362(k). Section 362(k) sanctions only violations of the unique automatic stay, conduct that occurs outside of the bankruptcy proceedings. Because the automatic stay is another custom-built area of bankruptcy, its sanctions are more likely to preempt related state claims. But this provision does not evidence a preemptive intent related to adversary proceedings because the two areas—regulating the conduct of persons outside the proceeding and regulating the conduct of litigants inside an adversary proceeding—are so unrelated that an intent to preempt in one cannot evidence an intent to preempt the other.

Bankruptcy Code section 930 allows dismissal of a municipality's bankruptcy petition for "cause." *Id.* § 930. This section is not evidence that Congress considered individual remedies for misuse of the adversarial proceedings because this chapter applies to municipalities, not individual debtors' petitions. *See* U.S.C. tit. 11, ch. 9. In addition, section 930 never addresses the actions of outside parties like Graber; it looks only to the petitioning municipality. *See* 11 U.S.C. § 930.

Bankruptcy Code section 1112 governs dismissal of a Chapter 11 bankruptcy case, as well as conversion of a Chapter 11 case to another type of bankruptcy case. *Id.* § 1112. Section 1112 is not evidence that Congress considered remedies for misuse of the adversarial process because the dismissal/conversion triggers address the conduct of the bankruptcy petitioner and the well-being of the estate, not the conduct of outside parties like Graber. *See id.* § 1112(b)(4)(a)-(p).[6]

The last provision Graber cites is 28 U.S.C. § 1927, which deals with an attorney's liability for excessive court costs. This statute cannot support preemption of malicious prosecution claims in bankruptcy cases because it cannot be applied by bankruptcy courts. *See Courtesy Inns, Ltd.*, 40 F.3d at 1085–86 ("the bankruptcy court may not impose sanctions under § 1927") (citing *Perroton v. Gray* (*In re Perroton*), 958 F.2d 889 (9th Cir. 1992)).[7]

Thus, the only broad provisions that apply to adversary proceedings—Rule 9011 and section 105(a)—evidence not an intent to preempt, but rather an intent to preserve the existing framework

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[6] The 2005 amendments to the Bankruptcy Code moved this provision from 1112(b)(1)–(10) section to section 1112(b)(4)(a)–(p). Pub. L. No. 109–8, § 442(a), 119 Stat. 115 (2005).

[7] *But see* 1 COWANS, *supra*, § 3.16. If section 1927 could be applied, it would be analyzed like Rule 11 above, and would not support preemption. *See Fed. R. Civ. P.* 11 advisory committee's note (presuming that malicious prosecution claims will coexist with the imposition of section 1927 sanctions).

of federal procedure that does not preempt state malicious prosecution claims. In light of the well-established general rule that federal law does not preempt malicious prosecution claims predicated on conduct in federal court, we are unable to find the requisite evidence of an intent to preempt these same claims in bankruptcy.

One final argument concerning Congress's statutory scheme deserves attention. Graber says that allowing malicious prosecution claims may change the incentives for participation in bankruptcy. As the argument goes, a creditor planning on bringing an involuntary proceeding might not do so if the state malicious prosecution claim is available to bankruptcy debtors.[8] Graber says that Congress contemplated the incentives for participation in bankruptcy, and that states ought not be able to alter the balance Congress struck by adding the risk of malicious prosecution. This argument fails for the same reason that the Rule 9011 argument fails. The Federal Rules of Civil Procedure balance incentives and penalties for participation in general federal litigation, and malicious prosecution claims in that context present the same potential to alter litigants' decision-calculus. Yet Congress chose not to preempt the malicious prosecution claim in general federal litigation. To effectuate a change in this result for bankruptcy, Congress must speak more clearly than it has. For these reasons, Graber's claim that Congress intended to exclude malicious prosecution claims from the field of remedies for abuse of a bankruptcy adversary proceeding fails.

B

[8] Even if litigants actually consider such possibilities, there is good reason to doubt that the addition of a potential malicious prosecution action would have any appreciable effect on their decision calculus, particularly in light of what Graber says is an existing comprehensive remedial scheme. We do not impute to Congress such a strained conclusion without clearer evidence.

Graber next argues that preemption is warranted by the risk of disrupting uniformity in bankruptcy. We disagree for two reasons. First, we think the uniformity argument does not warrant preemption because Fuqua's lawsuit will not necessarily affect the law of bankruptcy, be it in Fuqua's particular case or in bankruptcy cases at large. By definition, Texas claims for malicious prosecution arise only after the underlying case reaches a final judgment and all appeals are exhausted. *See Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 208 (Tex. 1996) ("[A]n underlying civil suit has not terminated in favor of a malicious prosecution plaintiff until the appeals process for that underlying suit has been exhausted.").[9] When Fuqua filed his malicious prosecution claim in state court, the bankruptcy court controversy between Graber and Fuqua had reached a final, undisturbable result. A judgment had been entered in the adversary proceeding in favor of Fuqua, the judgment had been appealed, the appeal had been dismissed, and the time for filing any further appeals had expired. *See* FED. R. BANKR. P. 9021–24 (providing final judgment rules); 28 U.S.C. § 158 (providing for federal district court jurisdiction over appeals from bankruptcy court final judgments); *Smith v. Seaside Lanes* (*In re Moody*), 825 F.2d 81, 85 (5th Cir. 1987) ("[I]t is generally held that a separate adversary proceeding within the framework of the overall bankruptcy case is an appropriate 'judicial unit' for determining finality . . . . Thus, even though the bankruptcy case may continue, an order disposing of such a proceeding is appealable as a final order."). Therefore,

[9] In Texas, "[t]o prevail in a suit alleging malicious prosecution of a civil claim, the plaintiff must establish: (1) the institution or continuation of civil proceedings against the plaintiff; (2) by or at the insistence of the defendant; (3) malice in the commencement of the proceeding; (4) lack of probable cause for the proceeding; (5) termination of the proceeding in plaintiff's favor; and (6) special damages." *Tex. Beef Cattle*, 921 S.W.2d at 207.

nothing occurring in the malicious prosecution claim could disturb the matters already decided in Fuqua's adversary proceeding.[10]

Nor can it be said that the adjudication of Fuqua's malicious prosecution claim will affect federal bankruptcy law at large. The element of a malicious prosecution claim that most concerns preemption cases is probable cause, which Graber says might require state courts to interpret federal law. As the argument goes, a state court can never determine whether there was probable cause to bring an adversary proceeding without impermissibly interpreting federal bankruptcy law. But this is not always the case because state courts can determine that an adversary proceeding was brought without probable cause by interpreting *only state law*. Fuqua's situation illustrates this.

Graber's adversary proceeding alleged that Fuqua committed acts of fraud in a financial transaction. In bankruptcy adversary proceedings, "[t]he validity of a creditor's claim is determined by rules of state law," *Grogan v. Garner*, 498 U.S. 279, 283–84 (1991),[11] while issues like

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[10] The dissent argues that the bankruptcy court has issued no final order closing Fuqua's Chapter 7 case and that, therefore, Fuqua could still petition the bankruptcy court for remedies. Even if this was the case, there is no question that the adversary proceeding, which is the basis of the malicious prosecution claim, has closed and that the time for an appeal has expired. Further, Fuqua's claim is not preempted simply because some remedies may be available in federal court. *See Del Rio*, 63 Cal. Rptr. 2d at 717; *McShares*, 970 P.2d at 1016.

[11] The United States Supreme Court recently reiterated the important role of state substantive law in bankruptcy:

> Indeed, we have long recognized that the basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law. Accordingly, when the Bankruptcy Code uses the word "claim"–which the Code itself defines as a right to payment–it is usually referring to a right to payment recognized under state law. As we stated in *Butner*, [p]roperty interests are created and defined by state law, and [u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.

Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 451 (2007) (citations and internal quotations omitted). *Cf. Chapman v. Currie Motors, Inc.*, 65 F.3d 78 (7th Cir. 1995) (discussing federal jurisdiction over "an (continued...)

dischargeability are determined by the Bankruptcy Code. *Id.* at 284. Thus, bankruptcy courts first determine whether a claimed act constitutes fraud *under state law*, and if so, they then determine how that act affects dischargeability under federal law. *Id.* at 284 n.10. Suppose Graber made the following assertions in the adversary proceeding:

> Adversary Proceeding Claim Part 1: Under Texas law, Fuqua committed an act of fraud.
>
> Adversary Proceeding Claim Part 2: Because of that fraud, federal law requires that Fuqua's bankruptcy debt not be discharged in manner X for reasons A, B, and C.

To succeed in a later action for malicious prosecution, Fuqua might try to prove there was no probable cause as to Claim Part 2 concerning dischargeability. In that case, the state court would be interpreting federal law. But Fuqua could also win the probable cause element of his state action for malicious prosecution by arguing only the state law elements of Graber's adversary proceeding claim. Fuqua's argument in such a case would look like this:

> Malicious Prosecution Claim Part 1: I concede Adversary Proceeding Claim Part 2—that if there was an act of state fraud, everything Graber says about federal bankruptcy law is correct.
>
> Malicious Prosecution Claim Part 2: But nonetheless, the adversary proceeding claim was malicious because there was *no probable cause for the predicate state law fraud allegation*.

In the above example, the state court would need only determine if Graber had probable cause as to the act of fraud under state law; it would not have to interpret federal law to adjudicate the malicious prosecution claim. In those kinds of circumstances, state courts could not affect the

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[11] (...continued)
adversary proceeding based . . . solely on state law").

uniformity of bankruptcy laws. Instead, the state law of fraud would continue to control Fuqua and Graber's fate, both in the bankruptcy proceeding and in the malicious prosecution proceeding. Thus, Fuqua could litigate this suit without ever arguing a matter of federal law. We see no threat to uniformity in that situation.[12]

The second reason that preemption is not warranted by the risk of disrupting uniformity in bankruptcy is more fundamental: The uniformity argument for preemption is not triggered by the mere fact that a claim requires state courts to interpret federal bankruptcy law. It is true that, "[p]ursuant to Art. I, § 8, cl. 4, of the Constitution, Congress has power to enact bankruptcy laws that are uniform throughout the United States," *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 469 (1982), and that in many places Congress has effectively expressed its intention to exclude states from the business of interpreting bankruptcy law. *See* 28 U.S.C. § 1334(a) (providing for exclusive federal jurisdiction for "cases under [the Bankruptcy Code]"); *Yaquinto v. Segerstrom* (*In re Segerstrom*), 247 F.3d 218, 223–24 (5th Cir. 2001) ("It has long been established that federal bankruptcy law determines the scope of a debtor's bankruptcy estate." (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204–205 (1983))). However, the mere existence of Congress's power to enact uniform bankruptcy laws does not require that Congress actually exercise the power to abolish by preemption all disparate state laws affecting bankruptcy. *See Gibbons*, 455 U.S. at 469. "A bankruptcy law may be uniform and yet 'may recognize the laws of the State in certain

[12] While Fuqua might later raise an issue of federal law, he has not done so yet, and because his pleadings do not "affirmatively negate the existence of jurisdiction," the trial court was required to deny the plea to the jurisdiction. *See County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). Thus, even under a standard that required total avoidance of federal law, Fuqua's claim should have survived the plea to the jurisdiction.

particulars, although such recognition may lead to different results in different States.'" *Id.* (quoting *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918)). It is precisely because "[b]ankruptcy legislation is superimposed on rights and obligations created by the laws of the States," *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 170 (1946) (Frankfurter, J., concurring), that "uniformity does not require the elimination of any differences among the States." *Gibbons*, 455 U.S. at 469 (citing *Vanston*, 329 U.S. at 170 (Frankfurter, J., concurring)). As one court put it, "because the common law of the various states provides much of the legal framework for the operation of the bankruptcy system, it cannot be said that Congress has completely preempted all state regulation which may affect the actions of parties in bankruptcy court." *Miles*, 430 F.3d at 1092; *see also California v. ARC Am. Corp.*, 490 U.S. 93, 105 (1989) ("Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law . . . ."); 1 COWANS, *supra*, § 3.2(b) ("[N]ot all state laws which undertake to regulate the debtor-creditor relationship are nullified."). There is no more reason to question a state court's aptitude at applying federal law now than there has been for the last two hundred years. *Cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816) ("[T]he framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction."); *see also Claflin v. Houseman*, 93 U.S. 130, 142–43 (1876). Because Congress has yet to actually exercise its power to unify this aspect of bankruptcy and suppress the disparate state laws of malicious prosecution, the uniformity argument does not warrant preemption.

III

We are not convinced that the Bankruptcy Code evidences Congress's intent to preempt Fuqua's malicious prosecution claim, and we are not convinced that entertaining Fuqua's malicious prosecution claim will impermissibly interfere with the federal interest in uniform bankruptcy laws. Graber's preemption argument simply fails to fulfill the requirements of any recognized category of preemption. Congress did not specifically express an intent to preempt Fuqua's claim, and it did not create a statutory scheme that impliedly requires as much. Allowing Fuqua's claim to proceed in Texas courts neither conflicts with the federal laws that were expressed, nor does it hinder the advancement of the policies embodied therein. Because Congress was silent on the matter, we see no reason to discontinue state law's historic function of providing common law remedies for misconduct in federal courts. To be sure, "it is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide," *Rice v. Santa Fe ElevatorCorp.*, 331 U.S. 218, 230–231 (1947), and this case is no exception.[13] When faced with

[13] Contrary to Graber's suggestion, very few courts have addressed the particular issue confronting the Court today. The vast majority of cases cited by Graber involve involuntary petitions or automatic stays, not adversary proceedings. No matter what these cases say about the custom-built areas of bankruptcy, they do not control our analysis of preemption in the adversary proceeding context. At least two courts generally oppose preemption of malicious prosecution claims predicated on conduct in bankruptcy. *Paradise Hotel Corp. v. Bank of N.S.*, 842 F.2d 47 (3d Cir. 1988); *R.L. LaRoche, Inc. v. Barnett Bank of S. Fla.*, N.A., 661 So.2d 855 (Fla. Dist. Ct. App. 1995). While some jurisdictions hold that bankruptcy statutes preempt malicious prosecution claims predicated on the bringing of an adversary proceeding, *see, e.g.*, *MSR Exploration*, 74 F.3d 910 (9th Cir. 1996); *Glannon v. Garrett & Assocs., Inc.*, 261 B.R. 259 (D. Kan. 2001); *Koffman v. Osteoimplant Tech., Inc.*, 182 B.R. 115 (D. Md. 1995); *Lewis v. Chelsea G.C.A. Realty P'ship*, 862 A.2d 368 (Conn. App. Ct. 2004); *Ross v. Universal Studios Credit Union*, 115 Cal. Rptr. 2d 712 (Cal. Ct. App. 2002); *Idell v. Goodman*, 273 Cal. Rptr. 605 (Cal. Ct. App. 1990), the opinions of those jurisdictions do not bind us; nor do the arguments that they have accepted persuade us.

such a difficult case, we must err in favor of the states. We affirm the judgment of the court of appeals.

_____
Paul W. Green
Justice

OPINION DELIVERED: January 9, 2009

IN THE SUPREME COURT OF TEXAS

NO. 05-0303

THOMAS GRABER AND HOPKINS & SUTTER, PETITIONERS,

v.

RICHARD L. FUQUA, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued January 26, 2006

JUSTICE WAINWRIGHT, joined by JUSTICE BRISTER, JUSTICE MEDINA, and JUSTICE WILLETT dissenting.

The question posed is whether federal or state law should provide the remedy to a debtor allegedly sued wrongfully in an adversary proceeding in bankruptcy court. The predicate conduct for the adversary proceeding occurred prior to the debtor's filing of the bankruptcy petition, and all of the alleged wrongful conduct occurred in the bankruptcy proceeding. The Court holds that on these facts the debtor may pursue a Texas common law malicious prosecution claim in state court for harm allegedly caused during federal bankruptcy proceedings. Because federal law occupies the field of bankruptcy, and Congress created an analogue in the Bankruptcy Code to malicious prosecution of an involuntary Chapter 11 bankruptcy, but not for the voluntary Chapter 7 bankruptcy

at issue here, I would not create a new claim for abuses in Chapter 7 bankruptcies that Congress saw fit not to create. Debtors have adequate recourse for abuse of the bankruptcy process in the Bankruptcy Code and Rules.

I am also concerned that the Court's holding undermines the uniformity mandated for bankruptcy law by the United States Constitution, as under the Court's rationale all fifty states could overlay their state remedies on the bankruptcy proceedings and multiply the controversy for years beyond the controlled confines of the federal bankruptcy process. I therefore respectfully dissent.

I. Background

In 1988, Richard L. Fuqua, an attorney, filed a voluntary bankruptcy petition under Chapter 7 in the Bankruptcy Court for the Southern District of Texas, McAllen Division. A year later, Thomas Graber and the law firm in which he is a partner, Hopkins & Sutter (referred to collectively as Graber), filed an adversary action in the bankruptcy proceeding on behalf of Sunbelt Savings (Sunbelt) alleging that Fuqua conspired with a client, Richard Aubin, and others to defraud Sunbelt in a pre-petition real estate transaction. Fuqua alleges that during discovery in the adversary proceeding, Graber provided false and intentionally misleading information about him and caused a criminal referral to be made to the United States Department of Justice regarding Fuqua's involvement in the real estate transaction.

The Department of Justice intervened in the adversary proceeding, and the bankruptcy judge stayed the proceeding during the criminal investigation. The investigation resulted in the indictment of Fuqua and Aubin for bank and tax fraud in 1992. In 1993, the bankruptcy court discharged Fuqua's debts, but the adversary proceeding remained pending in the bankruptcy court. After a 1994

trial in the U.S. District Court for the Northern District of Texas, Fuqua was acquitted of criminal wrongdoing. The civil adversary proceeding resumed upon resolution of the criminal trial. After a three-day trial in 1996, the bankruptcy court granted a directed verdict in favor of Fuqua. The bankruptcy court entered judgment against Sunbelt on May 13, 1997. The U.S. District Court of the Southern District of Texas dismissed Sunbelt's appeal of the bankruptcy judgment on September 8, 1998, and there was no appeal of that dismissal.

On September 7, 2000, Fuqua filed this state malicious prosecution action in the 93rd District Court of Hidalgo County, Texas. Fuqua alleged that Graber "knowingly, maliciously, and wantonly acted without probable cause in initiating or procuring the civil adversary proceeding, as well as the criminal proceeding, against Fuqua." The district court granted Graber's motion for partial summary judgment dismissing the criminal malicious prosecution claim based on the statute of limitations. In his third amended answer, Graber filed a plea to the jurisdiction, arguing that the district court lacked subject matter jurisdiction to hear Fuqua's civil malicious prosecution claim because the claim was preempted by federal bankruptcy law. The district court granted Graber's plea to the jurisdiction and dismissed the suit on November 25, 2002. Fuqua appealed.

The court of appeals held that Fuqua's malicious prosecution claim did not interfere with the bankruptcy court's jurisdiction, and therefore, the state court maintained concurrent jurisdiction unless it was preempted by the Bankruptcy Code. 158 S.W.3d 635, 646. On the latter point, the court of appeals determined that there was no express preemption language in the Bankruptcy Code and that state jurisdiction was not preempted by federal bankruptcy law. *Id.* Accordingly, the court of appeals reversed and remanded the case for trial. *Id.* at 647.

II. Parties' Arguments

Graber argues the court of appeals erred in holding that Fuqua's malicious prosecution claim was not preempted, complaining that even the court of appeals itself twice recognized that "a majority of courts that have considered the preemptive nature of bankruptcy law in the context of state tort claims alleging violations of the bankruptcy process have found such claims to be preempted." *Id.* at 641, 643-44. According to Graber, federal law preempts Fuqua's claim because section 105 of the Bankruptcy Code and rule 9011 of the Federal Rules of Bankruptcy Procedure provide the only remedies for abuse of the bankruptcy process. Allowing such claims in state court, Graber adds, would undermine the uniformity, free access, and finality Congress intended in the bankruptcy process.

Fuqua counters that Congress did not intend federal bankruptcy law to preempt his state malicious prosecution claim.[1] He points to a state court's concurrent jurisdiction over claims that do not affect distribution of the debtor's assets. He adds that section 105 and rule 9011 cannot occupy the field of malicious prosecution because they only provide sanctions, not damages, for abuse of the bankruptcy process. Fuqua further argues that under Graber's reasoning, Fuqua is without a remedy for his damages because a malicious prosecution cause of action does not accrue

[1] The elements to prove a malicious criminal prosecution are: (1) a criminal prosecution commenced against the plaintiff, (2) the defendant initiated or procured that prosecution, (3) the prosecution terminated in the plaintiff's favor, (4) the plaintiff was innocent of the charges, (5) the defendant lacked probable cause to initiate the prosecution, (6) the defendant acted with malice, and (7) the plaintiff suffered damages. *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 792 n.3 (Tex. 2006).

The elements to prove the malicious prosecution of a civil claim are: (1) the institution or continuation of civil proceedings against the plaintiff, (2) by or at the insistence of the defendant, (3) malice in the commencement of the proceeding, (4) lack of probable cause for the proceeding, (5) termination of the proceeding in the plaintiff's favor, and (6) special damages. *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 207 (Tex. 1996).

until the appeals process for the underlying suit has been exhausted. Fuqua admits that he did not seek sanctions or any other remedy in the bankruptcy court for the alleged abuse of process, but maintains he could not have pursued a claim against petitioners in bankruptcy court because Sunbelt's appeal of the adversary proceeding was not dismissed until September 8, 1998, ten years after he filed his bankruptcy petition and five years after his debts were discharged. The record, however, contains no indication that the bankruptcy court issued a final order, and no evidence was presented that the clerk closed the bankruptcy proceeding.

III. Federal Preemption of State Law

Federal preemption of state law is grounded in the Supremacy Clause of the United States Constitution: "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Under the Supremacy Clause, if state law conflicts with federal law, the state law is preempted and "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The parties do not argue that federal law preempts state law expressly in this case. 158 S.W.3d at 639. *See Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001). Graber asserts that federal bankruptcy law impliedly preempts state law, either (1) because the scheme of federal regulation is sufficiently comprehensive to support a reasonable inference that Congress left no room for supplementary state regulation (field preemption), or (2) because the state law actually conflicts with federal remedies (conflict preemption). *See id.*

"The purpose of Congress is the ultimate touchstone" in every preemption case. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963). Accordingly, to discern whether

Congress manifested a clear intent to preempt state claims arising from abuse of the bankruptcy process, we consider the statute's language and structure, the context of its enactment, and the purpose of the statute as a whole as revealed through our "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 367 (Tex. 1998) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996)).

IV. Federal Law Occupies the Field of Bankruptcy and Preempts State Law.

The U.S. Constitution gives Congress alone the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. Congress passed the Bankruptcy Act of 1898 to govern bankruptcies, then overhauled and codified those statutes in 1978, and has since superceded much of the Bankruptcy Code of 1978 in the 1984 and 1986 amendments to the Code. Manuel D. Leal, *The Power of the Bankruptcy Court: Section 105*, 29 S. Tex. L. Rev. 487, 492 (1988). Congress granted jurisdiction over bankruptcy matters to the federal courts by sections 157 and 1334 of title 28 of the United States Code. *Celotex Corp. v. Edwards,* 514 U.S. 300, 307 (1995). This jurisdiction is exercised in the first instance by bankruptcy courts, which are divisions of federal district courts. *See Cox v. Zale Del., Inc.*, 239 F.3d 910, 917 (7th Cir. 2001).

Filing a bankruptcy petition vests broad and exclusive jurisdiction over the property of the debtor and his estate in the district court, and hence the bankruptcy court. *In re Garnett*, 303 B.R. 274, 277 (E.D.N.Y. 2003). Section 541(a)(1) defines the property of the estate to include "all legal

or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "This definition is unquestionably broad, its main purpose being to 'bring anything of value that the debtors have into the [bankruptcy] estate.'" *Lyon v. Eiseman (In re Forbes)*, 372 B.R. 321, 330-31 (B.A.P. 6th Cir. 2007) (alteration in original) (citing *Booth v. Vaughan (In re Booth),* 260 B.R. 281, 284-85 (B.A.P. 6th Cir. 2001)). These broad powers extend to both a debtor's estate and all transfers made within two years before the filing of the bankruptcy petition. *See* 11 U.S.C. §§ 541, 548(a)(1). All legal proceedings against the debtor or his estate are automatically stayed and subjugated to the bankruptcy proceeding. 11 U.S.C. § 362. The disposition of the debtor's property is governed by federal law, although a debtor's property interests are generally "created and defined by state law" unless a federal purpose requires otherwise. *Lyon*, 372 B.R. at 331 (citing *Butner v. United States*, 440 U.S. 48, 55 (1979)).

In the absence of explicit preemptive language, Congress's intent to supersede state law fully may be inferred when the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," when the Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or when "the object sought to be obtained by federal law and the character of the obligations imposed by it may reveal the same purpose." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982) (citations omitted). This form of preemption is a federal defense to state law claims and implicates choice of

law rather than choice of forum.[2] *See Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 391 (1986). Graber argues federal bankruptcy law impliedly preempts Fuqua's claims because the state law purports to regulate conduct "in a field that Congress intended the Federal Government to occupy exclusively," *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990), and because the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).[3] The federal interest in and control of bankruptcy may truly be said to have completely "occupied the field."[4]

A. Congress Authorized the Award of Actual and Punitive Damages, Attorneys' Fees, and Costs to Parties, as Appropriate, for Violation of Bankruptcy Statutes and Rules and Malicious Prosecution in Bankruptcy Proceedings.

Fuqua concedes that an action based on a frivolous or groundless claim could be preempted by the Bankruptcy Code and Rules, but he contends the remedial scheme of the Bankruptcy Code and Rules is inapposite to the purpose and remedies of a malicious prosecution claim. Graber argues Congress intended to supercede state law in this field by designing adequate remedies in section 105 and rule 9011 to deter abuse of the bankruptcy process. Fuqua also concedes that section

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[2] Under our pleading rules, Graber's assertion of preemption as a plea to the jurisdiction was sufficient to apprise Fuqua of the character of proof he would need to address the preemption issue, whether it be defensive or jurisdictional in nature. TEX. R. CIV. P. 94. *See Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546 n.8 (Tex. 1991).

[3] Congress has accommodated state police power to a limited degree in bankruptcy proceedings. For example, known as the "police power" exception to the automatic stay, the Bankruptcy Code states that filing a petition does not operate as a stay of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police and regulatory power, other than enforcement of a money judgment. 11 U.S.C. § 362(b)(4).

[4] The Court's indication that federal preemption of state law cannot be based on the absence of explicit preemption language in federal law (called "congressional silence") is curious. *See* ___ S.W.3d ___. Both the field and conflict preemption doctrines take effect only when such silence exists.

105 grants the bankruptcy court broad equitable powers, but urges that the section does not sufficiently address malicious prosecution. According to Fuqua, rule 9011 only addresses frivolous or groundless claims and mirrors Federal Rule of Civil Procedure 11, which has been held not to preempt state law actions for malicious prosecutions in federal court. *See U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 392-93 (3d Cir. 2002).

The authority bestowed on bankruptcy courts by federal law arms them with a broad array of remedies to regulate the conduct of parties, issue injunctive relief, and award sanctions and damages for maliciously initiating proceedings. The Bankruptcy Code "provides a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights." *E. Equip. & Servs. Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 120 (2d Cir. 2001). Other courts have concluded that this comprehensive system overrides state law claims for this type of abuse of the bankruptcy process.

"A debtor who believes a filing in bankruptcy is frivolous or a violation of the automatic stay occurred has a comprehensive scheme of remedies available in the federal courts. The existence of this comprehensive scheme precludes collateral attacks on such filings in state courts." *Glannon v. Garrett & Assocs., Inc.*, 261 B.R. 259, 264 (D. Kan. 2001) (quoted in *Greene v. Young*, 174 S.W.3d 291, 302 n.7 (Tex. App–Houston [1st Dist.] 2005, pet. denied)). Sections 105(a) and 362(k) and rule 9011 provide effective remedies under federal law and authority for bankruptcy courts to enjoin violations of law and to award damages to debtors harmed by bad faith and abusive conduct in bankruptcy proceedings. 11 U.S.C. §§ 105(a), 362(k); FED. R. BANKR. P. 9011(b)-(c).

Section 105(a) empowers bankruptcy courts.

> *The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title*. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or *to prevent an abuse of process*.

11 U.S.C. § 105(a) (emphasis added). Section 105 gave the bankruptcy courts "broad equitable powers to exercise [their] jurisdiction any time there is a threat to the successful rehabilitation of the estate." Manuel D. Leal, *The Power of the Bankruptcy Court: Section 105*, 29 S. TEX. L. REV. 487, 497 (1988) (citing *In re Stuart Glass & Mirror, Inc.*, 71 B.R. 332, 335 (Bankr. S.D. Fla. 1987)). The last phrase–"to prevent an abuse of process"–was added in 1986 to affirm that bankruptcy courts may take any action on their own and make any necessary determination to prevent an abuse of process and expedite bankruptcy cases. *Id.* at n.219 (citing Senator Orrin Hatch who apparently made the only statement in legislative history concerning the amendment). Under section 105(a), the court may raise the issue of good faith in considering motions of the parties. *Little Creek Dev. Co. v. Commonwealth Mortg. Corp. (In re Little Creek Dev. Co.)*, 779 F.2d 1068, 1071 n.1 (5th Cir. 1986).

Under section 362(k), any individual injured by a willful violation of a stay "shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k) (stating further that a good faith belief limits recovery to actual damages). Although this case does not concern violation of a bankruptcy stay, this section clearly shows that Congress considered the award of actual and punitive damages, in addition to fees and costs, and authorized ordering those awards as appropriate.

Rule 9011, analogous to Fed. R. Civ. P. 11, empowers bankruptcy courts to impose "an appropriate sanction upon the attorneys, law firms, or parties" that have presented to the court

pleadings, motions, or "other paper" containing allegations, factual contentions, or claims and defenses that generally have no evidentiary support and are not warranted by existing law.[5] Rule 9011 authorizes the award of reasonable expenses and attorneys' fees, monetary sanctions, or a penalty to the court. FED. R. BANKR. P. 9011(c).

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[5] Rule 9011 provides sanctions for frivolous and harassing filings:

> (b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances–
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
>
> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
>
> (1) How Initiated
> > (A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). . . If warranted, the court may award to the party prevailing on the motions the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.
>
> * * *
>
> (2) Nature of Sanction: Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated . . . [t]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

FED. R. BANKR. P. 9011(b)-(c).

Fuqua asserts that "any sanctions ordered may be payable *solely* to the court and not the party subjected to the frivolous or groundless claim" (emphasis added). He argues this as another reason bankruptcy statutes and rules need to be supplemented by state law to provide recourse to debtors for harm caused them in bankruptcy adversary proceedings. This is incorrect, as the rule authorizes awards of sanctions and damages to parties in the proceeding. Rule 9011(c) expressly states that the court "may award *to the party prevailing* on the motion" reasonable expenses and attorneys' fees. FED. R. BANKR. P. 9011(c)(1)(A) (emphasis added). It also authorizes orders "directing payment *to the movant* of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." *Id.* (c)(2) (emphasis added).

Fuqua's assertion that section 105 does not provide recovery of damages for maliciously bringing proceedings in bankruptcy is likewise off the mark. A number of courts have affirmed that section 105, although widely used for injunctive relief, authorizes the award of "any type of order, whether injunctive, compensative or punitive, as long as it is 'necessary or appropriate to carry out the provisions'" of the Bankruptcy Code. *Hardy v. U.S. (In re Hardy)*, 97 F.3d 1384, 1389 (11th Cir. 1996) (citing 11 U.S.C. § 105(a)). *See also McTyeire v. Hunt (In re McTyeire)*, 357 B.R. 898, 903 (Bankr. M.D. Ga. 2006). Section 105 authorizes a bankruptcy court to order payment of actual and puntive damages as well as attorneys' fees and costs. *Manion v. Providian Nat'l Bank*, 269 B.R. 232, 241-42 (D. Colo. 2001) (affirming the bankruptcy court's order requiring a holder of void deeds of trust to pay actual damages and attorneys' fees in an adversary proceeding); *Moratzka v. Visa U.S.A. (In re Calstar, Inc.)*, 159 B.R. 247, 261 (Bankr. D. Minn. 1993) (awarding money damages

for a violation of the automatic stay and stating that punitive damages, although generally available under section 105, were not warranted in the case). Leal, 29 S. TEX. L. REV. at 496.

Section 303(i) also provides a close analogue to a Texas common law malicious prosecution claim, authorizing awards to debtors for reasonable attorneys' fees, costs, and actual or punitive damages when the court dismisses an involuntary petition. 11 U.S.C. § 303(i). Although section 303(i) only applies to involuntary cases, it once again affirms that Congress recognized the wide panoply of available remedies for abuse of process and then associated sanctions and awards with selected violations of the Code and the Rules. Congress provided sanctions for certain violations of Bankruptcy Code provisions, injunctive relief for some, actual damages for others, and punitive damages for a few. The provisions implicated by a debtor's claim of malicious prosecution, section 105 and rule 9011, both provide sanctions and damages upon proper proof.

Because Congress has provided a comparable, if not exact, counterpart in federal bankruptcy law to Fuqua's sought-after remedies, his argument that recoveries in bankruptcy law are woefully inadequate loses considerable steam. The existence of the remedial provisions cited "suggests that Congress has considered the need to deter misuse of the process and has not merely overlooked the creation of additional deterrents." *MSR Exploration*, 74 F.3d at 915 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 252-54 (1993) (enforcement scheme in ERISA indicates Congress did not forget other remedies) and *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 54 (1987) (ERISA remedies preempt others, even if some possible remedies are left out)). If a Texas common law claim packs more wallop than the bankruptcy relief, then Congress presumably intended to provide a more limited remedy for the malicious filing of an adversary proceeding in a voluntary bankruptcy. The

fundamental vacancy in Fuqua's argument is the unsubstantiated presumption that bankruptcy laws necessarily must provide equivalent levels of recovery to the state common law claim.

Fuqua contends that, were we to hold his state malicious prosecution claim preempted, he would have no remedy because the bankruptcy court has discharged his debts and no longer has jurisdiction over his case. Section 350(a) states that after the estate is fully administered and the court has discharged the trustee, "the court shall close the case." Further, according to the bankruptcy rules, a court "shall enter *a final decree* closing the case." FED. R. BANKR. P. 3022 (emphasis added).

Neither a discharge of debts nor a dismissal closes the case; on the contrary, a bankruptcy case is not closed, and the bankruptcy court retains jurisdiction, until the final decree is entered on the docket sheet. *See In re Union Home and Indus., Inc.*, 375 B.R. 912, 917 (B.A.P. 10th Cir. 2007); *Sherman v. Sec. & Exch. Comm'n (In re Sherman)*, 491 F.3d 948, 967 (9th Cir. 2007); *Greenfield Drive Storage Park v. Cal. Para-Prof'l Servs., Inc. (In re Greenfield Drive Storage Park*), 207 B.R. 913, 918 (B.A.P. 9th Cir. 1997); *Singleton v. Countrywide Home Loans, Inc. (In re Singleton*), 358 B.R. 253, 256 (D.S.C. 2006) (holding that dismissal of a bankruptcy case does not deprive the court of jurisdiction; it must be closed); *In re Hasan*, 287 B.R. 308, 311 (Bankr. D. Conn. 2002) (holding that a debtor's voluntary dismissal did not close the case and that the bankruptcy court retained jurisdiction to impose sanctions on the debtor); *In re A.H. Robins Co.*, 219 B.R. 145, 149 (Bankr. E.D. Va. 1998). *See also* 9 COLLIER ON BANKR. § 5009.01 (15th ed. 2006). Once the bankruptcy case is closed, there is no longer a bankruptcy estate, and there can no longer be "related to"

jurisdiction. 9 COLLIER ON BANKR. § 5009.01. As such, the bankruptcy court only then loses jurisdiction.

Graber states that there is no order in the record closing Fuqua's Chapter 7 case. Fuqua does not assert that a final order was issued and has presented no evidence that his bankruptcy case was ever closed. *See A.M.S. Printing Corp. v. Wernick (In re Wernick)*, 242 B.R. 194, 196 (Bankr. S.D. Fla. 1999); *Edwards v. Sieger (In re Sieger)*, 200 B.R. 636, 639 (Bankr. N.D. Ind. 1996). If his case remains open, the bankruptcy court retains jurisdiction, and Fuqua could petition that court for appropriate remedies. Moreover, if the bankruptcy case has in fact been closed, Fuqua could petition the court to reopen it "to accord relief to the debtor." 11 U.S.C. § 350(b). Fuqua has not persuaded me that he would have no relief in bankruptcy.

Ultimately, Congress, not the state courts, should decide what incentives and penalties are appropriate to address litigation conduct in the bankruptcy proceedings and when those incentives or penalties should be used. *See Gonzales v. Parks*, 830 F.2d 1033, 1036-37 (9th Cir. 1987).

B. The Court's Recognition of a State Common Law Malicious Prosecution Claim for Adversary Proceedings Conflicts with Congress's Decision Not to Create Such a Claim for Voluntary Chapter 7 Bankruptcies.

"[B]ankruptcy principles come from federal rather than state law." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) (Easterbrook, J.) (citing *Cox v. Zale Del., Inc.*, 239 F.3d 910, 916 (7th Cir. 2001) (Posner, J.). In bankruptcy, "the debtor's protection and remedy remain[] under the Bankruptcy Act." *Kokoszka v. Belford*, 417 U.S. 642, 651 (1974) (holding superceded in part by statute). The "delicate balance of a debtor's protections and obligations during the bankruptcy procedure" have been fixed, modified, overhauled, and set by Congress over more than a century,

eminating from explicit constitutional authority to make the bankruptcy laws. *Kokoszka*, 417 U.S. at 651.

Congress provided a roadmap to its intent in the relevant provisions of the Bankruptcy Code. It includes both voluntary and involuntary bankruptcies under Chapters 7 and 11. *See* 11 U.S.C. §§ 301, 303. In section 303, Congress promulgated a statutory analogue to state law malicious prosecution claims for abuse of bankruptcy proceedings in involuntary cases. *Id.* Section 303(i) provides for recovery of "any damages proximately caused," including actual and exemplary damages, by filing an involuntary petition in bad faith. *Id.* By its language, section 303(i) remedies include the damages that may be recovered under Texas common law for malicious prosecution**.** *See, e.g.*, *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 798 (Tex. 2006) (allowing mental anguish damages); *Ellis County State Bank v. Keever*, 915 S.W.2d 478, 479 (Tex. 1995) (discussing sufficiency of the evidence for punitive damages). Courts have consistently held that section 303(i) preempts state law actions for malicious prosecution in involuntary bankruptcy proceedings.[6]

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[6] *See Miles v. Okun (In re Miles)*, 430 F.3d 1083, 1089 (9th Cir. 2005); *Glannon*, 261 B.R. at 264; *Koffman v. Osteoimplant Tech., Inc.*, 182 B.R. 115, 123-28 (D. Md. 1995); *Mason v. Smith*, 672 A.2d 705, 708 (N.H. 1996); *Sarno v. Thermen*, 608 N.E.2d 11, 18 (Ill. App. Ct. 1992); *Gene R. Smith Corp. v. Terry's Tractor, Inc.*, 257 Cal. Rptr. 598, 600 (Cal. Ct. App. 1989).

A minority of courts have refused to adopt this reasoning. *See Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47, 52 (3d Cir. 1988) (reasoning that because section 303(i) is not available where debtor has converted a Chapter 7 proceeding to a Chapter 11 proceeding, it cannot be an exclusive remedy for abuse of process and malicious prosecution claims); *R.L. LaRoche, Inc. v. Barnett Bank of S. Fla.*, 661 So. 2d 855, 859-64 (Fla. Dist. Ct. App. 1995). However, *Paradise Hotel* has been distinguished as the minority view. *See Shiner v. Moriarty*, 706 A.2d 1228, 1238 (Pa. Super. Ct. 1998). Further, a subsequent member of the court that issued *R.L. LaRoche* identified the decision's minority status in light of the development of the law in this area and encouraged his court to recede from that position. *Mullin v. Orthwein*, 772 So. 2d 30, 31 (Fla. Dist. Ct. App. 2000) (Gross, J., concurring) (distinguishing other cases in line with it as not being based on conduct occurring in bankruptcy).

Importantly, for this case and Fuqua's claim, Congress did not similarly create a vehicle for recovery of "all damages proximately caused" or exemplary damages for voluntary Chapter 7 proceedings. Instead, Congress created remedies to recover attorneys' fees and costs as sanctions. The extensive remedial provisions for involuntary petitions indicate that Congress did not ignore but considered sanctions, equitable remedies, and compensatory and exemplary damages in the bankruptcy scheme. *MSR Exploration*, 74 F.3d at 913. Where Congress includes damages provisions in one section of a statute but omits them in another section of the same statute, we presume Congress acted intentionally and purposefully in the disparate inclusion or exclusion. *Clay v. U.S.*, 537 U.S. 522, 528 (2003); *Duncan v. Walker*, 533 U.S. 167, 173 (2001). In this context, Congress's creation of sanctioning tools, albeit broad, rather than damages, speaks loudly to Congress's intent for conduct constituting malicious prosecution in voluntary Chapter 7 proceedings. By allowing Fuqua's Texas common law prosecution claim to proceed for actions that occurred entirely in bankruptcy, the Court, in effect, creates a malicious prosecution claim for voluntary Chapter 7 bankruptcies that Congress saw fit not to create.

There is no provision comparable to a Texas malicious prosecution claim directed specifically at the voluntary filings of a debtor or an adversary proceeding instituted by a creditor. There are, however, many other remedial provisions in the Code that could apply. *See, e.g.*, 11 U.S.C. § 362(k) (willful violation of automatic stays); 11 U.S.C. § 707(b) (dismissal for "substantial abuse"); 11 U.S.C. § 930(a) (dismissal under Chapter 9); 11 U.S.C. § 1112(b) (dismissal under Chapter 11); 28 U.S.C. § 1927 (liability for excessive costs for "unreasonably and vexatiously" multiplying proceedings). And like 303(i), section 362(k) has been held to preempt state law abuse

of process claims for violations of an automatic stay. *See E. Equip. & Servs. Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 120 (2d Cir. 2001) (preemption of jurisdiction); *Periera v. Chapman*, 92 B.R. 903, 908 (C.D. Cal. 1988); *Brandt v. Swisstronics, Inc. (In re Shape)*, 135 B.R. 707, 708-09 (Bankr. D. Me. 1992); *Koffman*, 182 B.R. at 123-28 (preemption holding based on both section 303(i) and section 362(k)); *Smith v. Mitchell Constr. Co.*, 481 S.E.2d 558, 561 (Ga. Ct. App. 1997). *See also Halas v. Platek*, 239 B.R. 784, 792 (N.D. Ill. 1999) (holding that because a claim for sanctions under section 362(k) is within the exclusive jurisdiction of federal courts, state court lacked subject matter jurisdiction over claim).

The existence of such an extensive remedial scheme indicates congressional intent for bankruptcy law to "occupy exclusively" the regulation of conduct amounting to malicious prosecution or abusive filings in the bankruptcy process. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). An overlay of fifty states' common law claims would damage or interfere with the federal scheme. In addition to the Bankruptcy Code's extensive remedial scheme indicating congressional intent, the constitutionally prescribed need for uniformity in the bankruptcy laws is a special feature that warrants preemption. *Id.*

C. The Required Uniformity of Bankruptcy Laws Mitigates Against Development of State Common Law Claims for Misconduct in Bankruptcy Proceedings.

The Constitution grants Congress the authority to establish "uniform Laws" on the subject of bankruptcies. U.S. CONST. art. I, § 8. Utilizing this power, Congress created comprehensive regulations on the subject of bankruptcy and vested original and exclusive jurisdiction over bankruptcy petitions in the federal district courts. 28 U.S.C. § 1334(a). Allowing state court actions

for abuse of the bankruptcy process conflicts with this goal of uniformity. "[T]he unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws is another indication that Congress wished to leave the regulation of parties before the bankruptcy court in the hands of the federal courts alone." *See MSR Exploration*, 74 F.3d at 915.

There are several reasons to preclude these types of state common law claims to ensure the uniformity of bankruptcy law. First, Congress's authorization of certain penalties for frivolous filings in its pervasive promulgation of bankruptcy laws "should be read as an implicit rejection of other penalties, including the kind of substantial damage awards that might be available in state court tort suits." *Gonzales*, 830 F.2d at 1036. Second, the ability to sue parties in bankruptcy in civil proceedings under state law that is inconsistent with the Bankruptcy Code would threaten the uniformity of federal bankruptcy law by potentially affecting parties' rights before the bankruptcy court. *See Gonzales*, 830 F.2d at 1035 (discussing a claim against debtor for maliciously filing a voluntary petition). Third, the threat of being sued in tort in state court could deter persons from exercising their rights in bankruptcy, for instance by making them reluctant to file an adversary proceeding. *See id.* at 1036; *MSR Exploration*, 74 F.3d at 916.

"While it is true that bankruptcy law makes reference to state law at many points, the adjustment of rights and duties within the bankruptcy process itself is uniquely and exclusively federal." *MSR Exploration*, 74 F.3d at 916. Moreover,

> It is very unlikely that Congress intended to permit the superimposition of state remedies on the many activities that might be undertaken in the management of the bankruptcy process . . . [T]he highly complex laws needed to constitute the bankruptcy courts and regulate the rights of debtors and creditors also underscore the need to jealously guard the bankruptcy

> process from even slight incursions and disruptions brought about by state malicious prosecution actions.

Id. at 914. Even what may be slight incursions could very well collectively and over time, with fifty different jurisdictions considering them, even in a well-intentioned fashion, undermine the uniformity and objectives of the federal bankruptcy system.

Fuqua argues that Congress intended state law to supplement this area of bankruptcy. I disagree and conclude that, based on the remedial scheme established and the need for uniformity, Congress intended to preempt state common law claims based on malicious proceedings in a bankruptcy case to avoid such claims presenting "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and to avoid undermining the constitutional mandate of "uniform Laws on the subject of Bankruptcies throughout the United States." *Hines*, 312 U.S. at 67. *See* U.S. CONST. art. I, § 8.

V. Preemption of Jurisdiction

Ordinarily, federal preemption operates as an affirmative defense to a plaintiff's state law claims, but does not deprive a state court of jurisdiction over those claims. *Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 427 (Tex. 2005) (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987)). There are, however, situations in which federal law may preempt conflicting state-court jurisdiction. *Longshoremen*, 476 U.S. at 388. *See also Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 547 (Tex. 1991). State court jurisdiction is affected only when Congress requires that claims be addressed exclusively in a federal forum. *Mills*, 157 S.W.3d at 425 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242-45 (1959)). Whether a trial court has subject matter

jurisdiction is a legal question we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

> It is clearly within Congress' powers to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution. Whether it has done so in a specific case is the question that must be answered when a party claims that a state court's jurisdiction is pre-empted.

Longshoremen, 476 U.S. at 388 (citation omitted). *See Mills*, 157 S.W.3d at 427; *Gorman*, 811 S.W.2d at 546. The United States Supreme Court refers to the divesture of state-court jurisdiction by federal law as "*Garmon* preemption." *Longshoremen*, 476 U.S. at 388-89, 391.

The bankruptcy courts' jurisdiction is established by sections 157 and 1334 of title 28 of the United States Code. *Celotex,* 514 U.S. at 307. Section 1334(a) states that "the district courts shall have original and exclusive jurisdiction of all cases under title 11," which refers to the bankruptcy petition itself. *Wood v. Wood (In re Wood),* 825 F.2d 90, 92 (5th Cir. 1987). Section 1334(b) states that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Therefore, although Congress expressed its intent to create an exclusive federal forum with respect to cases "under title 11," "[i]n other matters arising in or related to title 11 cases, unless the Code provides otherwise, state courts have concurrent jurisdiction." *Sanders v. City of Brady (In re Brady, Tex., Mun. Gas Corp.)*, 936 F.2d 212, 218 (5th Cir. 1991).

The parties do not dispute that Fuqua's malicious prosecution claim, or the adversary proceeding upon which it is based, is anything more than merely "related to" a title 11 case, as opposed to a case "under title 11." Thus, this is not the type of case for which Congress provided

explicit forum-preempting language. *See, e.g.*, *Mills*, 157 S.W.3d at 427-28 (referring to the holding in *Gorman*, 811 S.W.2d at 547-49, that state courts have no jurisdiction over certain ERISA claims because 29 U.S.C. § 1132(e)(1) provides that "the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter. . . .").

The lack of explicit forum-preempting language regarding Fuqua's claim does not mean, however, that Congress did not intend to establish an exclusive federal forum for claims based on abuse of the bankruptcy process. "'[T]he presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.'" *Mills*, 157 S.W.3d at 428 (quoting *Tafflin v. Levitt*, 493 U.S. 455, 459-60 (1990)). For instance, in *Garmon*, the U.S. Supreme Court held that because Congress had enacted such a "complex and interrelated federal scheme of law, remedy, and administration" in the National Labor Relations Act, "due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 243-44 (citation omitted). Similarly, in *Longshoremen*, the Court held that neither state courts nor federal courts had jurisdiction to hear claims over which Congress intended the National Labor Relations Board to have exclusive jurisdiction. 476 U.S. at 390-91. But these cases dealt with the unique federal scheme of the National Labor Relations Act and Congress's intent that both state and federal courts "defer to the exclusive competence of the National Labor Relations Board" to avert "the danger of state interference with national policy." *Longshoremen*, 476 U.S. at 390 (quoting *Garmon*, 359 U.S. at 245).

Assuming, as the parties concede, that this claim is "related to" a bankruptcy case, the claim is one of many for which Congress declined to provide exclusive jurisdiction in the federal courts. *See* 28 U.S.C. §§ 1334(b), 157 (establishing the federal courts' original, but not exclusive, jurisdiction over "related to" matters and "core proceedings"). The jurisdictional scheme created by Congress thus prevents me from concluding that Congress intended to create an exclusive federal forum for the claims made in an adversary proceeding. Consequently, only a preemption argument related to the choice of law is viable.

VI. Conclusion

Because Congress created an extensive remedial scheme in the Bankruptcy Code to address abuse of process in bankruptcy proceedings, and because the constitutional goal of "uniform [bankruptcy] laws . . . throughout the United States" could be undermined by allowing state law malicious prosecution actions based on the filing of an adversary proceeding, I would hold that such a claim is preempted by federal bankruptcy law. Preemption operates in this case not to deprive the state court of jurisdiction, but as an affirmative defense to Fuqua's claims. Congress intended to supersede state law claims for malicious prosecution of the bankruptcy process, not to divest state courts of jurisdiction over such claims. I would affirm the court of appeals' judgment that the district court erred in dismissing this case for lack of subject matter jurisdiction, but I would reverse the court of appeals' judgment that a Texas common law malicious prosecution claim may be predicated on conduct that occurred entirely in the bankruptcy court and which the Bankruptcy Code's extensive remedial and sanction provisions address.

J. Dale Wainwright
Justice

OPINION DELIVERED: January 9, 2009

IN THE SUPREME COURT OF TEXAS

NO. 05-0653

GILBERT KERLIN, INDIVIDUALLY, GILBERT KERLIN, TRUSTEE, WINDWARD OIL & GAS CORP., AND PI CORP., PETITIONERS,

v.

CONCEPCION SAUCEDA, ET AL., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued April 22, 2008

JUSTICE O'NEILL delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE JOHNSON joined.

JUSTICE BRISTER filed a concurring opinion, in which JUSTICE HECHT, JUSTICE MEDINA ,and JUSTICE WILLETT joined.

In 1829, the State of Tamaulipas, Mexico, recognized the claims of Padre Nicolas Balli and his nephew, Juan Jose Balli, to Padre Island. Since then, the island's ownership has been the subject of numerous legal disputes, including the present one. *See, e.g., U.S. v. 34,884 Acres*, No. C.A. 142 (S.D. Tex. 1948), *aff'd sub nom De Lourett v. Kerlin*, 182 F.2d 750 (5th Cir. 1950); *State v. Balli*, 190 S.W.2d 71 (Tex. 1944); *Havre v. Dunn*, No. 6515 (103rd Dist. Ct., Cameron County, Tex. June 29, 1928). In this case, more than 275 descendants of Juan Jose Balli sued Gilbert Kerlin, individually and as trustee, as well as his wholly owned companies, Windward Oil & Gas Corp. and

PI Corp., asserting that Kerlin had defrauded them of oil and gas royalties and other interests in Padre Island. We hold that the Ballis' claims were not subject to statutory tolling and, accordingly, are time-barred. We therefore reverse and render judgment for the defendants.

I. Background

In 1829 the State of Tamaulipas recognized the claims of Padre Nicolas Balli and his nephew, Juan Jose Balli, to what is now known as Padre Island. When Padre Nicolas died, his interest passed by devise to his seven nieces and nephews, including Juan Jose. In 1830, Padre Nicolas's heirs partitioned the island, leaving Juan Jose with the northern four-sevenths of the island and the other heirs with the southern three-sevenths. On the same day, Juan Jose conveyed his interest to Santiago Morales. Several months later, Morales and Juan Jose signed a rescission agreement after Morales became concerned about the clarity of Juan Jose's title. Despite the rescission agreement, however, Morales later mortgaged part of the property and conveyed the remaining portion of the property to Jose Maria Tovar. The rescission agreement, in large part, formed the basis for the Ballis'[1] claims in this suit to an existing interest in Padre Island. In the 1840s, the other Padre Nicolas heirs conveyed their interests in the southern half of the island to Nicolas Grisanti.

The court of appeals' opinion sets out in some detail the history of the Ballis' claims and the various suits over title to Padre Island. *See* 164 S.W.3d 892. For purposes of our discussion, however, suffice it to say that by the early 1900s the Ballis' interests in the island under Juan Jose Balli's title had largely disappeared, either through conveyances or adverse judgments, and a federal

[1] We refer to Juan Jose Ballis' heirs collectively as "the Ballis."

court had resolved various title disputes by awarding possession of the island to a number of parties. *See Grisanti v. Am. Trust Co. of N.J.*, No. 18 (C.C.S.D. Tex. Nov. 16, 1905).

In 1923, Lizzie Havre filed a trespass to try title suit against three of the defendants who had been awarded possession in *Grisanti*: Pat F. Dunn, Sam A. Robertson, and W. E. Callahan. Dunn and the other defendants cross-claimed for title to and possession of all of Padre Island, except for the southernmost 7,500 acres. The Balli heirs were cited by publication, but did not appear. The district court ultimately granted title and possession of Padre Island, but for the southernmost 7,500 acres, to Sam A. Robertson and W. E. Callahan. Two of the cross-defendants timely filed a bill of review, which remained pending until the late 1930s.

In 1937, Gilbert Kerlin's uncle, Frederick Gilbert, was contacted by several people who had discovered evidence of an agreement to rescind the 1830 sale between Morales and Juan Jose Balli. Frederick Gilbert formed a partnership with them to pursue a claim to Juan Jose's interests in the island based upon the rescission agreement's existence. Gilbert put his nephew, a New York attorney, in charge of the venture, and Kerlin traveled to Brownsville to locate Juan Jose's heirs and purchase their interests. Kerlin contacted Primitivo Balli, the patriarch of the family, who agreed to assist him in securing all of Juan Jose's interests from the various heirs. Kerlin told the heirs that he was obtaining the deeds to clear title to Padre Island, and that each deed would reserve a 1/64th of 1/8th royalty in the grantor. The heirs allege Kerlin also assured them they would receive some compensation if he received anything through the deeds. Kerlin, as trustee, obtained eleven general warranty deeds from the heirs, each containing a reserved royalty interest.

At some point, Kerlin and Gilbert decided to pursue other claims to Padre Island independent of their agreement with the persons who had uncovered the Morales rescission agreement, and they obtained a number of other titles that had been cut off by the *Havre v. Dunn* judgment. Kerlin sought to vindicate all of those claims by obtaining a new trial and pursuing a cross-action in *Havre v. Dunn*. His attorney, F. W. Seabury, filed the motion in the name of Kerlin, the heirs of Juan Jose, and two other *Havre v. Dunn* defendants. The Ballis were not informed of the pending cross-action, and Seabury never communicated with them about it.

On February 28, 1940, Kerlin, Gilbert, and Seabury met with the opposing parties to discuss settlement. During the meeting, Seabury argued that the deeds from the Balli grantors were valid and proposed that his "group" should receive forty percent of Padre Island. The case did not settle at that time, but in 1942, Seabury submitted a written settlement proposal under which the Kerlin interests would receive 25,542.6 acres. The proposal suggested that 7,444 acres comprised "acreage that was never divested out of Juan Jose Balli on any theory of the case."[2] The parties ultimately reached a settlement, and a hearing on the motion for new trial was set for November 9, 1942. Kerlin, who was serving in the army at the time, obtained a three-day pass to attend the hearing. At the hearing, a stipulation was filed under which Kerlin was to receive the mineral interests in 1,000 acres of Padre Island located in Nueces County and fee simple title to 20,000 acres of land in the southern division of the island. During the three days he was in Texas, Kerlin, individually and in his capacity as trustee, executed reconveyance deeds to the Ballis. The Ballis were never informed

[2] This contention was based not on the rescission agreement but upon an alternative theory that Juan Jose had only conveyed to Morales "one-half league" of the land he inherited and retained 7,444 acres for himself.

of the deeds, nor were the deeds ever recorded or delivered. Kerlin also visited one of the Ballis, but he did not mention the *Havre v. Dunn* settlement.

Under the settlement stipulation, the parties were required to execute cross-conveyance deeds to each party's respective acreage. One of the parties to the settlement wrote to another that Seabury had agreed not to give the Ballis any recordable instrument that could cast a cloud on the parties' title, and Gilbert advised Seabury that the Ballis' interest would "die in Kerlin." After the settlement stipulation was executed, Seabury filed a motion to dismiss the Ballis' cross-action in *Havre v. Dunn*.

Some thirteen years later, in 1953, Primitivo Balli wrote two letters to Kerlin requesting documents showing his interest in Padre Island. Kerlin responded that he had received no title under the Ballis' deeds. He did not tell Primitivo Balli about the reconveyance deeds, or that *Havre v. Dunn* had been settled. The next year, Kerlin wrote Primitivo that he had been unable to establish that Juan Jose had not sold all of his interest in the island, and that his heirs consequently had no basis to claim any interest. Another eight years passed and, in 1961, Kerlin sold the 20,000-acre surface tract for more than $3.4 million. He also conveyed all of his mineral interests in the island to PI Corp., his wholly owned company. Another of Kerlin's wholly owned companies, petitioner Windward Oil & Gas Corp., acquired one of Kerlin's partner's mineral interests in the island.

In 1985, some thirty-two years after Primitivo Balli's inquiry and twenty-four years after Kerlin sold his interest, Connie Sauceda, a descendant of one of the Balli grantors, contacted Kerlin to inquire about the mineral interests reserved in the Balli deeds. Kerlin told her that the deeds were

invalid, and that she would have the burden of proof in an expensive, time-consuming lawsuit to prove otherwise.

Eight years later, in February 1993, some of the present Balli parties sued Kerlin, Windward, and PI Corp.[3] Ultimately, more than 275 other Balli heirs joined in the action. The Ballis alleged claims for breach of contract, breach of fiduciary duty, fraud, and conspiracy to commit fraud and breach of fiduciary duty. They sought damages, declaratory relief, the imposition of a constructive trust, and attorneys fees. Kerlin raised several affirmative defenses, including that the Ballis' claims were time barred by the statute of limitations and laches. After a two-month trial, the jury found that Kerlin was estopped from contesting the validity of the deeds executed by the Balli heirs; that the deeds reserved a 1/64 of a 1/8 royalty interest in the Ballis' favor; that Kerlin and PI Corp. breached fiduciary duties they owed the Ballis with respect to their reserved royalty interests; that Kerlin conspired with Seabury to commit fraud and breach the fiduciary duty Seabury owed the Ballis in settling *Havre v. Dunn*; and that Kerlin acquired 7,500 acres of land in his own name for the Ballis' benefit which he failed to share with them.

Regarding Kerlin's limitations defense and the Ballis' claim that his absence from the state tolled the statute's running, the jury found that Kerlin had not been present in the state for either a two- or four-year period between the date of the *Havre v. Dunn* settlement and the date this suit was filed. In addition, the jury found that Kerlin fraudulently concealed the facts and circumstances of the settlement and fraudulently concealed that he was receiving royalty payments that belonged to

[3] We generally refer to the defendants collectively as "Kerlin," although in some contexts we refer to Gilbert Kerlin individually.

the Ballis. Finally, the jury found that Kerlin was not physically present in the state when wrongdoing occurred that formed the basis of the Ballis' claims.

Because some courts have held that limitations is not subject to statutory tolling unless a nonresident committed all or part of a contractual breach or tort here, the Ballis moved to set aside the latter finding, contending that Kerlin's presence in the state when wrongdoing occurred was established as a matter of law. *See, e.g.*, *Howard v. Fiesta Tex. Show Park, Inc.*, 980 S.W.2d 716, 723 (Tex. App.—San Antonio 1998, pet. denied); *Wyatt v. Lowrance*, 900 S.W.2d 360, 362 (Tex. App.—Houston [14th Dist.] 1995, writ denied). The trial court granted the Ballis' motion. Based on the other jury findings, the trial court rendered judgment in the Ballis' favor for unpaid royalties, mineral lease rentals, and prejudgment interest and attorneys fees. The trial court imposed a constructive trust on an undivided 37.5% mineral interest, but denied the Ballis' request for an equitable accounting. The court of appeals affirmed except for the trial court's ruling denying an accounting, which it reversed and remanded to the trial court for further proceedings.[4] 164 S.W.3d at 903. We granted Kerlin's petition for review to consider the issues presented. 51 Tex. Sup. Ct. J. 445, 457–58 (Feb. 18, 2008). We begin with the threshold issues regarding limitations and fraudulent concealment, as their resolution is potentially dispositive of the parties' remaining claims.

II. Limitations

Statutes of limitation operate to prevent the litigation of stale claims; they

[4] After Kerlin's petition for review was filed, Kerlin and a group of plaintiffs who had reached a settlement filed a motion asking us to sever the equitable accounting claim and vacate that portion of the court of appeals' judgment. We granted that motion.

> "afford plaintiffs what the legislature deems a reasonable time to present their claims and protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. The purpose of a statute of limitations is to establish a point of repose . . . ."

S.V. v. R.V., 933 S.W.2d 1, 3 (Tex. 1996) (quoting *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990)). Kerlin contends the Ballis' breach of contract, fraud, and breach of fiduciary duty claims are barred by the four-year statute of limitations, and that the two-year statute bars their conspiracy claims. The Ballis maintain that the jury's fraudulent concealment findings and the tolling statute preclude the application of limitations in this instance. We first consider whether Kerlin's fraudulent concealment of the Ballis' entitlement to royalty payments and the details of the *Havre v. Dunn* settlement prevented limitations from running.

A. Fraudulent Concealment

The jury found that Kerlin fraudulently concealed the fact that he was receiving royalty proceeds belonging to the Ballis, and that he fraudulently concealed the "facts, details, and circumstances" of the *Havre v. Dunn* settlement. Kerlin contends the jury's findings must be disregarded because, as a matter of law, the Ballis could have timely discovered the existence of their claims through the exercise of reasonable diligence. We agree.

A defendant's fraudulent concealment of wrongdoing may toll the running of limitations. *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001). Fraudulent concealment will not, however, bar limitations when the plaintiff discovers the wrong or could have discovered it through the exercise of reasonable diligence. *Id.*; *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 531 (Tex. 1997);

Nichols v. Smith, 507 S.W.2d 518, 519 (Tex. 1974). In *HECI Exploration Co. v. Neel*, oil and gas royalty owners sued their lessee for failing to advise them of the lessee's successful suit against an adjoining operator for damages to the common field. 982 S.W.2d 881 (Tex. 1998). In evaluating the discovery rule's applicability to the royalty owners' claims, we noted that royalty owners are not entitled to "make[] no inquiry for years on end," and then sue for contractual breaches that could have been discovered within the limitations period through the exercise of reasonable diligence. *Id*. at 887–88. Because several sources of information are available to royalty owners about potential damage to their mineral resources, including their lessees, Railroad Commission records, and visible operations on adjoining property, we held that reasonable diligence would likely reveal any harm, and the discovery rule did not apply. *Id.* at 886–87. Like fraudulent concealment, the discovery rule does not apply to claims that could have been discovered through the exercise of reasonable diligence. While the discovery rule differs from fraudulent concealment in that its applicability is determined on a categorical basis, *HECI* is nevertheless instructive in this case.

After the *Havre v. Dunn* settlement, Kerlin advised the Ballis that their claims were worthless. *Havre v. Dunn*'s dismissal and Kerlin's receipt of more than 20,000 acres in fee simple and 1,000 mineral acres were matters of public record more than forty years before the Ballis filed this lawsuit. The Ballis were on notice that the warranty deeds their predecessors executed contained a royalty reservation, yet they never received any royalties. As a matter of law, the Ballis could have discovered the existence of any claims before limitations expired through the exercise of reasonable diligence. Consequently, unless statutory tolling applies, their claims are time barred.

B. Statutory Tolling

Kerlin argues that the trial court erred in setting aside the jury's findings that he was not present in the state when any portion of the tortious acts occurred. Alternatively, he contends the tolling statute violates the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, to the extent that it applies to the claims against him, by forcing him either to consent to general jurisdiction in Texas or forego the benefits of statutes of limitation.[5] The Ballis respond that no evidence supported the jury's answers to the questions the trial court disregarded, and that the constitutional authority Kerlin cites is inapposite. Because we conclude that the tolling statute does not apply in these circumstances, we need not resolve either of those issues.

Section 16.063 of the Texas Civil Practice and Remedies Code provides that "[t]he absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person's absence." TEX. CIV. PRAC. & REM. CODE § 16.063. Thus, unless Kerlin was somehow present in the state for more than four years since the *Havre v. Dunn* settlement, limitations has not run on the Ballis' claims against him.[6]

A little more than forty years ago, in *Vaughn v. Deitz*, 430 S.W.2d 487 (Tex. 1968), we considered the interplay between the tolling statute's substantively equivalent precursor, former article 5537, and article 2039a, now codified at section 17.062 of the Civil Practice and Remedies

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[5] The Attorney General has submitted an amicus brief contending that the statute does not violate the Commerce Clause, and urging us to decide the case on alternative grounds. *See Van Devender v. Woods*, 222 S.W.3d 430, 432 (Tex. 2007) ("Judicial restraint cautions that when a case may be decided on a non-constitutional ground, we should rest our decision on that ground and not wade into ancillary constitutional questions.").

[6] The tolling statute plainly does not apply to the corporate defendants, Windward Oil & Gas Corp. and PI Corp., as it is undisputed that these Texas corporations have never been absent from the state.

Code, which permits substituted service on a nonresident involved in an automobile accident in this state by serving the chairman of the State Highway Commission. The narrow issue we decided was "whether Article 5537 . . . applies in a case where substituted service of process is available under the provisions of Article 2039a." *Id.* at 488. We held that it did. *Id.*

Article 2039a provided that

> [t]he acceptance by . . . a person who was a resident of this State at the time of the accrual of a cause of action but who subsequently removes therefrom . . . of the rights, privileges and benefits extended by law to such persons of operating a motor vehicle . . . within the State of Texas shall be deemed equivalent to an appointment by such nonresident . . . of the Chairman of the State Highway Commission of this State . . . to be his true and lawful attorney and agent upon whom may be served all lawful process in any civil action or proceeding . . . hereafter instituted against said nonresident . . . growing out of any accident, or collision in which said nonresident . . . may be involved while operating a motor vehicle . . . within this State, . . . and said acceptance or operation shall be a signification of the agreement of said nonresident . . . that any such process against him . . . served upon said Chairman of the State Highway Commission . . . shall be of the same legal force and validity as if served personally.

Act of May 8, 1959, 56th Leg., R.S., ch. 502, § 1, 1959 Tex. Gen. Laws 1103, 1103–04 (codified at TEX. CIV. PRAC. & REM. CODE § 17.062). Article 2039a thus created a binding legal presumption that nonresidents, by driving on Texas roadways, had appointed the chairman of the State Highway Commission their agent for service of process in lawsuits arising from motor vehicle accidents within the state. We concluded that article 5537, section 16.063's precursor, "refer[red] to the absence of the defendant from or presence within the territorial limits of the state," and the availability of substituted service on the Highway Commission chairman was irrelevant to that inquiry. *Deitz*, 430 S.W.2d at 490. Accordingly, limitations was tolled during the driver's absence. *Id.*

We did not consider the effect of the general longarm statute in *Deitz*. Just as article 2039a deemed the Highway Commission chairman the agent for service of process for nonresident motorists in suits stemming from in-state accidents, the general longarm statute provides that "the secretary of state is an agent for service of process on a nonresident who engages in business in this state . . . in any proceeding that arises out of the business done in this state . . . ." TEX. CIV. PRAC. & REM. CODE § 17.044(b). But unlike article 2039a, in addition to providing for substituted service, the general longarm statute specifically addresses a nonresident defendant's presence within the state's territorial limits for purposes of personal jurisdiction; specifically, the statute provides that a nonresident does business "in this state" if, among other acts, the nonresident contracts with a Texas resident and either party is to perform in whole or in part here, or the nonresident commits a tort in whole or in part in this state. TEX. CIV. PRAC. & REM. CODE § 17.042. Of course, the longarm statute only affords in personam jurisdiction if "jurisdiction accords with federal due-process limitations." *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 575, 569 (Tex. 2007) (citing *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002); *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990)). But if a nonresident is amenable to service of process under the longarm statute and has contacts with the state sufficient to afford personal jurisdiction, as was the case with Kerlin, then we can discern no reason why a nonresident's "presence" in this state would not be established for purposes of the tolling statute.

In this case, the jury found that Kerlin was receiving royalty payments that rightfully belonged to the Ballis from January 1, 1966, until February 8, 1991, and that he continued to deceive

the Ballis about the *Havre v. Dunn* settlement from its execution until the same date. Thus, whether or not Kerlin was constructively present in Texas because he was subject to service of process via the secretary of state, he was present by doing business in this state as the statute defines that term. Because Kerlin was doing business here and was thus not absent from Texas, the tolling statute does not apply and limitations bars the Ballis' claims. Because the Ballis' claims are time barred, we need not address Kerlin's other arguments.

III. Conclusion

The record conclusively establishes that the Ballis could have discovered Kerlin's wrongful conduct through the exercise of reasonable diligence. In addition, the statute of limitations was not tolled because, under the general longarm statute, Kerlin was present in the state. Accordingly, the statute of limitations bars the Ballis' claims. We reverse the court of appeals' judgment and render judgment for Kerlin.

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Harriet O'Neill
Justice

OPINION DELIVERED: October 10, 2008

IN THE SUPREME COURT OF TEXAS

NO. 05-0653

GILBERT KERLIN, INDIVIDUALLY, GILBERT KERLIN, TRUSTEE, WINDWARD OIL & GAS CORP., AND PI CORP., PETITIONERS,

v.

CONCEPCION SAUCEDA, ET AL., II, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued April 22, 2008

JUSTICE BRISTER, joined by JUSTICE HECHT, JUSTICE MEDINA, and JUSTICE WILLETT, concurring.

I concur in the Court's judgment. I understand the Court's reluctance to overrule one of our cases, but 40 years ago Justices Pope, Greenhill, and Steakley were right that *Vaughn v. Deitz* was wrongly decided.[1] Our "absent from the state" statute arose in 1841, a long time before minimum-contacts analysis did; as almost every other state has decided, a person whose minimum contacts

[1] 430 S.W.2d 487, 491 (Tex. 1968) ("The Texas tolling statute . . . is not unique or different from those of other states, almost all of which have held that the presence or absence of a defendant must be solved in terms of jurisdiction over the person.") (Pope, J., dissenting).

make them amenable to suit in a state cannot fairly be said to be "absent from the state."[2] Indeed, such a construction would face serious constitutional problems.[3]

It is unclear why the Court is afraid to say so. No one has argued that we should distinguish rather than overrule *Vaughn* for a very good reason: it is impossible. Both the long-arm business statute here and the long-arm motorist statute in *Vaughn* are part of the same chapter in the Civil Practices and Remedies Code, and both make nonresidents amenable to suit in Texas. Indeed, one can sue a nonresident motorist under either: as a party to a collision,[4] or as one who has conducted business by "commit[ting] a tort in whole or in part in this state."[5] Does the Court mean to say today that limitations is tolled under this Code's section 16.063 if the plaintiff serves the Secretary of State,[6] but not if the plaintiff serves the Transportation Commission Chairman?[7]

But the court of appeals' opinion also purports to say a lot about several other legal doctrines (there are 95 headnotes in the Southwestern Reporter), some of which we have not addressed in a very long time, and every one of which the court of appeals misapplied. If experienced judges can

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[2] *Id*.

[3] *See Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 891-93 (1988) (holding states cannot condition limitations statutes on requirement that nonresidents appoint a local agent for service).

[4] TEX. CIV. PRAC. & REM. CODE § 17.062(a).

[5] *Id.* § 17.042(2).

[6] *See id.* § 17.044(a).

[7] *See id.* § 17.062(a).

make such mistakes, others may follow and the jurisprudence of the state become disoriented.[8] I would straighten a few of these out.

The primary mistake made by the courts below was forgetting that the transaction on which this suit is based was a *sale.* The heirs of Juan Jose Balli (nephew of the Roman Catholic priest after whom Padre Island is named) sold any interest they might have in that island in 1938 to Gilbert Kerlin in 11 duly recorded quitclaim deeds,[9] retaining only a 1/512th interest[10] in any minerals:

> KNOW ALL MEN BY THESE PRESENTS that the undersigned, [each of the Balli heirs], for and in consideration of the sum of $10.00 cash in hand to us paid by Gilbert Kerlin, trustee . . . and other valuable considerations, the receipt of all of which is hereby acknowledged and confessed, have GRANTED, SOLD AND CONVEYED and by these presents do GRANT, SELL AND CONVEY, unto the said Gilbert Kerlin, trustee, all of our undivided interest in and to all that certain tract of land situated in the counties of Cameron, Willacy, Kenedy, Kleberg and Nueces, in the State of Texas, commonly known as PADRE ISLAND. . . . It being our intention to convey all the interest which we have in the hereinabove described premises, and each and every part thereof, by reason of our being the lawful heirs of the said Juan Jose Balli, irrespective of the acreage or quantity thereof, save and except that there is specifically reserved to us a one-sixty-fourth (1/64th) of the royalty of one-eighth (1/8th) of any and all oil and/or gas or other minerals in, on or under our pro rata interest in the above described premises.

Keeping this simple fact in mind, all of the Plaintiffs' claims — and the 15 years of litigation that have followed — collapse in a heap.

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[8] *See* TEX. GOV'T CODE § 22.001(a)(6) ("The supreme court has appellate jurisdiction . . . extending to all questions of law arising in . . . any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.").

[9] Apparently 12 deeds were signed but only 11 were recorded as one appeared to be a duplicate. *See* 164 S.W.3d 892, 905.

[10] The deeds reserve "a one-sixty-fourth (1/64th) of the royalty of one-eighth (1/8th) of any and all oil and/or gas or other minerals . . . ," yielding a 1/512th royalty interest.

The Heirs Had Nothing to Sell

Juan Jose Balli sold his interests in Padre Island to Santiago Morales in 1830. This Court so held in 1944 in *State v. Balli*.[11] Balli's heirs have never lived on Padre Island, never worked it, never paid taxes on it. Their sole claim to title — that Balli and Morales rescinded their sale — was rejected by this Court in *State v. Balli.*[12]

But even assuming that holding was not binding on these heirs, any claim the heirs had to Padre Island was extinguished by a default judgment in 1928 in *Havre v. Dunn*. There, all Balli heirs known and unknown (the ancestors and privies of all current claimants) were served by publication in a case regarding title to these parts of Padre Island. When none of the Balli heirs appeared, all were defaulted. One non-Balli claimant filed a motion for new trial within the two-year period for setting aside a default served by publication,[13] but none of the Balli heirs did. Thus any interest the heirs held in Padre Island was extinguished in 1928, ten years before they met Gilbert Kerlin.

Estoppel By Deed Does Not Apply

The courts below disregarded these facts based on an "estoppel by deed" — that because Kerlin bought quitclaim deeds from the heirs and used them in the hope of gaining something thereby, he was estopped to claim that they conveyed him nothing.[14] While we have not written much about

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[11] *See* 190 S.W.2d 71, 81 (Tex. 1944) ("On January 19, 1830, Juan Jose Balli . . . conveyed to Santiago Morales his original one-half of Padre Island, together with one-half league more that he had acquired by inheritance from his uncle, the Priest Nicolas Balli.").

[12] *Id*. at 87 ("It may be inferred from these proceedings that Balli cleared his title to the satisfaction of Morales.").

[13] *See* TEX. R. CIV. P. 329(a).

[14] 164 S.W.3d at 915–16.

estoppel by deed in a long time, the 2003 RESTATEMENT (THIRD) OF PROPERTY describes at least two reasons why estoppel by deed has nothing to do with this case:

> Under the doctrine of estoppel by deed, a purported transfer of land that the transferor does not own becomes enforceable and takes place automatically if the land is later acquired, but only if the deed represents to the grantee that title of a specified quality is being conveyed, which most warranty deeds but few quitclaim deeds do.[15]

This case does not involve after-acquired title, no Balli heir having bought or inherited any part of Padre Island in over 170 years. Even if they had, the quitclaim deeds they gave Kerlin did not warrant title, so estoppel by deed could never apply.[16]

Relying on a court of civil appeals case from 1892, the court of appeals extended estoppel by deed to the much broader proposition that "'all parties to a deed are bound by the recitals therein.'"[17] But even assuming that is true, the heirs' deeds contained no recitals of ownership or title; they were mere quitclaims.[18] While the deeds reserved a 1/512th royalty, Kerlin never denied that reservation;

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[15] RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 6.1, comt. f (2003).

[16] *See Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 770 (Tex. 1983) ("[W]hen one conveys land by warranty of title, or in such a manner as to be estopped to dispute the title of his grantee, a title subsequently acquired to that land will pass *eo instante* to his warrantee, binding both the warrantor and his heirs and subsequent purchasers from either."); *Robinson v. Douthit*, 64 Tex. 101, 105 (1885) (finding estoppel by deed because donor's deed was "neither in form nor substance a mere quitclaim"); *see also* RESTATEMENT (FIRST) OF PROPERTY §§ 166, 167 (noting that "a quitclaim deed . . . affords no foundation for either an estoppel by deed or an equitable transfer"); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 311.1, at 583–84 (noting estoppel by deed is likely inapplicable to a quitclaim); M. Benjamin Cowan, *Venue for Offshore Environmental Crimes: The Seaward Limits of the Federal Judicial Districts*, 49 VAND. L. REV. 825, 856 n.165 (1996) ("Quitclaim deeds by definition contain no warranties of title, and as such are categorically excepted from the doctrine of estoppel by deed."); Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 HARV. L. REV. 729, 745 n.52 (1972) ("[E]stoppel by deed is invoked in law when there is an attempted transfer by warranty deed.").

[17] 164 S.W.3d at 915 (quoting *Wallace v. Pruitt*, 20 S.W. 728, 728–29 (Tex. Civ. App.—Corpus Christi 1892, no writ).

[18] *See Geodyne Energy Income Prod. P'ship I-E v. Newton Corp.*, 161 S.W.3d 482, 486 (Tex. 2005) ("A warranty deed to land conveys property; a quitclaim deed conveys the grantor's rights in that property, if any.").

he was trying to deny that the heirs had any interest to convey *before* the reservation, a matter as to which the quitclaim deeds were silent. As nothing about Kerlin's claim was inconsistent with the deeds, the courts below erred in holding they created title in the heirs.

The Heirs' Royalty Claim Is Against Someone Else

But even assuming all this could be ignored and the heirs held a 1/512th royalty, they have sued the wrong man. The heirs' claim for royalties lies against the operators who have been producing minerals from those properties since 1938. That was not Kerlin; he released any interest he had in those same properties in 1942. The lands Kerlin got in the 1942 settlement were in southern Padre Island and Nueces County — lands Juan Jose Balli never even arguably owned. The heirs' tiny royalty interest did not follow Kerlin wherever he went; if the heirs have a royalty claim, it is against someone else.

The Settlement Did Not Affect the Heirs' Claims

But even assuming the heirs had some interest to claim against Kerlin, Kerlin's 1942 settlement in *Havre v. Dunn* did not touch it. "In order to effectively release a claim in Texas, the releasing instrument must 'mention' the claim to be released."[19] Kerlin released a number of claims he had bought from others in the *Havre v. Dunn* settlement, but the settlement documents make no mention of releasing claims arising through the Balli heirs.

The heirs' only evidence that the settlement involved their claim is an unaccepted settlement demand sent by Kerlin's attorney, F.W. Seabury, asking for 7,500 acres "[f]or the Juan Jose interest."

[19] *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991).

But that wasn't for the heirs — Kerlin had *bought* the "Juan Jose interest" for himself, the heirs retaining only a tiny royalty. Moreover, a settlement offer in Texas courts is "not admissible to prove liability for or invalidity of [a] claim or its amount."[20] The court of appeals held Kerlin had waived this objection by testifying about the offer after it was admitted;[21] but since the trial court had granted him a running objection, he "was entitled to defend [him]self by explaining, rebutting, or demonstrating the untruthfulness of the objectionable evidence without waiving [his] objection."[22] As a matter of law, Kerlin got nothing for the heirs' claims in the settlement documents, and there is no evidence otherwise.

The heirs gained nothing from the settlement of *Havre v. Dunn* because they never appeared or made any claims in the case. The claims Kerlin made were his own, which he had bought and owned outright; he could neither have made nor settled the heirs' tiny mineral claim *because he did not own it*.

Kerlin Was Not the Heirs' Fiduciary

Like any other buyer, Kerlin owed his sellers (the heirs) no fiduciary duty after buying their interests.[23] The court of appeals located a fiduciary duty in the duty a holder of executive rights owes

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[20] TEX. R. EVID. 408.

[21] 164 S.W.3d at 920.

[22] *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 4 (Tex. 1986).

[23] *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997) ("[T]o impose [a fiduciary] relationship in a business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit.").

to royalty owners.[24] But this duty is limited to benefits that accrue from a mineral *lease*, not a *sale*;[25] as Texas law has long recognized, leasing minerals imposes duties that selling them does not.[26] Texas law has never required an owner who is selling a mineral interest to negotiate a sales price for royalty owners who are *not* selling. The court of appeals inexplicably held that Kerlin violated a fiduciary duty by not giving the Ballis some of what he got from selling his own interest rather than theirs. There is no such duty.

Having Your Own Attorney is not a Conspiracy

Nor could Kerlin be liable for conspiring with Seabury, his own attorney, to commit fraud or breach the latter's fiduciary duty to the heirs *because the heirs were never Seabury's clients*. It is undisputed Seabury never met or spoke with any of the Balli heirs; how exactly could he have become their attorney? And if he was not their attorney, how exactly could failing to disclose something to them be fraud or breach a fiduciary duty? It is true that Seabury filed an answer in *Havre v. Dunn* in the name of each of the heirs, but it has long been the rule that an assignee (Kerlin) can sue in the name of his assignors (the heirs).[27] Because the heirs had been named and served by publication in

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[24] 164 S.W.3d at 916; *see Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984) ("[T]he duty of the executive ... requires the holder of the executive right . . . to acquire for the non-executive every benefit that he exacts for himself."); *Schlittler v. Smith*, 101 S.W.2d 543, 545 (1937).

[25] *In re Bass*, 113 S.W.3d 735, 744 (Tex. 2003).

[26] *See HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 889 (Tex. 1998) (citing *Danciger Oil & Ref. Co. of Tex. v. Powell*, 154 S.W.2d 632, 635 (Tex. 1941)) ("The decision in *Danciger* drew a distinction between oil and gas *leases* and *conveyances* with a reservation of mineral interests. The obvious purpose of a mineral lease is for the lessee to conduct exploration and drilling within a defined period of time. That is not the case with conveyances of mineral interests." (citation omitted)).

[27] *Tex. Mach. & Equip. Co. v. Gordon Knox Oil & Exploration Co.*, 442 S.W.2d 315, 316 (Tex. 1969).

Havre v. Dunn, it was perfectly proper for Seabury's bill of review seeking to reopen that suit to be filed in their names, even though the title claims (if any) now belonged to Kerlin. As Seabury was not the heirs' attorney, he owed them no fiduciary duty or duty to disclose anything that occurred.

Conclusion

Recent years have seen a number of suits in South Texas seeking to reopen title claims to lands that have been dormant for decades or centuries.[28] The court of appeals' opinion here will go a long way toward encouraging such suits, should someone make the mistake of considering it a correct statement of Texas law. I would disabuse them of that notion.

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Scott Brister
Justice

OPINION DELIVERED: August 29, 2008

[28] *See, e.g.*, *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742 (Tex. 2003); *Aguillera v. John G. and Marie Stella Kenedy Mem'l Found.*, 162 S.W.3d 689, 692 (Tex. App.—Corpus Christi 2005, pet. denied).

IN THE SUPREME COURT OF TEXAS

NO. 05-0721

SSP PARTNERS AND METRO NOVELTIES, INC., PETITIONERS,

v.

GLADSTRONG INVESTMENTS (USA) CORPORATION, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued March 20, 2007

JUSTICE HECHT delivered the opinion of the Court.

In Texas, the seller of a defective product is subject to strict liability for damages the product causes even though the defect was not his fault, but he is generally entitled to indemnity from the manufacturer by statute[1] and by common law.[2] Is he entitled to indemnity from an upstream supplier other than the manufacturer? Not, we hold, by statute, and not under the common law without showing that the upstream supplier was at fault. We also hold that corporations cannot be held liable

[1] TEX. CIV. PRAC. & REM. CODE § 82.002(a) ("A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.").

[2] *Aviation Office of Am., Inc. v. Alexander & Alexander of Tex., Inc.*, 751 S.W.2d 179, 180 (Tex. 1988) (per curiam) ("The only remaining vestiges of common law indemnity involve purely vicarious liability or the innocent product retailer situation."); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 432 (Tex. 1984) ("Comparative causation does not affect the right of a retailer or other member of the marketing chain to receive indemnity from the manufacturer of the defective product when the retailer or other member of the marketing chain is merely a conduit for the defective product and is not independently culpable."); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 819 (Tex. 1984) ("An . . . indemnity right survives in products liability cases to protect the *innocent* retailer in the chain of distribution.").

for each other's obligations merely because they are part of a single business enterprise. For reasons different from the court of appeals',[3] we remand the case to the trial court for further proceedings.

I

The parents of a five-year-old boy killed in a house fire sued SSP Partners and Gladstrong Investments (U.S.A.) Corp. on a claim of product liability, alleging that the fire was started by a WAX-brand disposable butane lighter with a defective child-resistant mechanism, sold by SSP and designed, manufactured, and marketed by Gladstrong USA. SSP sought indemnity from Metro Novelties, Inc., one of its suppliers of WAX lighters, and SSP and Metro both sought indemnity from Gladstrong USA. Before trial, the parents settled with Gladstrong USA and SSP for $1.6 million each, and SSP settled its indemnity claim against Metro for $800,000. Because SSP's and Metro's positions are aligned here, we refer to them collectively as SSP except when necessary to distinguish between them.

Gladstrong USA moved for summary judgment on SSP's indemnity claims. Statutory indemnity under chapter 82 of the Texas Civil Practice and Remedies Code is owed only by a manufacturer,[4] defined as "a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product".[5] Gladstrong USA asserted that there was no evidence it manufactured WAX lighters or that it sold the lighter in question. In response, SSP argued that Gladstrong USA was a "producer" of WAX lighters within the ordinary meaning of that word and therefore a "manufacturer" under the statutory definition; that it was an apparent manufacturer with the same statutory duty; that it should be deemed to have been a manufacturer under industry standards and federal law; and that it should be liable with the actual manufacturer

[3] 169 S.W.3d 27 (Tex. App.—Corpus Christi 2005).

[4] TEX. CIV. PRAC. & REM. CODE § 82.002(a).

[5] *Id.* § 82.001(4).

because they were part of a single business enterprise. As for common law indemnity, SSP argued that upstream distributors other than the manufacturer must indemnify downstream distributors. The parties' arguments thus raised six issues:

- Regarding statutory indemnity:
  - Was Gladstrong USA a "manufacturer" of WAX-brand lighters as defined by the statute?
  - Should Gladstrong USA be deemed by federal law and industry standards to have been a "manufacturer" as defined by statute?
  - Is an entity liable as a manufacturer if it is part of a "single business enterprise" with a manufacturer?
  - Is an apparent manufacturer of a product a "manufacturer" as defined by statute?
- Regarding common law indemnity:
  - Must upstream sellers indemnify downstream sellers for product liability?
  - Did Gladstrong USA sell the lighter that caused the accident?

The record establishes the following facts. WAX lighters are made in China by Tianjin Sico Lighters Company, Limited and exported exclusively by Gladstrong Hong Kong, both Chinese companies.[6] Gladstrong Hong Kong designed and patented the lighters' safety wheel and instructed Tianjin on construction of the lighters. Gladstrong Hong Kong has sometimes referred to itself as the manufacturer of the lighters for promotional purposes and in obtaining a Uniform Product Code required for sales in the United States.

Gladstrong Hong Kong owns Gladstrong USA, a California corporation, which imports, promotes, and distributes the lighters in the United States, sharing the profits with its parent. Of the two companies' employees, all but one belong to the same family, and Gladstrong Hong Kong holds Gladstrong USA out as its "branch office".

[6] SSP also sued Tianjin for indemnity, but the trial court severed those claims from this case. The trial court denied SSP's motions to join Gladstrong Hong Kong in the litigation.

Metro, a Texas corporation, sells WAX lighters to SSP, a Texas general partnership, which retails them through its Circle K convenience stores. Circle K stores sell WAX lighters, identified by a unique Uniform Product Code that Gladstrong Hong Kong owns and by their distinctive labels, markings, and slender shape. The deceased child's aunt bought two lighters at one of SSP's Circle K stores. One of the lighters was allegedly destroyed in the fire. The other bore the WAX-brand UPC, label, and model number GIL-02 ("GIL" stands for Gladstrong Investments, Limited), and had the slim shape of a WAX-brand lighter.

After the child's death, Gladstrong USA sent out safety recall notices to purchasers of WAX lighters, stating that the "Consumer Product Safety Commission has tested these lighters and found they violate federal regulations pertaining to child safety [and] found the child safety mechanism in these lighters to be ineffective." No one else sent recall notices regarding WAX lighters. Gladstrong Hong Kong paid for the recall.

The trial court granted Gladstrong USA's motions for summary judgment, and SSP appealed. The court of appeals implicitly rejected SSP's arguments that Gladstrong USA was, or by federal law could be deemed to be, the manufacturer of the lighter for purposes of statutory indemnity.[7] The court held that an apparent manufacturer — which the court defined as "one who puts out, as its own product, chattel manufactured by another"[8] — could be liable for common law indemnity[9] (an argument SSP did not make) but not for statutory indemnity,[10] and that there was some evidence Gladstrong USA was an apparent manufacturer.[11] The court also held that one entity cannot be liable

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[7] The court of appeals mentioned both arguments but addressed neither. 169 S.W.3d at 36; *id*. at 42 (op. on reh'g).

[8] *Id*. at 38.

[9] *Id* at 42.

[10] *Id*. at 39-40.

[11] *Id.* at 42.

as part of a single business enterprise if the other entities in the enterprise are not parties to the case.[12] The court reversed in part and remanded the case for further development of the record.[13]

SSP and Gladstrong USA both petitioned this Court for review.

II

We first consider whether Gladstrong USA is liable for indemnity under chapter 82 of the Texas Civil Practice and Remedies Code.

A

Although a seller of a defective and unreasonably dangerous product may be liable, along with the manufacturer, for physical harm caused to the consumer,[14] chapter 82 requires the manufacturer to indemnify an innocent seller against losses arising out of a products liability action.[15] Section 82.002(a) imposes that obligation only on manufacturers, not on other sellers.[16] As already noted, a manufacturer is defined by section 82.001(4) as "a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler" of a product,[17] while a seller

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[12] *Id*. at 38; *id.* at 42-44 (op. on reh'g).

[13] *Id.* at 42.

[14] *E.g.*, *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334-335 (Tex. 1998) ("This Court has adopted the products liability standard set forth in section 402A of the Restatement (Second) of Torts. Section 402A states: (1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.").

[15] TEX. CIV. PRAC. & REM. CODE § 82.002(a).

[16] *Id.*

[17] *Id.* § 82.001(4) ("'Manufacturer' means a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce.").

is defined by section 82.001(3) as someone who commercially distributes a product.[18] Thus, as we have previously observed, "all manufacturers are also sellers, but not all sellers are manufacturers."[19]

SSP argues that because Gladstrong USA imports WAX-brand lighters from Gladstrong Hong Kong in China, it "produces" them, as that word is commonly understood, and is therefore a manufacturer. We do not disagree that the dictionary meaning of a producer is broad enough to encompass distributors, but to equate them in the statute would destroy all distinction between manufacturers and sellers. If all sellers were manufacturers because all sellers are producers, then the indemnity obligation would be unlimited; everyone in the distribution chain would owe everyone else indemnity, contrary to the statute's stated purpose of requiring indemnity only by manufacturers. The word "producer" cannot be read to confound the statute; rather, the word's meaning in the statutory definition is confined by the words that surround it: "designer, formulator, constructor, rebuilder, fabricator, . . . compounder, processor, or assembler"[20] — that is, someone involved in making a product.[21] Gladstrong USA imports lighters; it has nothing to do with making them. We have no difficulty concluding that Gladstrong USA was not a manufacturer for purposes of statutory indemnity.

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[18] *Id*. § 82.001(3) ("'Seller' means a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.").

[19] *General Motors Corp. v. Hudiburg Chevrolet, Inc.* 199 S.W.3d 249, 256 (Tex. 2006).

[20] TEX. CIV. PRAC. & REM. CODE § 82.001(4).

[21] *See Hilco Elec. Coop. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003) ("[T]he rule of *ejusdem generis* . . . provides that when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation.").

B

SSP argues that the Federal Consumer Product Safety Act defines a "manufacturer" to include an importer,[22] reflecting a common commercial understanding, and so should section 82.001(4). But the purpose of that Act is to protect consumer safety,[23] not to adjust liabilities among distributors. Imposing safety standards on everyone that introduces a product into the American marketplace, importers and manufacturers alike, is obviously important to consumer safety. Imposing a no-fault indemnity obligation only on importers and not other sellers is certainly not essential to a fair allocation of responsibility. The fact that Congress has chosen to impose product safety requirements on importers in no way suggests that the Legislature has chosen to require importers to indemnify other sellers from products liability actions. As different as the two statutory schemes are, the federal Act's treatment of importers as manufacturers suggests nothing about the scope of the indemnity obligation under chapter 82.

C

SSP argues that even if Gladstrong USA was not a manufacturer of WAX-brand lighters, it is nevertheless liable for statutory indemnity because it and Gladstrong Hong Kong, which did manufacture the lighters, operated as a "single business enterprise". The single business enterprise liability theory on which SSP relies was put forward by the court of appeals in *Paramount Petroleum Corp. v. Taylor Rental Center*.[24] There the court stated:

> [W]hen corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose, each constituent corporation may

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[22] 15 U.S.C. § 2052(a)(11) (2006) ("The term 'manufacturer' means any person who manufactures or imports a consumer product.").

[23] *Id*. § 2051(b) ("The purposes of this chapter are (1) to protect the public against unreasonable risks of injury associated with consumer products; (2) to assist consumers in evaluating the comparative safety of consumer products; (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.").

[24] 712 S.W.2d 534 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

> be held liable for debts incurred in pursuit of that business purpose. Factors to be considered in determining whether the constituent corporations have not been maintained as separate entities include but are not limited to the following: common employees; common offices; centralized accounting; payment of wages by one corporation to another corporation's employees; common business name; services rendered by the employees of one corporation on behalf of another corporation; undocumented transfers of funds between corporations; and unclear allocation of profits and losses between corporations.[25]

SSP asserts that it offered evidence of all these factors.[26]

SSP does not contend that Gladstrong USA and Gladstrong Hong Kong are jointly liable as participants in what Texas law calls a joint venture or joint enterprise[27] (not to be confused with single business enterprise), the essential elements of which are an agreement, a common purpose, a community of pecuniary interest, and an equal right of control.[28] Nor does SSP contend that liability should be imposed on Gladstrong USA by disregarding its structure as a separate corporation — that is, by piercing the corporate veil or holding it to be the alter ego of Gladstrong Hong Kong. We have held that the limitation on liability afforded by the corporate structure[29] can

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[25] *Id.* at 536.

[26] SSP summarizes its evidence as follows. Kin Chung Li and his wife and daughter own Gladstrong Hong Kong, which owns Gladstrong USA, whose sole purpose is to promote Gladstrong Hong Kong's business in the United States. Li is president of both companies and approves all their decisions, including hiring and salaries. He considers Gladstrong USA a branch office of Gladstrong Hong Kong, and he considers the United States his home. Gladstrong USA's employees are paid by Gladstrong Hong Kong, and all except one is part of the Li family. The two companies share accounting functions, and funds are transferred between them, though the allocation of revenues and profits is unclear. Gladstrong Hong Kong funded the WAX lighter recall.

The court of appeals stated that Gladstrong USA held itself out as the manufacturer of WAX lighters. 169 S.W.3d at 38-39. Gladstrong USA contends that this misstates the record, that only Gladstrong Hong Kong held itself out as the manufacturer.

[27] *See Texas Dep't. of Transp. v. Able*, 35 S.W.3d 608, 613 (Tex. 2000) ("Joint enterprise liability makes each party thereto the agent of the other and thereby to hold each responsible for the negligent act of the other." (internal quotation marks omitted)); *Truly v. Austin*, 744 S.W.2d 934, 937 (Tex. 1988) ("A joint venturer is jointly and severally liable for joint venture debts and obligations.").

[28] *Able*, 35 S.W.3d at 613; *Blount v. Bordens, Inc.*, 910 S.W.2d 931, 933 (Tex. 1995); *Triplex Communc'ns, Inc. v. Riley*, 900 S.W.2d 716, 718 (Tex. 1995); *Shoemaker v. Estate of Whistler*, 513 S.W.2d 10, 14-17 (Tex. 1974) (adopting RESTATEMENT (SECOND) OF TORTS § 491 cmt. c (1965)).

[29] *See, e.g., Willis v. Donnelly*, 199 S.W.3d 262, 271 (Tex. 2006) ("A bedrock principle of corporate law is that an individual can incorporate a business and thereby normally shield himself from personal liability for the corporation's contractual obligations."); *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986) ("The corporate form normally

be ignored only "when the corporate form has been used as part of a basically unfair device to achieve an inequitable result".[30] Examples are when the corporate structure has been abused to perpetrate a fraud, evade an existing obligation, achieve or perpetrate a monopoly, circumvent a statute, protect a crime, or justify wrong.[31] In some instances, the imposition of liability is limited by statute to situations involving actual fraud.[32]

The "single business enterprise" liability theory on which SSP relies does not entail the level of agreement required for joint enterprise liability or the abuse required before the law disregards the corporate structure to impose liability. The theory SSP advocates applies whenever two corporations coordinate operations and combine resources in pursuit of the same business purpose. We have never approved of imposing joint liability on separate entities merely because they were part of a single business enterprise,[33] and we have pointed out that an issue exists "whether a theory of 'single business enterprise' is a necessary addition to Texas law regarding the theory of alter ego for disregarding corporate structure".[34]

As the only authority for its single business enterprise liability theory, the *Paramount Petroleum* court cited two cases, *Murphy Bros. Chevrolet Co. v. East Oakland Auto Auction*[35] and

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insulates shareholders, officers, and directors from liability for corporate obligations . . . .").

[30] *Castleberry*, 721 S.W.2d at 271.

[31] *Id*. at 272.

[32] TEX. BUS. CORP. ACT art. 2.21 (expires Jan. 1, 2010); TEX. BUS. ORGS. CODE § 21.223 (effective Jan. 1, 2006).

[33] *National Plan Adm'rs, Inc. v. National Health Ins. Co.*, 235 S.W.3d 695, 704 (Tex. 2007) ("We do not reach the question of, and express no opinion on, whether the single-business enterprise theory is a viable doctrine to pierce the corporate veil of a party . . . ."); *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 173 (Tex. 2007) (referring to single business enterprise as "a theory we have never endorsed"); *Southern Union Co. v. City of Edinburg*, 129 S.W.3d 74, 86 (Tex. 2003) (noting that this Court "has never considered the 'single business enterprise' concept in any detail").

[34] *Southern Union Co.*, 129 S.W.3d at 87.

[35] 437 S.W.2d 272 (Tex. Civ. App.— El Paso, 1969, writ ref'd n.r.e.).

Allright Texas, Inc. v. Simons.[36] In *Murphy Bros.*, the court of civil appeals held that the plaintiff had established the liability of the defendant corporation as opposed to the defendant's predecessor, and that in any event the two corporations were engaged in a joint venture and thus jointly liable.[37] This was sufficient to affirm the trial court's judgment, but the court digressed. Citing our opinion in *State v. Lone Star Gas Co.*[38] for the "well settled [rule] that courts will look through the forms to the realities of the relationship between two or more corporations to determine whether each is a separate entity or corporation, or what their relationship might be",[39] the court then quoted from our opinion:

> The fact that separate corporate entities were formed which represent different departments of the integrated but single business enterprise does not affect the question, because the court must look beyond the corporate form to the purpose of the unified organization and to the officials who are identified with that purpose.[40]

This statement, true on its face, was taken out of context. "The question" to which we referred in *Lone Star* was not whether two entities engaged in a single business enterprise were jointly liable for each other's obligations, but whether a natural gas pipeline company whose business was integrated with local distribution companies serving Texas cities was subject to regulation by the Railroad Commission even though the pipeline cut across Oklahoma on its way from Texas gas fields to Texas consumers.[41] We concluded, not surprisingly, that the pipeline could not use the interstate aspect of its business to shield its affiliates' intrastate operations from

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[36] 501 S.W.2d 145 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

[37] 437 S.W.2d at 275.

[38] 86 S.W.2d 484 (Tex. Civ. App.—Austin 1935, writ ref'd), *rev'd and remanded*, 304 U.S. 224 (1938), *op. on remand*, 129 S.W.2d 1164 (Tex. Civ. App.—Austin 1939), *rev'd and remanded*, 153 S.W.2d 681 (Tex. 1941).

[39] *Murphy Bros. Chevrolet Co.*, 437 S.W.2d at 276.

[40] *Id.* (quoting 86 S.W.2d at 492).

[41] 86 S.W.2d at 490.

regulation.[42] In any event, we said, the companies' business affiliations were immaterial because the pipeline company was not engaged in interstate commerce.[43] We went on to explain in *Lone Star* that corporations could be operated in such a way that they could no longer be regarded as distinct entities,[44] but we did not suggest that unity of enterprise would alone justify disregarding corporate structures.

In *Allright*, the other case on which the *Paramount Petroleum* court relied, the plaintiff sued two corporations with "Allright" in their names and obtained a judgment against both for personal property taken from his car, which he had parked at an Allright parking lot.[45] On appeal, the defendants argued for the first time that the trial court's judgment failed to distinguish between them. The court of civil appeals held that their complaint had not been preserved for appeal but went on to reject it.[46] Based on evidence that the defendants did business under the same Allright trade style and assumed name, and that they and three other corporations shared bookkeeping services and employees and had all guaranteed payment of the judgment (for $1,444.05), the appellate court concluded that "the trial court was justified in looking beyond corporate form and in determining, as a matter of law, that the relationship between the corporations constituted in reality a single business enterprise."[47] The only authority the court cited was *Murphy Bros*.

In *Paramount Petroleum*, the plaintiff rented equipment to a business that identified itself as "Paramount" to be used in repairing a ship.[48] When the bills went unpaid, the plaintiff sued

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[42] *Id.* at 495.

[43] *Id.*

[44] *Id.* at 492; *accord Humble Oil & Ref. Co. v. Railroad Comm'n*, 128 S.W.2d 9, 11-12 (Tex. 1939).

[45] 501 S.W.2d 145, 146-147 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

[46] *Id.* at 149-150.

[47] *Id.* at 150.

[48] 712 S.W.2d 534, 535 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

Paramount Petroleum Corp., which denied responsibility, contending that the responsible party was Paramount Steamship Co., Ltd., another entity owned by the same shareholder. The court of appeals affirmed the judgment against Paramount Petroleum on the ground that the two corporations were operated as a single business enterprise and not as separate entities.[49] The court summarized the evidence as follows:

> The same shareholder owned all of the stock in both companies. The two companies operated from the same Houston office. They used the same telephone number and the same post office box. Both companies paid funds . . . for repair work on the [ship]. The employees of both companies referred to both companies as "Paramount". Petroleum transferred funds, with no ledger entries, to a checking account over which an employee of Steamship was signatory. The president of Steamship testified that assets of Petroleum were seized when the [ship] was seized. All accounting for the two companies was performed at the Houston office by an employee paid by Petroleum. Finally, Petroleum failed to produce, in response to discovery requests, any corporate records of either corporation. This evidence demonstrates that the corporations were not operated as separate entities.
>
> The evidence also shows that the corporations shared the goal of restoring the [ship]. Petroleum funded the bank account from which the restoration expenditures were paid. Petroleum's employees performed the accounting for the restoration. Steamship's employees performed the actual reconditioning work and hired subcontractors.[50]

The court held that the judgment against Paramount Petroleum could also be based on the theory of partnership by estoppel, noting that the two Paramounts had made no effort to distinguish themselves in renting equipment from the plaintiff.[51]

The bare mention of single business enterprise liability in *Murphy Bros.* and *Allright* was inadequate to support the multi-factored theory set out in *Paramount Petroleum*, and while other courts have applied the theory, none to our knowledge has found sound jurisprudential footing for

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[49] *Id.* at 536-537.

[50] *Id.*

[51] *Id.* at 537.

the theory. Importantly, in this Court's opinion in *Castleberry v. Branscom*,[52] decided shortly after *Paramount Petroleum*, we comprehensively reviewed the bases for imposing liability despite the corporate structure and did not include single business enterprise among them:

> We disregard the corporate fiction, even though corporate formalities have been observed and corporate and individual property have been kept separately, when the corporate form has been used as part of a basically unfair device to achieve an inequitable result. Specifically, we disregard the corporate fiction:
>
> (1) when the fiction is used as a means of perpetrating fraud;
>
> (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation;
>
> (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation;
>
> (4) where the corporate fiction is employed to achieve or perpetrate monopoly;
>
> (5) where the corporate fiction is used to circumvent a statute; and
>
> (6) where the corporate fiction is relied upon as a protection of crime or to justify wrong.[53]

Each example involved an element of abuse of the corporate structure, including example (2), alter ego; in that situation, we specifically stated, "holding only the corporation liable would result in injustice."[54] Abuse and injustice are not components of the single business enterprise theory stated in *Paramount Petroleum*. The theory applies to corporations that engage in any sharing of names, offices, accounting, employees, services, and finances. There is nothing abusive or unjust about any of these practices in the abstract. Different entities may coordinate their activities without joint liability.

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[52] 721 S.W.2d 270 (Tex. 1986).

[53] *Id*. at 271-272 (footnotes and citations omitted).

[54] *Id.* at 272.

Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace. We have never held corporations liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances. There must also be evidence of abuse, or as we said in *Castleberry*, injustice and inequity. By "injustice" and "inequity" we do not mean a subjective perception of unfairness by an individual judge or juror; rather, these words are used in *Castleberry* as shorthand references for the kinds of abuse, specifically identified, that the corporate structure should not shield — fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like. Such abuse is necessary before disregarding the existence of a corporation as a separate entity. Any other rule would seriously compromise what we have called a "bedrock principle of corporate law"[55] — that a legitimate purpose for forming a corporation is to limit individual liability for the corporation's obligations.

Disregarding the corporate structure involves two considerations. One is the relationship between two entities, which can be assessed using factors like those listed by the court in *Paramount Petroleum*. The other consideration is whether the entities' use of limited liability was illegitimate. On this issue the *Paramount Petroleum* factors are almost entirely irrelevant. That determination must be based on a careful evaluation of the policies supporting the principle of limited liability.

In *Castleberry*, we held that the corporate structure could be disregarded on a showing of constructive fraud, even without actual fraud.[56] The Legislature has since rejected that view in certain cases. Article 2.21 of the Texas Business Corporation Act takes a stricter approach to disregarding the corporate structure:

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[55] *Willis v. Donnelly*, 199 S.W.3d 262, 271 (Tex. 2006) ("A bedrock principle of corporate law is that an individual can incorporate a business and thereby normally shield himself from personal liability for the corporation's contractual obligations.").

[56] 721 S.W.2d at 273.

A. A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate thereof or of the corporation, shall be under no obligation to the corporation or to its obligees with respect to:

* * *

(2) any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, owner, subscriber, or affiliate is or was the alter ego of the corporation, or on the basis of actual fraud or constructive fraud, a sham to perpetrate a fraud, or other similar theory, unless the obligee demonstrates that the holder, owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, owner, subscriber, or affiliate; or

(3) any obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality, including without limitation: (a) the failure to comply with any requirement of this Act or of the articles of incorporation or bylaws of the corporation; or (b) the failure to observe any requirement prescribed by this Act or by the articles of incorporation or bylaws for acts to be taken by the corporation, its board of directors, or its shareholders.

B. The liability of a holder, owner, or subscriber of shares of a corporation or any affiliate thereof or of the corporation for an obligation that is limited by Section A of this article is exclusive and preempts any other liability imposed on a holder, owner, or subscriber of shares of a corporation or any affiliate thereof or of the corporation for that obligation under common law or otherwise, except that nothing contained in this article shall limit the obligation of a holder, owner, subscriber, or affiliate to an obligee of the corporation when:

(1) the holder, owner, subscriber, or affiliate has expressly assumed, guaranteed, or agreed to be personally liable to the obligee for the obligation; or

(2) the holder, owner, subscriber, or affiliate is otherwise liable to the obligee for the obligation under this Act or another applicable statute.[57]

The single business enterprise liability theory is fundamentally inconsistent with the approach taken by the Legislature in article 2.21.

[57] TEX. BUS. CORP. ACT art. 2.21 (expires Jan. 1, 2010). Sections A and B of this article, after a legislative reorganization of the statutes governing business entities effective January 1, 2006, were recodified in substantially similar form in TEX. BUS. ORGS. CODE § 2.223, and §§ 21.224-.225, respectively. Act of May 29, 2003, 78th Leg., R.S., ch. 182, §§ 1, 2, 2003 TEX. GEN. LAWS 267, 427, 595.

Accordingly, we hold that the single business enterprise liability theory set out in *Paramount Petroleum* will not support the imposition of one corporation's obligations on another. Although Gladstrong USA was entitled to summary judgment on this issue, for reasons explained below, we conclude that the case must be remanded to the trial court for further proceedings. SSP will be free to assert a valid theory for requiring Gladstrong USA to meet any indemnity obligation Gladstrong Hong Kong may have.

D

Finally, SSP argues that even if Gladstrong USA was not the actual manufacturer of the WAX-brand lighters, it is liable for statutory indemnity as the apparent manufacturer. SSP relies on section 400 of the *Restatement (Second) of Torts*, which states: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."[58]

We have never considered whether section 400 correctly states the law of Texas, and we need not do so here. Nor need we consider whether the rule in section 400 should apply to claims for indemnity or only consumer claims for damages. As we have already observed, the indemnity obligation created by chapter 82 is limited to manufacturers, a defined term. The statutory definition is quite specific and does not include apparent manufacturers. Including apparent manufacturers in the definition would extend the indemnity obligation to any seller, and perhaps a non-seller, who "put out" a product as his own. We can find no basis for reading the statute so broadly.

Because the parties have confined their arguments regarding section 400 to statutory indemnity claims, we disapprove of the court of appeals' discussion of the applicability of section 400 to common law indemnity claims.

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[58] RESTATEMENT (SECOND) OF TORTS § 400 (1965); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 14 (1998) ("One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer.").

III

We next consider whether Gladstrong USA is liable for common law indemnity.

A

By its terms, chapter 82 is "in addition to any duty to indemnify established by law, contract, or otherwise"[59] and thus does not preclude common law indemnity. The common law requires a manufacturer who is liable for a product defect to indemnify a seller who is not independently culpable against any liability the seller incurs.[60] SSP argues that an upstream seller owes the same obligation to innocent downstream sellers that a manufacturer does. For this reason, SSP contends, it is entitled to indemnity from Gladstrong USA even if Gladstrong USA did not manufacture WAX lighters.

But a manufacturer's indemnity obligation is based on its responsibility for the product defect.[61] A seller is also responsible for injuries to the consumer, just as the manufacturer is, but the seller's liability is not based on fault; it is imputed by law.[62] SSP would impose an indemnity obligation on an innocent upstream seller. This would be at odds with what we have called "the fundamental principle underlying indemnity law", that:

> [g]enerally speaking, a person who, without personal fault, has become subject to tort liability for the unauthorized and *wrongful* conduct of another, is entitled to full indemnity from the other for expenditures properly made to discharge the liability. We noted in *City of San Antonio v. Talerico*, 98 Tex. 151, 81 S.W. 518, 520 (1904),

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[59] TEX. CIV. PRAC. & REM. CODE § 82.002(e)(2).

[60] *General Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 255 (Tex. 2006) ("Under the common law, a person is entitled to indemnity for products liability only if his liability is entirely vicarious and he is not himself independently culpable. The indemnitor must be liable or potentially liable for the product defect, and his liability must be adjudicated or admitted." (footnotes omitted)).

[61] *Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc.*, 251 S.W.3d 481, 486 (Tex. 2008) ("The rationale behind the common law concept of indemnification is that a party exposed to liability solely due to the wrongful act of another should be permitted to recover from the wrongdoer.").

[62] *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789 (Tex. 1967) ("The rule . . . of strict liability [makes] the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product." (quoting RESTATEMENT (SECOND) OF TORTS § 402A, cmt. a (1965)).

> that it is a "general principle[ ] of law [that an] active *wrongdoer* may be made to indemnify one who has been subjected to, or is sought to be held liable for, damage through his *wrong.*"[63]

This principle does not support the imposition of an indemnity obligation on someone innocent of wrongdoing. SSP argues that an importer of a defective product is at fault for facilitating entry of the product into this country. But even if we assume this is true, any such fault is not the kind of actionable wrongdoing on which common law indemnity is predicated.

Accordingly, SSP is not entitled to common law indemnity without proof that Gladstrong USA was responsible for the defective condition of the WAX lighters. SSP did not establish such responsibility as a matter of law, but Gladstrong USA did not move for summary judgment for want of such evidence. The case must therefore be remanded for further consideration of the issue.

B

Gladstrong USA did move for summary judgment on the ground that there is no evidence that it sold the actual lighter that caused the fire in this case. It argues that the lighter at issue was either imported by someone else or was a counterfeit. SSP's evidence that Gladstrong USA imports WAX-brand lighters and knows of no one else who does is sufficient to raise an issue of fact precluding summary judgment for Gladstrong USA on this ground.

[63] *Humana Hosp. Corp. v. American Med. Sys., Inc.*, 785 S.W.2d 144, 145 (Tex. 1990) (citation omitted).

* * *

Though we do not entirely agree with the court of appeals' reasoning, we do agree that Gladstrong USA was entitled to summary judgment on SSP's claim for statutory indemnity but not on SSP's claim for common law indemnity. Accordingly, the court of appeals' judgment remanding the case to the trial court for further proceedings is affirmed.

Nathan L. Hecht
Justice

Opinion delivered: November 14, 2008

IN THE SUPREME COURT OF TEXAS

NO. 05-0729

EXXON CORPORATION AND EXXON TEXAS, INC., PETITIONERS,

v.

EMERALD OIL & GAS COMPANY, L.C., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued February 13, 2007

JUSTICE WAINWRIGHT delivered the opinion of the Court.

JUSTICE O'NEILL did not participate in the decision.

In this oil and gas dispute, we determine whether section 85.321 of the Texas Natural Resources Code allows a subsequent mineral lessee to maintain a cause of action against a prior lessee for damages to the subsequent lessee's interest. We hold that section 85.321 creates a private cause of action that does not extend to subsequent lessees. Because the plaintiff in this case owned no interest in the mineral leases when the prior lessee allegedly damaged the interest, the plaintiff lacks standing to assert a cause of action under section 85.321.[1] Accordingly, we reverse the court

[1] The original lessee did not assign its claim for damages to the property to the subsequent lessee.

of appeals' judgment. Today, we also issue our opinion in *Exxon Corp. v. Miesch*, the companion to this case. ___ S.W.3d ___ (Tex. 2009).

I. Factual and Procedural Background

In the 1950s, Humble Oil & Refining Company (Humble) held mineral leases with Mary Ellen and Thomas James O'Connor on several thousand acres in Refugio County, Texas (O'Connor Tract). Exxon Texas, Inc. succeeded Humble's interest in the leases. Under the leases, Exxon paid a fifty percent royalty, which was higher than the royalty Exxon paid on an adjoining tract. In the 1980s, Exxon unsuccessfully sought to renegotiate the royalty percentage with the royalty owners. Deciding that it was no longer sufficiently profitable to continue operating the O'Connor Tract, Exxon systematically plugged and abandoned the wells. In 1991, Exxon plugged and abandoned its last well on the tract.

In 1993, Emerald Oil & Gas Company, L.P. (Emerald) obtained leases for half of the O'Connor Tract and attempted to reenter the wells. Emerald encountered unexpected difficulties when it tried to reenter the wells. Emerald alleges that Exxon caused these difficulties by improperly plugging and intentionally sabotaging the wells by putting considerable quantities of metal, unidentifiable refuse, tank bottoms, and other environmental contaminants into the wells. In 1996, Emerald, on behalf of its working-interest owner, Saglio Partnership Ltd., sued Exxon on six claims: (1) breach of a statutory duty to properly plug a well, (2) breach of a statutory duty not to commit

waste, (3) negligence per se, (4) tortious interference with economic opportunity, (5) fraud, and (6) negligent misrepresentation. The royalty owners[2] intervened, alleging the same claims.

Exxon moved for partial summary judgment against Emerald and the royalty owners on grounds that: (1) Exxon has no obligation to potential future lessees; (2) there is no private cause of action for breach of a statutory duty to plug a well in a particular way; (3) there is no private cause of action for breach of any statutory duty not to commit waste; and (4) the facts alleged do not give rise to a claim for tortious interference with economic opportunity; but (5) in the alternative, if the royalty owners have a claim against Exxon for failure to plug the wells properly, it sounds in contract only, not in tort.

The trial court granted portions of Exxon's motion for partial summary judgment, concluding that under sections 85.045, 85.046, 85.321, and 89.011 of the Texas Natural Resources Code and Title 16 section 3.14(c)(1) of the Texas Administrative Code, Exxon owed no statutory duty to potential future lessees, including Emerald. Accordingly, the trial court granted partial summary judgment in Exxon's favor on Emerald's three statutory claims of (1) negligence per se, (2) breach of a statutory duty to plug a well properly, and (3) breach of a statutory duty not to commit waste. The trial court then severed those claims and proceeded to trial on Emerald's three remaining claims against Exxon: fraud, negligent misrepresentation, and tortious interference. The court also denied

[2] The royalty owners (collectively referred to as Miesch) are Molly Miesch Allen, Brien O'Connor Dunn, Bridey Kathleen Dunn Greeson (individually and as trustee of Dunn-O'Connor Family Trust), Jack Miesch, Laurie T. Miesch, Michael Miesch, Morgan Frances Dunn O'Connor, Nancy O'Connor, T. Michael O'Connor, Janie Miesch Robertson, and Kelly Patricia Dunn Schaar.

Exxon's motion for summary judgment on the royalty owners' claims and tried those claims. Emerald filed an appeal challenging the trial court's decision.

The court of appeals reversed and remanded Emerald's three statutory claims to the trial court, holding that section 85.321 imposes a duty on current lessees to future lessees and thus provides a basis for a cause of action against Exxon. Exxon petitioned this Court for review. We now review the trial court's summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Our opinion in *Exxon v. Miesch*, also issued today, decides the appeal of claims that were tried. ___ S.W.3d ___ (Tex. 2009).

II. Discussion

A. Private Cause of Action

Two of Emerald's claims against Exxon invoke statutory duties: breach of a statutory duty to plug a well properly and breach of a statutory duty not to commit waste. Emerald's pleadings cite section 85.321 of the Texas Natural Resources Code as the basis for its standing to bring the first claim and refers to other related provisions of the Code in support of standing to bring the second claim. Section 85.321, titled "Suit for Damages," reads:

> A party who owns an interest in property or production that may be damaged by another party violating the provisions of this chapter that were formerly a part of Chapter 26, Acts of the 42nd Legislature, 1st Called Session, 1931, as amended, or another law of this state prohibiting waste or a valid rule or order of the commission may sue for and recover damages and have any other relief to which he may be entitled at law or in equity. Provided, however, that in any action brought under this section or otherwise, alleging waste to have been caused by an act or omission of a lease owner or operator, it shall be a defense that the lease owner or operator was acting as a reasonably prudent operator would act under the same or similar facts and circumstances.

TEX. NAT. RES. CODE § 85.321. The court of appeals held that section 85.321 creates a private cause of action for damages resulting from statutory violations. We agree.

In construing statutes, this Court starts with the plain language of the statute. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). The language of section 85.321 clearly creates a private cause of action. A party whose interest in property is damaged by another party violating provisions of a conservation law of this state or a Railroad Commission rule or order "may sue for and recover damages" and other relief to which the party may be entitled. TEX. NAT. RES. CODE § 85.321. Section 85.321 also expressly provides a defense to civil actions for lease owners and operators acting as a reasonably prudent operator would act under the same or similar circumstances, adding more credence to the conclusion that section 85.321 creates a private cause of action. *Id.*

This Court previously reached the same conclusion. In *HECI Exploration Co. v. Neel*, royalty owners sued their lessee for failing to notify them that the lessee sued the operator on an adjoining tract whose overproduction of oil, in violation of Railroad Commission rules, damaged the common reservoir. 982 S.W.2d 881, 884 (Tex. 1998). The court of appeals held that the lessee violated an implied covenant to notify them of an intent to sue the offending operator. *Id.* at 884–85. This Court held no such implied covenant exists because the lessee's suit against the adjoining operator does not collaterally estop the royalty owners from suing separately under section 85.321. *Id.* at 890–91. "When a mineral or royalty interest owner is damaged by a violation of the conservation law of this state or a Railroad Commission rule or order, section 85.321 of the Texas Natural Resources Code also expressly provides for a damage suit against the offending operator." *Id.*

Relying on *Magnolia Petroleum Co. v. Blankenship*, 85 F.2d 553, 556 (5th Cir. 1936), Exxon urges the Court to disregard *HECI* and hold that section 85.321's predecessor, article 6049c, does not create a private cause of action. *Magnolia* involved a dispute between two lessees producing out of a common reservoir. *Id.* at 554. Magnolia produced oil from several wells on a tract of eighty-one acres while Blankenship had one well on half an acre. Blankenship had sunk his well without a permit. The Railroad Commission sued him for a $1,000 penalty. Blankenship countered for a certificate authorizing him to operate the well. The trial court authorized the penalty and also ordered the certificate of operation. Magnolia appealed the decision, contending that the trial court did not have authority to order the certificate of operation, and moved for an injunction against Blankenship under section 13 of article 6049c. *Id.* at 554, 556. Interpreting the statute, the Fifth Circuit held that while the first sentence of section 13 "purports to give no new cause of action," the second sentence gives a producer the right to sue for damages and appropriate equitable remedies, including an injunction. *Id.* at 556. However, the court determined that an injunction would have been inequitable in that case because Blankenship's single well did not produce as much oil as Magnolia's many wells. *Id.* at 554. Instead, Magnolia should have requested that the Railroad Commission regulate the distribution of oil to each operator. *Id.* at 556. Exxon argues that *Magnolia* stands for the proposition that the Railroad Commission has primary jurisdiction to regulate the allocation of oil between producers from a common reservoir and prohibits a private cause of action under what is now section 85.321. We agree *Magnolia* explains that, at the time, statutes gave the Railroad Commission primary jurisdiction to adjust correlative rights of oil and gas owners in a common reservoir, but we disagree on the latter assertion. Exxon's reading overstates

Magnolia's holding. *Magnolia* reasons that, compared to the Commission's proration of production, allowing such allocation to be performed by the random institution and adjudication of private lawsuits would be problematic. Surely that is correct. But *Magnolia* does not hold that section 85.321's predecessor bars private lawsuits for a mineral owner's recovery of damages. *Magnolia* does not answer that question except to say that if section 85.321's predecessor creates such a private cause of action, it does not provide a right to an injunction when the evidence fails to establish an equitable basis for doing so. 85 F.2d at 556.

Furthermore, the Fifth Circuit has held on more than one occasion, not inconsistent with *Magnolia*, that the language in section 85.321's predecessor (section 13 of article 6049c) does, in fact, create a private cause of action. *Turnbow v. Lamb*, 95 F.2d 29, 31 (5th Cir. Tex. 1938) ("Article 6049c, section 13, Vernon's Civil Stat. Texas, expressly recognizes and preserves to an injured party his cause of action for damages 'or other relief' against a violator of the oil production laws."); *see Sun Oil Co. v. Martin*, 330 F.2d 5, 5 (5th Cir. Tex. 1964) (adopting the lower court's reasoning in *Sun Oil Co. v. Martin*, 218 F.Supp. 618, 621–22 (S.D. Tex. 1963) (explaining that a violation under section 13 of article 6049c "may give rise to an action for damages")); *see also Ivey v. Phillips Petroleum, Co.*, 36 F. Supp. 811, 816 (S.D. Tex. 1941) (holding, in accord with Fifth Circuit law, that a plaintiff does not have standing to sue pursuant to section 13 of article 6049c if no Railroad Commission regulation or state law occurred). Although section 85.321 and section 13 of article 6049c are not identical, the pertinent parts of section 85.321 and section 13 are the same. Act effective August 12, 1931, 42nd Leg., 1st C.S., ch. 26, § 13, 1931 Tex. Gen. Law 46, 53, *repealed by* Act effective September 1, 1977, 65th Leg., R.S., ch. 871, § 1, 1977 Tex. Gen. Law 2345, 2527.

Thus, we do not agree that *Magnolia* interprets section 13 of article 6049c to prohibit a private cause of action.

Exxon also argues that section 85.321 limits the scope of a private cause of action to waste and does not extend to Emerald's second cause of action, which relates to section 89.011 and the duty of an operator to plug wells properly. Even if the alleged improper plugging damaged the wells, Exxon argues that these allegations do not prevent Emerald from sinking new wells and developing oil. Taking Emerald's allegations as true, they do not constitute waste under the Natural Resources Code because Exxon's alleged conduct did not cause the loss of oil or escape of gas. *See* TEX. NAT. RES. CODE §§ 85.045–.047 (concerning waste).

However, the question still remains whether section 85.321 creates a cause of action for a section 89.011 plugging violation. The plain language of section 85.321 casts a wide net. The statute states that an aggrieved owner may sue for damages arising from violations of (1) provisions of this chapter, (2) another law of this state prohibiting waste, or (3) a valid rule or order of the Railroad Commission. *Id.* § 85.321. The first two classes of causes refer to waste, but a violation of a Commission rule or order triggers the third category of actions. Emerald asserts that Exxon violated section 89.011 by violating the Commission rules regulating plugging in section 3.14 of title 16 of the Texas Administrative Code. Emerald's allegations that Exxon violated the Commission's plugging rules raise the question of whether this type of violation triggers the right to a private cause of action under the third prong of section 85.321 and, therefore, gives Emerald standing.

B. Standing by Statute

The Constitution requires standing to maintain suit. *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001). A party suing under a statute must establish standing, or the right to make a claim, under that statute. *See id.*; *Scott v. Bd. of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966). In these cases, the statute itself provides the framework for the standing analysis. *See Williams*, 52 S.W.3d at 178–79; *Scott*, 405 S.W.2d at 56. We do not imply a right of enforcement just because a party has suffered harm from the violation of a statute; we look to the intent of the Legislature as expressed in the language of the statute. *See Brown v. De la Cruz*, 156 S.W.3d 560, 567 (Tex. 2004). Here, we analyze section 85.321 to determine if the Legislature intended to confer standing upon a party in Emerald's position. *See Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001).

C. Subsequent Lessees

Having concluded that section 85.321 creates a private cause of action, we examine whether Emerald's status as a subsequent lessee impacts its standing to bring a cause of action under section 85.321. The Legislature gave the right to a private cause of action to a person who "owns an interest . . . that may be damaged by another party violating the provisions of this chapter . . . ." TEX. NAT. RES. CODE § 85.321. Exxon argues that "violating" is a present tense term that indicates an injury concurrent with ownership, whereas Emerald maintains that "violating" would include any party that had violated the statute at some point in time. The plain language is unclear as to whether concurrent ownership is required or whether subsequent interest owners could also maintain a cause of action. The participle phrase "violating the provisions of this chapter" could indicate a continuous

action: a party who has violated, continues to violate, or is violating the provision, which would open the cause of action to a wider range of interest owners. *Id.* The statute could also be interpreted as another party *who is* violating the provisions of this chapter, which suggests a temporal limitation on the private cause of action. Because the text itself is unclear, we look to section 85.321's statutory predecessor and the surrounding context for guidance. *See Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006).

Section 85.321's statutory predecessor, section 13 of article 6049c, preserved common law standards:

> Nothing herein contained or authorized and no suit by or against the [Railroad] Commission shall impair or abridge or delay any cause of action for damages, or other relief, any owner of any land or any producer of crude petroleum oil or natural gas, or any other party at interest, may have . . . .

Act effective August 12, 1931, 42nd Leg., 1st C.S., ch. 26, § 13, 1931 Tex. Gen. Law 46, 53, *repealed by* Act effective September 1, 1977, 65th Leg., R.S., ch. 871, § 1, 1977 Tex. Gen. Law 2345, 2527. Thus, part of the stated purpose of Chapter 26 was to prevent the Railroad Commission from infringing on existing causes of action under the common law. The language in sections 85.321 and 85.322 comes directly from section 13 of article 6049c.

For more than 100 years, this Court has recognized that a cause of action for injury to real property accrues when the injury is committed. *See Houston Water-Works Co. v. Kennedy*, 8 S.W. 36, 37 (Tex. 1888). The right to sue is a personal right that belongs to the person who owns the property at the time of the injury, and the right to sue does not pass to a subsequent purchaser of the property unless there is an express assignment of the cause of action. *Abbott v. City of Princeton*, 721 S.W.2d 872, 875 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). "Accordingly, a mere subsequent

purchaser [of the property] cannot recover for an injury committed before his purchase." *Lay v. Aetna Ins. Co.*, 599 S.W.2d 684, 686 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.); *see also Vann v. Bowie Sewerage Co.*, 90 S.W.2d 561, 562–63 (Tex. 1936) (holding that a cause of action for damages to property resulting from a permanent nuisance accrues to the owner of the land at the time the injury begins to affect the land, and mere transfer of the land by deed does not transfer the claim for damages). Therefore, under Texas common law, absent a conveyance of the cause of action, a subsequent owner cannot sue a prior owner for injury to realty before the subsequent owner acquired his interest. *See Vann*, 90 S.W.2d at 562–63; *see also Haire v. Nathan Watson Co.*, 221 S.W.3d 293, 298 (Tex. App.—Fort Worth 2007, no pet.); *Cook v. Exxon Corp.*, 145 S.W.3d 776, 781 (Tex. App.—Texarkana 2004, no pet.); *Exxon Corp. v. Pluff*, 94 S.W.3d 22, 27 (Tex. App.—Tyler 2002, pet. denied); *Senn v. Texaco, Inc.*, 55 S.W.3d 222, 225 (Tex. App.—Eastland 2001, pet. denied). Similarly, a subsequent lessee, like Emerald, can stand in no better shoes than a subsequent owner. If the Legislature intended to change this common law principle, it could have done so in the statute.

Were we to interpret section 85.321 to allow Emerald to sue Exxon as a prior lessee, we would expand the class of potential claimants beyond that allowed by common law and subsumed in the statute. Without explicit direction from the Legislature, we hesitate to adopt an interpretation of section 85.321 that would make any party who holds a mineral interest indefinitely liable to all subsequent interest holders for prior alleged damage to the land. The consequences of such an interpretation run contrary to the legislative intent to protect and encourage the development of Texas natural resources. *See* TEX. CONST. art. XVI, § 59. We are mindful of the consequences of a particular construction. *See* TEX. GOV'T CODE § 311.023(5); *McIntyre*, 109 S.W.3d at 745.

Absent a legislative enactment clearly abrogating the common law, we conclude that Emerald does not have standing as a subsequent lessee to pursue a claim under section 85.321 for Exxon's alleged wrongful actions as a prior lessee. *See, e.g.*, *Tooke v. City of Mexia*, 197 S.W.3d 325, 342–43 (Tex. 2006) (holding that TEX. LOC. GOV'T CODE § 51.075 abrogated *City of Texarkana v. City of New Boston*, 141 S.W.3d 778 (Tex. 2004)).

D. Negligence Per Se

Because our holding that a subsequent lessee has no standing to bring a claim under section 85.321 stems from common law principles, Emerald lacks standing to bring a negligence per se claim for the same reasons.

III. Conclusion

Accordingly, we reverse the court of appeals' judgment and render judgment that Emerald take nothing.

_____
Dale Wainwright
Justice

OPINION DELIVERED: March 27, 2009

IN THE SUPREME COURT OF TEXAS

NO. 05-0801

S. MURTHY BADIGA, M.D., PETITIONER,

v.

MARICRUZ LOPEZ, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued September 9, 2008

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE WILLETT.

JUSTICE BRISTER delivered a dissenting opinion, in which JUSTICE MEDINA joined.

The Civil Practice and Remedies Code requires a health care liability claimant to serve expert reports on providers within 120 days after filing suit. If a claimant does not do so, the trial court "must grant" the provider's motion to dismiss the claim, and the provider may appeal from the court's failure to do so. If the claimant's report is timely but deficient, the trial court may grant a single thirty day extension to cure the deficiency, and the order granting that extension may not be appealed. We decide today whether a provider may immediately appeal when a trial court both denies a motion to dismiss and grants the claimant a thirty day extension, even though no expert report was timely served. We conclude that the statute permits such an appeal.

I
Factual and Procedural Background

Maricruz Lopez filed a health care liability claim against S. Murthy Badiga, M.D. on October 24, 2003, alleging that Doctor Badiga committed medical malpractice by perforating Lopez's colon during a colonoscopy. Lopez was required to serve an expert report on Dr. Badiga by February 23, 2004—the 120th day after she filed suit. TEX. CIV. PRAC. & REM. CODE § 74.351(a). Because Lopez did not serve a report by February 23, Dr. Badiga moved to dismiss the case. On March 31, Lopez moved for an extension of time to serve the report and filed a second such motion on April 1. On May 18, the trial court extended the deadline to June 18, but did not rule on Dr. Badiga's motion to dismiss. Lopez served the expert report of Dr. Rodolfo Guerrero on June 8. Dr. Badiga then filed a second motion to dismiss, incorporating his first motion and also challenging the adequacy of Dr. Guerrero's report. On August 10, the trial court denied Dr. Badiga's motion to dismiss, and he subsequently filed this interlocutory appeal. The court of appeals dismissed the appeal for want of jurisdiction, concluding that "the substance of the appeal is directed at the legality of the 30-day extension," for which there is no interlocutory appeal. __ S.W.3d __. We granted the petition for review.[1] 51 Tex. Sup. Ct. J. 770-71 (Apr. 18, 2008).

II
Discussion

Section 74.351(a) of the Texas Civil Practice and Remedies Code provides that, within 120 days of suit, a claimant must serve expert reports for each physician or health care provider against

[1] We have jurisdiction to determine the court of appeals' jurisdiction. *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 343 (Tex. 2004).

whom a liability claim is asserted. TEX. CIV. PRAC. & REM. CODE § 74.351(a). If an expert report has not been served within the 120 day period:

> the court, on the motion of the affected physician or health care provider, shall, subject to [an extension of time for a deficient report], enter an order that:
>
> (1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and
>
> (2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.

TEX. CIV. PRAC. & REM. CODE § 74.351(b). If a report "has not been served within [120 days] because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency." *Id.* § 74.351(c). The defendant has the right to an interlocutory appeal from an order that "denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351." *Id.* § 51.014(a)(9). So, under the Civil Practice and Remedies Code, an interlocutory appeal is permitted for the denial of a motion to dismiss but not for the grant of an extension to cure a deficient report.

We have never addressed whether interlocutory appeal of the denial of a motion to dismiss under section 74.351(b) is permitted when an extension has been granted even though the claimant served no expert report within the 120 day period. In *Ogletree v. Matthews*, we held that the denial of a motion to dismiss, coupled with the grant of an extension of time to cure a timely but *deficient* expert report, are inseparable for purposes of an appeal. *Ogletree*, 262 S.W.3d 316, 321 (Tex. 2007).

In such cases, the Legislature's prohibition on appealing extension orders precludes an interlocutory appeal. *Id*.

We noted that, in contrast to the predecessor statute, which allowed a thirty day extension for good cause and a mandatory thirty day "grace period" upon a showing that the failure to file a conforming report was due to accident or mistake and was not intentional or due to conscious indifference, the 2003 statutory amendments created a statute-of-limitations-type deadline within which expert reports must be served. *Id*. at 319. Accordingly, "[i]f no report is served within the 120 day deadline provided by 74.351(a), the Legislature denied trial courts the discretion to deny motions to dismiss or grant extensions, and a trial court's refusal to dismiss may be immediately appealed." *Id*. at 319-20 (citing TEX. CIV. PRAC. & REM. CODE § 74.351(b) (stating that a trial court "shall" dismiss a claim when expert reports are not served within 120 days); TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9) (authorizing interlocutory appeal of the denial of a motion to dismiss filed under 74.351(b))).

We anticipated the situation presented in this case, noting that several courts of appeals have allowed interlocutory appeals of denied motions to dismiss coupled with extension grants when there is an absence of a report, rather than a timely but deficient report. *Id*. at 320 n. 2. We cited the court of appeals' opinion in this case as an example of a court that "has concluded that, notwithstanding the absence of a timely served report, it lacked jurisdiction over the provider's interlocutory appeal." *Id*. (citing 2005 WL 1572273). Because that situation was not presented in *Ogletree*, we expressed no opinion on the propriety of that holding; nevertheless, we made clear that "a deficient report differs from an absent report." *Id*. at 320.

In this case, Dr. Badiga's first motion to dismiss alleged that no expert report had been served within the 120 day deadline. At the hearing, Lopez's counsel asserted that the failure to serve an expert report was "not a result of conscious indifference or an intentional act of not filing. It was a mistake . . . ." He noted that before filing the lawsuit, he provided "a substantial portion of the medical records" to Badiga's insurance carrier. Those medical records are not in the appellate record, but at the hearing, Lopez's counsel said that the records include "the doctor's name, information, treatment, everything was in those reports . . . . They may not have his resume, but they have everything else." Lopez asserts that serving the medical records on the insurance carrier demonstrates that her failure to serve a report was not the result of conscious indifference and that Dr. Badiga could not have been prejudiced. These concerns are no longer relevant, however, in deciding a motion to dismiss when no expert report has been served. *Compare* Act of May 1, 1995, 74th Leg., R.S., ch. 140, § 1, 1995 Tex. Gen. Laws 985, 986, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875, *with* TEX. CIV. PRAC. & REM. CODE § 74.351(b).

Because no expert report was served within 120 days, this case differs from *Ogletree*, in which a deficient expert report was served within the 120 day period. In *Ogletree*, we held that "the actions denying the motion to dismiss and granting an extension are inseparable" because "if a defendant could separate an order granting an extension from an order denying the motion to dismiss *when a report has been served*, section 51.014(a)(9)'s ban on interlocutory appeals for extensions would be meaningless." *Id*. at 321 (emphasis added). The purpose of the ban on interlocutory appeals for extensions is to allow plaintiffs the opportunity to cure defects in *existing* reports. If a

defendant could immediately appeal the denial of his motion to dismiss, the court of appeals would be reviewing the report's sufficiency while its deficiencies were presumably being cured in the trial court.

These policy concerns do not arise when, as here, no report has been served within the 120 day deadline. Allowing immediate appeal of the denial of such a motion to dismiss is appropriate even when the trial court has granted plaintiff's motion to extend time because there is no expert report for the claimant to cure. If an interlocutory appeal were not allowed, a claimant who ignores the 120 day deadline could obtain an unreviewable thirty day extension plus whatever amount of time it took the trial court to rule on the extension motion, which in this case totaled 116 days. This puts a claimant who has made no attempt to comply with the 120 day deadline in at least as good a position as one who attempts to serve a conforming expert report but refuses to meet the statutory guidelines.

The exception to section 51.014(a)(9) prohibiting appeal from an order granting an extension under section 74.351 does not apply when no expert report has been served. Except as noted below, in the absence of a timely report, the trial court cannot properly grant an extension under section 74.351. The trial court may grant an extension in only two circumstances: (1) by written agreement of the parties or (2) to allow a claimant to cure a report's deficiencies. TEX. CIV. PRAC. & REM. CODE §§ 74.351(a), (c). This case involves neither circumstance; there was no agreed extension and no report for which a challenge to adequacy could be lodged. Contrary to the court of appeals' conclusion that "the substance of the appeal is directed at the legality of the 30-day extension," this appeal is not a challenge to the extension. __ S.W.3d __. Dr. Badiga properly appealed the denial

of his motions to dismiss. He first sought dismissal because Lopez served no report within the 120 day deadline. Dr. Badiga's second motion expressly incorporated the first and added that, in any event, the expert report Lopez subsequently served was deficient. Whether the trial court granted an extension or not, the issue here is whether a case must be dismissed when no expert report is timely served.

III
Conclusion

A provider may pursue an interlocutory appeal of the denial of a motion to dismiss when no expert report has been timely served, whether or not the trial court grants an extension of time. We reverse the court of appeals' judgment dismissing the appeal for lack of jurisdiction and remand the case for that court to consider the merits of the trial court's denial of Dr. Badiga's motion to dismiss. TEX. R. APP. P. 60.2(d).

Wallace B. Jefferson
Chief Justice

Opinion delivered: January 9, 2009

IN THE SUPREME COURT OF TEXAS

NO. 05-0801

S. MURTHY BADIGA, M.D., PETITIONER,

v.

MARICRUZ LOPEZ, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued September 9, 2008

JUSTICE BRISTER filed a dissenting opinion, in which JUSTICE MEDINA joined.

We held one year ago that an interlocutory appeal cannot be taken from an order granting an extension to cure a *deficient* expert report.[1] Today the Court holds that an interlocutory appeal can be taken from an order granting an extension to cure a *missing* expert report. But the interlocutory-appeal statute makes no such distinction; it simply says that "an appeal may not be taken from an order granting an extension."[2] In the plainest of terms, this statute applies to all extensions — right or wrong, deficient report or no report. As the Court reads into this jurisdictional statute a distinction that is not there, I respectfully dissent.

[1] *Ogletree v. Matthews*, 262 S.W.3d 316, 321 (Tex. 2007).

[2] TEX. CIV. PRAC. & REM. CODE § 51.014(9).

The plaintiff here did not serve an expert report within 120 days of filing. She sent medical records to the defendant's insurer, but a defendant is entitled to those even before suit is filed.[3] If medical records alone satisfied the expert report requirement, expert reports would never be required.

The defendant moved to dismiss due to the missing report. The trial court responded by granting an extension, during which the plaintiff served a report in which a physician retyped the hospital discharge summary and signed it. The defendant filed a second motion to dismiss, incorporating the arguments from her first motion and adding that the new report was inadequate. The trial court denied the motion without specifying the grounds. The defendant then filed this interlocutory appeal, abandoning any complaint about inadequacy of the report served during the extension,[4] and complaining only that no report was served during the first 120 days. The court of appeals dismissed the appeal for lack of jurisdiction.[5]

This Court generally cannot review interlocutory appeals.[6] But we can review whether jurisdiction of one was correctly declined by a court of appeals.[7] Those courts have jurisdiction to review interlocutory orders that deny a motion to dismiss, but not those that grant an extension:

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[3] *See id.* § 74.051.

[4] Dr. Badiga challenged the adequacy of the purported report in the trial court, but made clear in her Reply Brief in the court of appeals that she was "not challenging the adequacy of Plaintiff's expert report through this appeal."

[5] ___ S.W.3d ___.

[6] *See* TEX. GOV'T CODE § 22.225(b) ("Except as provided by Subsection (c) or (d), a judgment of a court of appeals is conclusive on the law and facts, and a petition for review is not allowed to the supreme court, in . . . interlocutory appeals that are allowed by law").

[7] *Lewis v. Funderburk*, 253 S.W.3d 204, 206 (Tex. 2008); *Ogletree v. Matthews*, 262 S.W.3d 316, 319 n.1 (Tex. 2007).

> A person may appeal from an interlocutory order of a district court, county court at law, or county court that ... denies all or part of the relief sought by a motion under Section 74.351(b) [providing for dismissal with prejudice and cost awards], except that an appeal may not be taken from an order granting an extension under Section 74.351.[8]

The statutory language is plain enough: interlocutory appeals may be taken from orders *denying dismissal*, but not orders *granting extension*s. Yet this provision has created considerable confusion about when interlocutory review is available. The confusion arises because every order that grants an extension also denies dismissal, at least by implication.

There are two reasons why these orders are inseparable. First, extensions occur only in response to a motion to dismiss; absent such a motion, the case proceeds to trial with no report at all. Second, extensions necessarily imply that the motion to dismiss is denied (at least temporarily), because no case can be extended and dismissed at the same time. Accordingly, the statute creates an apparent conflict because an order that is *not* appealable (granting an extension) also does something that *is* appealable (denying dismissal).

We resolved this conflict in *Ogletree v. Matthews*, holding that an order granting an extension cannot be severed from the accompanying order (explicit or implicit) denying dismissal, as doing so would render the statute meaningless.[9] Treating every extension as a denial of dismissal would make all extension orders immediately appealable — even though the statute expressly says they are not. To give effect to both parts of the statute (as we must),[10] an order granting an extension

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[8] TEX. CIV. PRAC. & REM. CODE § 51.014.

[9] 262 S.W.3d at 321.

[10] TEX. GOV'T CODE § 311.021(2).

that expressly or impliedly denies dismissal cannot be severed into separate parts; the whole must be treated as an order granting an extension. Accordingly, we held in *Ogletree* that a defendant cannot appeal when the trial court grants an extension, but must instead wait 30 days and then appeal if the amended report is inadequate.[11]

We did not decide in *Ogletree* whether this same analysis applies when a plaintiff serves no report rather than a deficient report,[12] but there is no way to avoid it. If no report is filed but the trial judge grants an extension, the jurisdictional statute plainly says that an interlocutory appeal "may not be taken from an order granting an extension."[13] There is nothing unclear about this statute, and it must be strictly construed.[14] Thus, it does not matter whether an extension is granted because there was no report or a deficient report; it is still an extension and extensions are not immediately appealable.

The Court says the limit on interlocutory review "does not apply when no expert report has been served,"[15] but that conclusion has no support in the statute. The statute bars review of all extensions — right or wrong. The Court distinguishes *Ogletree* based on a policy against appellate review of a report at the same time it is being cured in the trial court, a policy that does not apply

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[11] 262 S.W.3d at 321.

[12] *Id*. at 320 n.2.

[13] TEX. CIV. PRAC. & REM. CODE § 51.014(9).

[14] *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007); *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001).

[15] ___ S.W.3d at ___.

when there is no report to review or cure.[16] But appellate courts cannot decide whether an appeal involves no report or a deficient report without reviewing them all. This takes time. Denying review in deficient-report cases has several advantages,[17] all of which are lost if every appeal must be reviewed anyway to decide into which category it belongs.

Moreover, there is no clear line between no-report and deficient-report cases, because the Legislature drew none. To the contrary, the statute treats deficient reports as one type of missing report: "If an expert report *has not been served* within the period specified by Subsection (a) *because elements of the report are found deficient*, the court may grant one 30-day extension to the claimant in order to cure the deficiency."[18] By using the plural word "elements," this statute appears to allow a party to cure a report missing several elements, perhaps even all. So trying to draw a line between deficient and missing reports is like trying to draw a line between "boys" and "people": the words mean different things, but they cannot be treated differently because one is part of the other.

The defendant claims she is not appealing the order of extension but only the order denying her motion to dismiss. But for the reasons noted above the two are "inseparable," as we stated in *Ogletree*.[19] It is true that both orders in *Ogletree* were in the same instrument, while the denial of dismissal here was signed almost three months after the extension. But if two orders are *inseparable*, signing them separately cannot change that result.

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[16] *Id.* at ___.

[17] *See Ogletree,* 262 S.W.3d at 321 (noting that extensions mean delay of only 30 days, and that reviewing a report's deficiencies at the same time they were being cured was "an illogical and wasteful result").

[18] TEX. CIV. PRAC. & REM. CODE § 74.351(c) (emphasis added).

[19] 262 S.W.3d at 321.

And in any event, the plaintiff here served a report during the extension, and the defendant has abandoned any complaint that this report was inadequate. An unchallenged report prevents dismissal,[20] so this case can be dismissed only if this report should be disregarded because extension was improper. No matter how the defendant characterizes her appeal, she is challenging the extension because she must.

The Court is undoubtedly right that denying review here allows the plaintiff and trial court to ignore a procedural requirement the Legislature took great pains to construct. The statute provides that if a report "has not been served" within 120 days, the court "shall" sign an order that "dismisses the claim."[21] Surely most trial judges in Texas would not have granted an extension here, although this case is proof that some would. But if the Legislature wants Texas appellate courts to rein in those few, it must grant them the jurisdiction to do so — rather than expressly denying it as it has done here.

When a trial court grants an extension, it does not matter whether a deficient report or no report was served; an interlocutory appeal cannot be taken in either case. As the court of appeals did only what the statute says, I would affirm; because the Court holds otherwise, I respectfully dissent.

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Scott Brister
Justice

OPINION DELIVERED: January 9, 2009

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[20] *See id.* at 322 (holding order denying dismissal was correct when hospital did not object to adequacy of report).

[21] TEX. CIV. PRAC. & REM. CODE § 74.351(b).

IN THE SUPREME COURT OF TEXAS

NO. 05-0986

HARRIS COUNTY HOSPITAL DISTRICT, PETITIONER,

v.

TOMBALL REGIONAL HOSPITAL, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued December 4, 2007

JUSTICE JOHNSON delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, and JUSTICE GREEN joined.

CHIEF JUSTICE JEFFERSON filed a dissenting opinion, in which JUSTICE O'NEILL, JUSTICE BRISTER, and JUSTICE WILLETT joined.

In this case we consider whether Harris County Hospital District is immune from suit by the Tomball Hospital Authority to recover medical expenses for hospital care the Hospital Authority rendered to indigent patients. We hold that the Legislature has not waived the district's immunity from suit either by specific statutory language or by implication from a constitutional and statutory framework.

I. Background

Tomball Hospital Authority (THA) was created and organized pursuant to chapter 262 of the Texas Health and Safety Code. TEX. HEALTH & SAFETY CODE ch. 262.[1] It owns and operates Tomball Regional Hospital (the hospital) in Harris County. From 2001 to 2002, the hospital provided medical care to certain indigent patients who were residents of the Harris County Hospital District (HCHD). THA sought payment from HCHD for the care it provided, but HCHD refused to pay. THA sued HCHD in district court, basing its claim on the Indigent Health Care and Treatment Act (IHCTA) and the Texas Constitution. In a plea to the jurisdiction and motion for dismissal and alternatively for summary judgment, HCHD asserted that (1) it had governmental immunity from suit; (2) county courts had exclusive jurisdiction over the matters; and (3) the Texas Department of Health had exclusive, original jurisdiction over the claim. THA responded by alleging that jurisdiction was proper in the district court and that Article IX, Section 4 of the Texas Constitution and Health and Safety Code sections 61.002(6), 61.0045, 61.060, and 281.056(a), which require a hospital district to provide and pay for indigent care, waived HCHD's governmental immunity.

The trial court granted HCHD's plea to the jurisdiction and motion to dismiss. In an opinion predating this Court's decision in *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006), the court of appeals concluded that Health and Safety Code section 281.056(a) providing that boards of hospital districts like HCHD may "sue and be sued" waived HCHD's immunity from suit. 178 S.W.3d 244,

[1] Further references to provisions of the Health and Safety Code will generally be by section numbers.

252-53. The court of appeals also determined that the Health and Safety Code did not vest exclusive, original jurisdiction in either the county court or the Texas Department of Health. *Id.* at 254-55. The court reversed and remanded the case. *Id.* at 256.

In this Court, HCHD challenges the court of appeals' holding that the "sue and be sued" language in section 281.056(a) waives its governmental immunity. THA argues the court of appeals is correct, but also contends that even if section 281.056(a) does not explicitly waive HCHD's immunity to suit, its immunity is waived by a framework of law that includes the Texas Constitution and the Health and Safety Code. Additionally, THA argues that upholding HCHD's claim that it retains immunity will lead to: (1) cities withholding taxes collected for hospital districts in order to offset debts owed by districts to the cities for indigent care resulting in suits against the cities to recover the withheld taxes; (2) bankruptcies of cities and municipal hospital authorities; and (3) violations of Texas Constitution Article III, Section 52(a) by cities in that a public benefit does not result from expenditures of public funds benefitting indigent parties not entitled to care by the cities. Disagreeing with THA's positions, we reverse the judgment of the court of appeals and dismiss the case.

II. Standard of Review

A party asserting governmental immunity to suit challenges the trial court's jurisdiction. *See State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007). A motion or plea asserting such immunity involves a question of law that we review de novo. *Id.* Further, THA's assertions require review of both Texas constitutional and statutory provisions which involve matters of law and are reviewed de novo. *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003); *Tex. Nat'l*

Guard Armory Bd. v. McCraw, 126 S.W.2d 627, 634 (Tex. 1939) (noting that the Constitution is the fundamental law of the State).

III. Analysis

A. Construction

In construing the Constitution, as in construing statutes, the fundamental guiding rule is to give effect to the intent of the makers and adopters of the provision in question. *Cox v. Robison*, 150 S.W. 1149, 1151 (Tex. 1912). "We presume the language of the Constitution was carefully selected, and we interpret words as they are generally understood." *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148 (Tex. 1995). We rely heavily on the literal text. *Stringer v. Cendant Mortgage Corp.*, 23 S.W.3d 353, 355 (Tex. 2000). However, we may consider such matters as the history of the legislation, *Harris v. City of Fort Worth*, 180 S.W.2d 131, 133 (Tex. 1944), the conditions and spirit of the times, the prevailing sentiments of the people, the evils intended to be remedied, and the good to be accomplished. *See Dir. of the Dep't of Agric. & Env't v. Printing Indus. Ass'n of Tex.*, 600 S.W.2d 264, 267 (Tex. 1980).

In construing a statute, our objective is to determine and give effect to the Legislature's intent. *State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002); *see also* TEX. GOV'T CODE § 312.005; *Am. Home Prods. Corp. v. Clark*, 38 S.W.3d 92, 95 (Tex. 2000). We look first to the "plain and common meaning of the statute's words." *Gonzalez*, 82 S.W.3d at 327 (internal quotation marks omitted) (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999)). We determine legislative intent from the statute as a whole and not from isolated portions. *Id.*

B. Governmental Immunity

Governmental immunity protects political subdivisions of the State from lawsuits for damages. *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Hospital districts have such immunity. *See Martinez v. Val Verde County Hosp. Dist.*, 140 S.W.3d 370, 371 (Tex. 2004). Governmental immunity, like the doctrine of sovereign immunity to which it is appurtenant, involves two issues: whether the State has consented to suit and whether the State has accepted liability. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003). Immunity from suit is jurisdictional and bars suit; immunity from liability is not jurisdictional and protects from judgments. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). Immunity is waived only by clear and unambiguous language. *See* TEX. GOV'T CODE § 311.034 ("[A] statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."); *Tooke*, 197 S.W.3d at 328-29.

C. "Sue and be sued"

The board of managers of a hospital district "shall manage, control and administer the hospital or hospital system of the district." TEX. HEALTH & SAFETY CODE § 281.047. Section 281.056 is entitled "Authority to Sue and be Sued; Legal Representation" and provides that "[t]he board may sue and be sued." The court of appeals held that this language waived immunity from suit. 178 S.W.3d 252-53. In its brief predating this Court's decision in *Tooke*, THA cites *Missouri Pacific Railroad Co. v. Brownsville Navigation District*, 453 S.W.2d 812, 813-14 (Tex. 1970), and *Tarrant County Hospital District v. Henry*, 52 S.W.3d 434, 448 (Tex. App.—Fort Worth 2001, no

pet.), in support of the court of appeals' decision. HCHD discounts *Missouri Pacific* and *Henry* because they were decided before *Tooke*. We agree with HCHD.

When an entity's organic statute provides that the entity may "sue and be sued," the phrase in and of itself does not mean that immunity to suit is waived. *Tooke*, 197 S.W.3d at 337. Reasonably construed, such language means that the entity has the capacity to sue and be sued in its own name, but whether the phrase reflects legislative intent to waive immunity must be determined from the language's context. *Id.* Thus, section 281.056(a) does not in and of itself waive HCHD's immunity. *See id.* at 334, 337. Nor does section 281.056(a)'s language indicate a waiver of HCHD's immunity when considered in context with the remainder of section 281.056 which specifies who will represent the district in civil proceedings. This section anticipates the district's involvement in civil proceedings of some nature at some point, but it does not address immunity from suit. *See id.*

Likewise, the other sections of chapter 281 do not, in context, reflect legislative intent to waive immunity. For example, section 281.050 authorizes a district, in broad terms and subject to approval of the commissioners court, to construct, acquire, and maintain property and hospital facilities to provide services. Section 281.051 grants authority, again subject to approval of the commissioners court, to contract or cooperate with various governmental and private entities to fulfill a district's duties and to enter contracts to provide for medical care of certain classes of needy individuals. Section 281.055 authorizes districts to accept gifts and endowments to be held in trust and to administer them.

The context in which section 281.056(a) is found shows that the Legislature intended to invest districts with powers and authority necessary to conduct their business, subject in large part to approval of the county commissioners court. There is, however, no indication that by use of the "sue and be sued" language the Legislature clearly intended to waive districts' immunity from suit. We conclude that section 281.056(a) does not, either by itself or in context, clearly and unambiguously waive HCHD's immunity to suit.

Next, we turn to THA's claim that HCHD's immunity is waived by the framework of law created by the Texas Constitution and certain sections of the Health and Safety Code.

D. Constitutional Provisions

Article IX, Section 4 of the Texas Constitution was proposed and adopted as an amendment in 1954. It provides that if a hospital district is legislatively authorized and created, "such Hospital District shall assume full responsibility for providing medical and hospital care to needy inhabitants of the county and thereafter such county and cities therein shall not levy any other tax for hospital purposes." *Id.* At the time the amendment was proposed, city-county hospitals were supported by both city and county taxes. The amendment was meant to address the issue of city residents being taxed by both cities and counties to support the hospitals, while non-city residents paid only county taxes. *Dallas' Stake Big in Hospital Vote*, DALLAS MORNING NEWS, Oct. 24, 1954, at pt. VII, p. 6. At that time, the common-law doctrine of sovereign immunity that "no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent" had been established in Texas for over one hundred years. *See Tooke*, 197 S.W.3d at 331 (internal quotation marks omitted) (quoting *Hasner v. DeYoung*, 1 Tex. 764, 769 (1847)). The constitutional language

as it was proposed and adopted did not address waiver of a hospital district's immunity. The constitutional language bears on a hospital district's *liability* for providing care, but it does not address the method by which that liability may be enforced; that is, whether a hospital district is or is not immune from suit to establish and secure a judgment for the amount of whatever its liability may be. We need go no further than the plain language of the Constitution to conclude it does not provide that suits for damages may be filed against a hospital district. *See Bouillion*, 896 S.W.2d at 148.[2] We hold that article IX, section 4 does not waive a district's governmental immunity from suit.

E. Statutory Provisions

Looking next to the statutes involved, we note that it is more difficult to determine legislative consent to suit against an entity when language specifying that "immunity is waived" is absent from the provisions in question. *Taylor*, 106 S.W.3d at 697. We have developed aids to help analyze statutes for legislative consent to suit: (1) whether the statutory provisions, even if not a model of clarity, waive immunity without doubt; (2) ambiguity as to waiver is resolved in favor of retaining immunity; (3) immunity is waived if the Legislature requires that the entity be joined in a lawsuit even though the entity would otherwise be immune from suit; and (4) whether the Legislature provided an objective limitation on the governmental entity's potential liability. *See id.* at 697-98. We have also considered whether the statutory provisions would serve any purpose absent a waiver

[2] Even if we were to go behind the plain language of the Constitution, the available legislative history and records of public discussions about the proposed amendment do not show that any consideration was given to the subject of immunity from suit.

of immunity. *See, e.g.*, *id.* at 700; *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 643 (Tex. 2004); *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 6 (Tex. 2000).

Pursuant to the authority granted by Texas Constitution Article IX, Section 4, section 281.002 of the Health and Safety Code statutorily authorizes creation of hospital districts in counties with populations over 190,000. Section 281.046 provides that if such a district is created, then "[b]eginning on the date on which taxes are collected for the district, the district assumes full responsibility for furnishing medical and hospital care for indigent and needy persons residing in the district." Section 281.046's language parallels that of the Constitution insofar as mandating that once a district begins collecting taxes for purposes of providing health care to indigents, then it has the responsibility to provide such care. Our analysis of the similar constitutional language applies to section 281.046 which is, for purposes of the issue before us, the same as the language in article IX, section 4. The statutory language might impact or even foreclose the question of whether a hospital district is *liable* for allowable expenses, an issue not before us, but the statute is silent as to waiver of a district's immunity from suits such as the one THA has brought. And section 281.046 neither requires the district to be joined in some type of suit nor does it set an objective limitation on the district's potential liability. *See Taylor*, 106 S.W.3d at 697-98. In sum, section 281.046 does not waive HCHD's immunity from suit.

We next consider THA's argument that HCHD's immunity is waived by Section 61.002(6) of the IHCTA. Section 61.002 contains definitions applicable to that chapter:

> (6) "Governmental entity" includes a county, municipality, or other political subdivision of the state, but does not include a hospital district or hospital authority.

> (7) "Hospital district" means a hospital district created under the authority of Article IX, Sections 4-11, of the Texas Constitution.

THA claims that because a hospital district is excluded from the definition of "governmental entity," immunity does not apply to hospital districts for claims under the IHCTA because only "governmental entities" are protected by the doctrine of governmental immunity. A fair and reasonable reading of the statute yields the conclusion that where the term "governmental entity" is *used* in the chapter, a hospital district is not included. If the chapter said that notwithstanding any provision of the chapter that might be interpreted otherwise, immunity is retained for governmental entities, then THA's argument would carry greater weight. But the chapter nowhere addresses immunity of "governmental entities." Applying the interpretation aids of *Taylor*, we conclude that section 61.002(6)'s definition of "governmental entity" which excludes HCHD, does not waive HCHD's immunity. *See Taylor*, 106 S.W.3d at 697-98.

Section 61.0045 is entitled "Information Necessary to Determine Eligibility." Section 61.0045(a) allows medical service providers to require patients to furnish and authorize the release of information necessary for determination that the patient is an eligible resident of the service area so the provider may submit a claim to the "county, hospital district, or public hospital that is liable for payment for the service." Section 61.0045(b) provides:

> A county, hospital district, or public hospital that receives information obtained under Subsection (a) *shall* use the information to determine whether the patient to whom services were provided is an eligible resident of the service area of the county, hospital district or public hospital and, if so, *shall pay* the claim made by the provider in accordance with this chapter.

(Emphasis added). THA argues that the use of "shall" mandates payment by HCHD, and if the language is not interpreted as waiving HCHD's immunity from suit, then the statute's use of mandatory language is of no effect. THA urges that failing to interpret section 61.0045 as waiving immunity would violate our principles of statutory construction and the Legislature's mandate that in interpreting statutes it is presumed the entire statute is intended to be effective and that a just and reasonable result is intended. *See* TEX. GOV'T CODE § 311.021(2),(3). We disagree with THA. Like our discussion of sections 281.046 and 61.002(6), the analysis for legislative consent to suit applies here as well: (1) the statutory provisions do not waive the district's immunity from suit without doubt; (2) to the extent the statute creates some ambiguity as to waiver of immunity from suit, we resolve the doubt in favor of retaining immunity; (3) neither section 61.0045 nor chapter 61 requires a hospital district to be joined as a party to some type of lawsuit; and (4) neither section 61.0045 nor chapter 61 places an objective limitation on any potential liability. *See Taylor*, 106 S.W.3d at 697-98.

Section 61.0045 requires a hospital district to pay claims by a provider for services rendered to an eligible resident of the district. But as with Article IX, Section 4 of the Constitution and section 281.046, section 61.0045 is directed toward the question of whether a hospital district is *liable* for allowable expenses; but the statute is silent as to waiver of a district's immunity from *suit* asserting a right to reimbursement by parties such as THA. Thus, section 61.0045 does not waive HCHD's immunity from suit.

Section 61.060 is entitled "Payment for Services." Section 61.060(b) provides that "[a] hospital district is liable for health care services as provided by the Texas Constitution and the statute

creating the district." Section 61.060 also addresses a hospital district's liability for payment and not its immunity from suit. THA's urging that section 61.060 waives HCHD's immunity from suit is misplaced for the reasons we have expressed above as to sections 281.046, 61.002(6), and 61.0045.

F. Additional Considerations

Next we consider THA's assertion that the IHCTA is part of a framework of law that waives HCHD's immunity from suit. THA contends that the provisions of the IHCTA, when considered with the previously discussed language of Article IX, Section 4 of the Constitution and section 281.046(a) (specifying that a hospital district "assumes full responsibility for furnishing medical and hospital care for indigent and needy persons residing in the district"), yield the inescapable conclusion that the Legislature intended for hospital districts' immunity from suit to be waived. Districts could then be required to pay claims for which they are statutorily liable and for which they have received tax money. THA posits that if the law were otherwise, hospital districts could collect taxes to pay for indigent care, yet deny a treating entity's requests for payment with impunity, thereby transferring the cost of the care to entities such as THA that do not have taxing authority. *See* TEX. HEALTH & SAFETY CODE §§ 262.003(e), 281.045(a) (providing that a hospital authority does not have taxing power). THA warns that if we hold the Legislature has not waived HCHD's immunity from suit, then (1) cities will begin withholding taxes collected for hospital districts and offset those collections against alleged "debts" owed by districts to the cities for indigent care, resulting in numerous suits by districts to recover the taxes withheld; (2) cities and municipal hospital authorities will be bankrupted by paying for indigent medical care; and (3) cities and

municipal hospital districts, by expending funds for care of ineligible indigents will be in violation of Texas Constitution Article III, Section 52(a). Despite THA's construct and warnings of dire results if HCHD prevails here, we disagree with THA that the statutory framework or predicted negative effects of sustaining HCHD's claim of immunity to suit justifies our reading clear and unambiguous waiver language into the statutes. *See Seay v. Hall*, 677 S.W.2d 19, 25 (Tex. 1984) ("While this court may properly write in areas traditionally reserved to the judicial branch of government, it would be a usurpation of our powers to add language to a law where the legislature has refrained."); *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920) ("[Courts] are not the law-making body. They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law.").

Even though a hospital district assumes responsibility for providing medical and hospital care as a condition of collecting a tax, none of the statutes referenced by THA clearly waive a hospital district's governmental immunity so it can be sued over how and when the tax receipts are spent. And policy determinations involving who actually collects taxes, whether collecting entities are subject to suit if taxes are withheld by the collecting authority, whether laws will result in bankruptcy of municipal entities, and conforming statutory mandates for indigent care to constitutional mandates are the very type of policy decisions the Legislature is expected to make. The judiciary's task is not to refine legislative choices about how to most effectively provide for indigent care and collect and distribute taxes to pay for it. The judiciary's task is to interpret legislation as it is written. *See McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003) ("Our role . . . is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task

is to interpret those statutes in a manner that effectuates the Legislature's intent."). And as to THA's contention that municipal hospital districts' expenditures for certain indigent health care are a constitutional violation, no one has charged in this case that THA's expenditures are unconstitutional, and whether they are is not an issue properly presented.

THA also argues that in light of the constitutional provision, the Legislature must have intended to waive immunity to suit by so thoroughly addressing hospital districts' *liability* and procedures for determination of eligibility of indigents for care.[3] THA refers to two statutes that have been interpreted as waiving sovereign or governmental immunity by language that the governmental entity "is liable for" certain damages, similar to the statutes under consideration here. The first is the Tort Claims Act's provision that "[a] governmental unit in the state is liable for . . . property damage, personal injury, and death" under certain circumstances. *See* TEX. CIV. PRAC. & REM. CODE § 101.021. THA cites *University of Texas Medical Branch v. York*, 871 S.W.2d 175, 177-79 (Tex. 1994), for support. THA's reliance on the language of the Tort Claims Act and *York* is misplaced. First, the Tort Claims Act specifically waives immunity in section 101.025:

> 101.025 Waiver of Governmental Immunity; Permission to Sue
> (a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.
> (b) A person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter.

[3] This argument is similar to an argument that the statutes at issue would have no purpose absent waiver of HCHD's immunity from suit. *See Tex. Dep't of Transp.*, 146 S.W.3d at 643. THA does not claim that the statutes have no purpose in the absence of waiver. To the contrary, at oral argument THA candidly professed that the statutory construct is well designed in regard to allocation of responsibility for indigent care.

TEX. CIV. PRAC. & REM. CODE § 101.025. And in *York*, the question was not whether immunity to suit had been waived by the Tort Claims Act; the issue was whether the use, misuse, or non-use of information recorded in a patient's medical records constituted use of tangible personal property for which governmental immunity is waived. *York*, 871 S.W.2d at 175.

THA also points to Code of Criminal Procedure article 104.002(a) which states "[e]xcept as otherwise provided by this article, a county is liable for all expenses incurred in the safekeeping of prisoners . . . kept under guard by the county." THA refers us to *Harris County v. Hermann Hospital*, 943 S.W.2d 547 (Tex. App.—Eastland 1997, no writ), in which a suspect who was under guard by Harris County was taken by Life Flight to Hermann Hospital and treated. When the County refused to pay for the care rendered, Hermann Hospital sued. *Id.* at 548. The trial court denied Harris County's motion for summary judgment and granted that of Hermann Hospital. *Id.* The question of immunity to suit was not urged, but the court of appeals, in addressing Harris County's claim that article 104.002 did not authorize a third-party lawsuit against the County held that "[a]lthough the statute does not explicitly authorize a suit against a county for the payment of prisoners' medical expenses, it is clear that the statute imposes liability for these expenses on counties." *Id.* at 550. The court then stated that the hospital's only recourse after the County refused to pay was to bring suit. *Id.* The court relied on former Texas Local Government Code section 81.041[4] (now section 89.004) which provided that "a person may not sue on a claim against a county unless the person has presented the claim to the commissioners court and the commissioners court

[4] *See* Act of May 15, 1987, 70th Leg., R.S., ch. 149, § 1, 1987 Tex. Gen. Laws 707, 793.

has neglected or refused to pay all or part of the claim." The court also cited *Farmers State Bank of New Boston v. Bowie County*, 95 S.W.2d 1304, 1306 (Tex. 1936), and *Jensen Construction Co. v. Dallas County*, 920 S.W.2d 761, 770 (Tex. App.—Dallas 1996, writ denied), which interpreted similar statutory language to determine whether suit against a county was authorized. We are not persuaded that the referenced authorities are a firm footing for THA. First, those cases did not rely only on a statute that provided a governmental entity was liable. Additionally, after those cases were decided, this Court rejected the argument that Texas Local Government Code Section 89.004 waived immunity from suit. *Travis County v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246, 249 (Tex. 2002).

Furthermore, as we have noted, "[T]he 'heavy presumption in favor of immunity' derives not just from principles related to separation of powers but from practical concerns: 'In a world with increasingly complex webs of governmental units, the Legislature is better suited to make the distinctions, exceptions, and limitations that different situations require.'" *Nueces County v. San Patricio County*, 246 S.W.3d 651, 653 (Tex. 2008) (*quoting City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007)). Given the interaction between federal, state, and local entities to provide for indigent health care, it is the Legislature that is in the better position to weigh the competing interests, financial burdens, benefits, and allocation of costs and resources among the participants in the process of providing that care. If the Legislature intends to waive hospital districts' immunity from suit, we have confidence it will do so clearly and unambiguously, not by implication as THA in effect urges has been done. If we were to hold that waiver of governmental immunity to suit can occur in the manner contended for by THA—by repeatedly using language in statutes to the effect that the district "assumes liability" and "is liable" for expenses—our holding would be at odds with

the Legislature's plainly expressed intent that statutes not be construed as waiving immunity unless there is clear and unambiguous waiver language in the statute. *See* TEX. GOV'T CODE § 311.034 ("[A] statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."); *id.* § 311.016 (providing that use of the word "shall" in a statute imposes a duty absent another meaning from the context or specific statutory provision). The language THA references is not a clear and unambiguous waiver of hospital districts' immunity from suit for the type claim it makes. *Cf. Tex. Dep't of Transp.*, 146 S.W.3d at 643-44 (holding that a statute's requirement that compensation "shall be made" does not alone waive immunity). Nor does the whole of the referenced framework of constitutional and statutory law, when analyzed according to the factors we set out in *Taylor*, lead us to the interpretation THA urges.[5]

IV. Response to the Dissent

The dissent argues that the case should be remanded based on *City of Beaumont v. Bouillion*, 896 S.W.2d 143 (Tex. 1995), and *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007), which provide that suits for injunctive relief may be maintained against governmental entities. The dissent claims that by not doing so, we preclude THA from seeking injunctive relief. But this has always been and remains a suit for money damages. In the trial court, THA sought judgment for "liquidated actual damages" for the itemized care it had already provided to specific patients as well as interest, costs, and attorney's fees. HCHD filed pleas to the jurisdiction asserting immunity, and although

[5] THA also references several Attorney General opinions responding to questions about county hospital districts' liability for costs of indigent care. The opinions address *liability* of the districts, but not immunity from suit. The referenced Attorney General opinions do not persuade us that districts' immunity from suit has been waived for the reasons we have expressed as to statutory provisions addressing districts' liability for indigent health care costs.

THA amended its petition twice, it never requested relief other than monetary damages. Nor did THA ask that we remand the case so that it may replead and request such relief. *See State v. Brown*, 262 S.W.3d 365, 370 (Tex. 2008) (declining to remand a case when the petitioner did not seek such relief).[6]

V. Conclusion

HCHD's immunity from suit for damages has not been waived and the trial court did not have jurisdiction over TRH's suit. The judgment of the court of appeals is reversed and the cause is dismissed.

_____

Phil Johnson
Justice

OPINION DELIVERED: May 1, 2009

[6] In *City of El Paso v. Heinrich*, ___ S.W.3d ___ (Tex. 2009), also issued today, the Court holds that a claim for prospective declaratory and injunctive relief against government actors in their official capacities but acting *ultra vires* is not barred by immunity even if the requested relief compels the governmental entity to make monetary payments. However, the Court reaffirms the principle that immunity bars suits against governmental entities for retrospective monetary relief. *Id.* at ___.

IN THE SUPREME COURT OF TEXAS

NO. 05-0986

HARRIS COUNTY HOSPITAL DISTRICT, PETITIONER,

v.

TOMBALL REGIONAL HOSPITAL, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued December 4, 2007

CHIEF JUSTICE JEFFERSON, joined by JUSTICE O'NEILL, JUSTICE BRISTER, and JUSTICE WILLETT, dissenting.

Despite a constitutional dictate requiring a legislatively authorized hospital district to "assume full responsibility for providing medical and hospital care to needy inhabitants of the county," the Court leaves Tomball Hospital Authority ("THA") no means to obtain payment from Harris County Hospital District ("HCHD") for services provided to indigent patients. The Court holds that HCHD is immune from suit and dismisses the case, precluding THA from seeking even injunctive relief for HCHD's alleged constitutional violations. Because our constitution compels a different result, I respectfully dissent.

Article IX, section 4 of the Texas Constitution provides that if a hospital district is created by statute, it "shall assume full responsibility for providing medical and hospital care to needy

inhabitants of the county, and thereafter such county and cities therein shall not levy any other tax for hospital purposes." TEX. CONST. art. IX, § 4. The Court holds that this constitutional language:

> bears on a hospital district's *liability* for providing care, but it does not address the method by which that liability may be enforced; that is, whether a hospital district is or is not immune from suit to establish and secure a judgment for the amount of whatever its liability may be. We need go no further than the plain language of the Constitution to conclude that it does not provide that suits for damages may be filed against a hospital district.

__ S.W.3d at __. I am not persuaded by the Court's approach. There are many constitutional mandates that do not spell out precisely the means of implementation, but this silence does not render them advisory.

The Court cites *City of Beaumont v. Bouillion*, 896 S.W.2d 143 (Tex. 1995), to support its holding today. In *Bouillion*, however, we explained that while there was no implied private right of action for damages arising under the free speech and free assembly section of the Texas Constitution, suits for injunctive relief were permissible:

> The framers of the Texas Constitution articulated what they intended to be the means of remedying a constitutional violation. The framers intended that a law contrary to a constitutional provision is void. There is a difference between voiding a law and seeking damages as a remedy for an act. A law that is declared void has no legal effect. Such a declaration is different from seeking compensation for damages, or compensation in money for a loss or injury. Thus, suits for equitable remedies for violation of constitutional rights are not prohibited.

Id. at 149 (citation omitted). In so holding, we distinguished article I, section 17, the takings clause, which "provides that no person's property shall be taken, damaged or destroyed or applied to public use without adequate compensation" and noted that this language created "a textual entitlement to compensation in its limited context" and was "'a waiver of governmental immunity'" for a takings

claim. *Id*. (quoting *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980)). We cautioned, however, that "th[e] language [of the takings clause] cannot be interpreted beyond its context. The text of section 17 waives immunity only when one seeks adequate compensation for property lost to the State." *Id.*

The constitutional provision at issue in this case, article IX, section 4, may not be as clear a "textual entitlement to compensation" as article I, section 17. But this suit is also not a private action for damages like *Bouillion*, in which the plaintiffs sought money damages for violation of their constitutional rights. Here, Tomball seeks reimbursement for care that it provided to indigent patients within the hospital district under the assumption that it was constitutionally entitled to payment from HCHD. I would hold that the constitutional mandate that hospital districts "shall assume full responsibility for providing medical and hospital care to needy inhabitants of the county" is "itself . . . the authorization for compensation . . . and is a waiver of governmental immunity" for a suit alleging a violation of this requirement. *Steele*, 603 S.W.2d at 791.

Even if this mandate were not clear, however, because THA alleges that HCHD violated the constitutional mandate to "assume full responsibility" for indigent care, governmental immunity does not bar THA from seeking injunctive relief against HCHD.[1] *Bouillion*, 896 S.W.2d at 149 (noting that "suits for equitable remedies for violation of constitutional rights are not prohibited"). We

[1] This is consistent with federal cases addressing alleged violations of the United States Constitution; the United States Supreme Court has repeatedly held that federal courts may grant equitable relief for constitutional violations. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *Johnson v. Wells Fargo & Co.*, 239 U.S. 234, 244 (1915) ("Such continuing violation of constitutional rights might afford a ground for equitable relief."); *see also Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting) ("The broad power of federal courts to grant equitable relief for constitutional violations has long been established.").

recently held that under *Bouillion*, "'suits for injunctive relief' may be maintained against governmental entities to remedy violations of the Texas Constitution." *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007) (per curiam) (quoting *Bouillion*, 896 S.W.2d at 149). In *City of Elsa*, police officers sought equitable and injunctive relief for alleged constitutional violations. *Id*. at 391. The court of appeals affirmed the trial court's denial of the City's plea to the jurisdiction and remanded the officers' claims for injunctive relief to the trial court. *Id*.

At this Court, the City asserted that the court of appeals should have dismissed the claims for injunctive relief rather than remanding because the officers sought relief against the City itself and not against the officials alleged to have committed the unauthorized acts. *Id*. We rejected this argument, finding it inconsistent with *Bouillion*'s holding that "although there is no 'implied private right of action for damages against governmental entities for violations of the Texas Constitution,' suits for 'equitable remedies for violation of constitutional rights are not prohibited.'" *Id*. at 392 (quoting *Bouillion*, 896 S.W.2d at 144, 149). We concluded that the court of appeals did not err by refusing to dismiss the officers' claims for injunctive relief because "'suits for injunctive relief' may be obtained against governmental entities to remedy violations of the Texas Constitution." *Id*. (quoting *Bouillion*, 896 S.W.2d at 149). Thus, immunity would not bar THA's claims for such relief here.

While THA's live pleading does not seek equitable relief, we have held that in considering a plea to the jurisdiction, "[i]f the pleadings are insufficient to establish jurisdiction but do not affirmatively demonstrate an incurable defect, the plaintiff should be afforded the opportunity to replead." *Westbrook v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007); *Tex. Dep't of Parks and Wildlife*

v. Miranda, 133 S.W.3d 217, 226-27 (Tex. 2004). I would affirm the court of appeals' judgment remanding this case to the trial court. Because the Court instead dismisses the case, I respectfully dissent.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: May 1, 2009

IN THE SUPREME COURT OF TEXAS

NO. 05-1076

EXXON CORPORATION AND EXXON TEXAS, INC., PETITIONERS,

v.

EMERALD OIL & GAS COMPANY, L.C. AND LAURIE T. MIESCH, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued February 13, 2007

JUSTICE WAINWRIGHT delivered the opinion of the Court.

JUSTICE O'NEILL did not participate in the decision.

In this oil and gas dispute, royalty owners and an oil and gas lessee sued a previous lessee for alleged wrongful conduct in the development and subsequent abandonment of two oil and gas tracts near Refugio, Texas. The plaintiffs allege statutory and common law waste, negligence per se, negligent misrepresentation, tortious interference, breach of lease, and fraud. The trial court directed a verdict in favor of the previous lessee on some claims, and the remaining claims went to verdict. The jury found in favor of the royalty owners and awarded $18.6 million in damages. The court of appeals reversed the directed verdict and affirmed the jury verdict. 180 S.W.3d 299. We

reverse and remand.[1] Today, we also issue our opinion in *Exxon Corp. v. Emerald Oil & Gas Co.*, the companion to this case. ___ S.W.3d ___ (Tex. 2009).

I. FACTUAL AND PROCEDURAL BACKGROUND

The royalty owners[2] own several thousand acres of land in Refugio, Texas (O'Connor Lease). As early as the 1950s, Humble Oil and Refining Company, a predecessor of Exxon Corporation and Exxon Texas, Inc. (collectively Exxon), began acquiring mineral leases from the royalty owners. Exxon derived its interest from four separate mineral leases. The leases included an atypical fifty-percent royalty obligation and stringent disclosure, development, and surrender clauses.[3] During the term of the agreement, Exxon drilled 121 wells and produced at least 15 million barrels of oil and more than 65 billion cubic feet of gas, resulting in the payment of more than $43 million in royalties.

In the early 1970s, Exxon attempted to renegotiate a lower royalty because profitability of the operations was declining. As early as 1987, the royalty owners requested that Exxon provide them information and documentation to support Exxon's position that the field was depleted and no longer profitable, as the royalty owners claimed was required by the Lease to discontinue operations. By 1990, the royalty owners knew Exxon intended to plug six active wells and demanded that Exxon abandon its plans to plug these wells. On August 30, 1990, they sent a letter advising Exxon "that

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[1] We received amicus briefs from the Texas Oil & Gas Association, The Texas Alliance of Energy Producers, the Texas Land and Mineral Owners' Association, Texas and Southwestern Cattle Raisers Association, and Jerry Patterson, Commissioner of the Texas General Land Office and Chairman of the School Land Board.

[2] The royalty owners (collectively referred to as Miesch) are Molly Miesch Allen, Brien O'Connor Dunn, Bridey Kathleen Dunn Greeson (individually and as trustee of Dunn-O'Connor Family Trust), Jack Miesch, Laurie T. Miesch, Michael Miesch, Morgan Frances Dunn O'Connor, Nancy O'Connor, T. Michael O'Connor, Janie Miesch Robertson, and Kelly Patricia Dunn Schaar.

[3] The four leases are not identical; however, the differences are not material to the analysis in this case.

in the event [Exxon] plug[s] and abandon[s] any wells which are producing or capable of producing minerals in paying quantities to [the royalty owners], Exxon will be sued under the terms of the lease and the common law, both for present breach of contract and anticipatory damages."

On September 12, 1990, the royalty owners demanded by letter that Exxon deliver "any and all information, data and documents pertaining or relating to the subject wells, including drilling, production, completion and re-completion data, well bore production or completion schematics or diagrams and flow line maps and surface facility diagrams or schematics." In the same letter, the royalty owners explained that "plugging and abandonment of the [six] referenced wells would commit waste and would be contrary to public policy and laws" and that the letter "shall also be considered as [a] formal demand not to plug the above referenced six wells." The royalty owners further informed Exxon that they had "located a group of oil and gas companies willing to accept the plugging obligation" and assignment of the O'Connor Lease.

Initially, Exxon refused to provide any information, claiming that the information was proprietary. Later, Exxon claimed the information was too difficult to locate and retrieve. Then, Exxon agreed to provide the royalty owners a "reading room" containing the requested information subject to a confidentiality agreement. The reading room included a large quantity of information, but it did not contain any interpretive data or the complete well logs. Exxon ultimately concluded that it could no longer profitably afford the O'Connor Lease unless the royalty owners agreed to reduce the royalty obligation. When negotiations to lower the royalty obligation failed, starting in 1989, Exxon began plugging and abandoning the wells. As required by law, after Exxon plugged each of the wells, it filed a plugging report with the Texas Railroad Commission. 7 Tex. Reg. 3991

(1982) (16 Tex. Admin. Code § 3.14(b)(1)), *amended by* 23 Tex. Reg. 9303 (1998) (current version at 16 Tex. Admin. Code § 3.14(b)(1)).[4] By letter dated August 16, 1991, Exxon notified the royalty owners that it had completed its plugging operations.

In 1993, after Exxon's lease terminated, the royalty owners entered into a lease agreement with Pace West Production, Ltd. (Pace), later known as Emerald Oil & Gas Co., L.P. (Emerald)[5], for one-third of the acreage in the O'Connor Lease. In deciding whether to lease the land, Emerald reviewed Exxon's public filings related to the field, including the oil well plugging reports (W-3 forms) that Exxon filed with the Railroad Commission. The filings indicated that Exxon properly plugged the wells. However, Emerald encountered problems upon trying to reenter the plugged wells, including wellbores plugged with cut casing[6] and other "junk,"[7] wellbores containing environmental contaminants, and plugs in locations other than those listed on the reports. Emerald sent the royalty owners a written status report on June 8, 1994, explaining that it "encountered junk

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[4] Title 16 section 3.14 of the Texas Administrative Code requires well operators to file plugging reports, or W-3 forms, with the Railroad Commission within thirty days after each well is plugged. 16 Tex. Admin. Code § 3.14. Section 3.14 mandates that an operator disclose the specific methods used to plug the wells and sign an oath verifying that the statements in the report are true. *Id.*

[5] The evidence indicates that Emerald was formerly known as Pace West Production, Ltd. A May 25, 1993 "Agreement for Waivers" between Emerald and the royalty owners states that Emerald was "formerly known as Pace West Production, L.C., and also formerly known as Pace West Production, Ltd." An undated "Memorandum of Amended Oil and Gas Lease and Financing Statement" also states that Emerald was formerly known as Pace West. Additionally, Glenn Warren Lynch, a representative from Emerald, testified that Emerald "was formerly known as Pace West." T. Michael O'Connor, one of the royalty owners, explained that Emerald was operating under another name, Pace West, when it made an initial offer to reopen some of the wells in the O'Connor Lease.

[6] Exxon does not dispute that it plugged the wells using non-standard plugging procedures. It admits to cutting the well casing and leaving it in the wellbore. This material may delay completion of the well and increase reentry expenses. *Tarrant County Water Control & Imp. Dist. No. One v. Fullwood*, 963 S.W.2d 60, 67 (Tex. 1998).

[7] The term "junk" is a term of art used in the oil and gas industry to refer to "non-drillable material such as steel or iron, in [a] well bore." *Id.*

in hole" and that Exxon had cut the casing in some wells. On January 24, 1995, Emerald met with the royalty owners and explained more about the extent of the damage to the wells due to Exxon's plugging techniques.

In January 1995, Emerald obtained Exxon's internal well records on the O'Connor Lease from Quintana, Exxon's partner on the adjoining tract, also leased by Exxon. Exxon's internal records differed substantially from the Railroad Commission filings regarding its plugging of the wells in the O'Connor Lease. Concluding that Exxon intentionally sabotaged the field, Emerald sued Exxon in July 1996, claiming (1) breach of a duty to plug the wells properly, (2) breach of a duty to avoid committing waste, (3) negligence per se in violating several sections of the Natural Resources Code and Commission Regulations, (4) tortious interference with economic opportunity, (5) negligent misrepresentation, and (6) fraud. In August and September 1996, the royalty owners intervened and alleged similar claims. In October 1999, the royalty owners amended their petitions, adding claims for breach of contract for Exxon's failure to comply with development clauses in the lease.

Prior to trial, the trial court granted Exxon's motion for summary judgment and severed Emerald's claims for breach of a duty to plug the wells properly, breach of a duty to avoid committing waste, and negligence per se, reasoning that Exxon owed no duty to Emerald as a subsequent lessee. Emerald appealed the trial court's summary judgment ruling and severance order. The court of appeals reversed and remanded the claims to the trial court. *Emerald Oil & Gas, L.C. v. Exxon Corp.*, 228 S.W.3d 166 (Tex. App.—Corpus Christi 2005), *rev'd* ____ S.W.3d ____ (Tex. 2009). Exxon appealed that judgment to this Court in cause number 05-0729.

At trial, Exxon obtained a directed verdict on Emerald's remaining claims and all of the royalty owners' claims except common law and statutory waste and breach of lease. The jury found in favor of the royalty owners on the causes of action for waste and breach of lease, awarding $5 million in actual damages for waste, $10 million in punitive damages for waste, and $3.6 million in damages for breach of lease. The trial court rendered judgment in accordance with the verdict. All parties appealed. The court of appeals affirmed the judgment in favor of the royalty owners, reversed the directed verdict against Emerald, and remanded Emerald's claims for a new trial. 180 S.W.3d 299. We granted Exxon's petition for review.

II. LAW AND ANALYSIS

A. Statute of Limitations: Statutory and Common Law Waste, Negligence Per Se, Negligent Misrepresentation, and Tortious Interference

The parties agree that a two-year statute of limitations applies to their claims for statutory and common law waste, negligence per se, negligent misrepresentation, and tortious interference.[8] TEX. CIV. PRAC. & REM. CODE § 16.003(a). However, Emerald and the royalty owners argue that Exxon's conduct tolled the statute of limitations or delayed accrual of their claims. At trial, the jury found that the royalty owners discovered, or should have discovered in the exercise of reasonable diligence, the waste committed by Exxon on January 24, 1995, the date that Emerald's representatives met with the royalty owners and informed them, in the words of the court of appeals, "about the full extent of damage to the wells and the numerous discrepancies" in Exxon's plugging reports. 180 S.W.3d

[8] This discussion pertains only to the royalty owners' claims for statutory and common law waste and negligence per se. Emerald's similar claims were severed at the trial court and are the subject of the opinion issued in the companion case, *Exxon v. Emerald Oil & Gas Co., L.C.* ___ S.W.3d ___ (Tex. 2009).

at 316. The court of appeals determined that the statute of limitations tolled until that date and affirmed the judgment on that issue. *Id.* at 316–17. Exxon argues that the court of appeals improperly tolled the two-year statute of limitations until Emerald and the royalty owners discovered the full extent of the damage, instead of the date Exxon completed plugging the wells.[9] Emerald and the royalty owners do not dispute that, unless accrual of the cause of action is deferred or the statute of limitations tolled, the two-year statute of limitations bars all of their claims except fraud, which has a four-year statute of limitations. *See* TEX. CIV. PRAC. & REM. CODE § 16.004.

Although Emerald and the royalty owners argue that the statute of limitations on their claims has tolled under the doctrine of fraudulent concealment, or that the accrual of their claims have been deferred because of the discovery rule, we do not reach these issues because Emerald and the royalty owners had actual knowledge of violations of the lease agreement and their injuries by June 8, 1994 at the latest. Specifically, the royalty owners advised Exxon in writing in September 1990 that plugging the wells would commit waste in violation of the law. In June 1994, Emerald advised the royalty owners that it discovered that Exxon placed cut casing and junk in one or more wells. Therefore, by September 1990, the royalty owners had actual knowledge of the facts underlying their breach of lease and waste claims, and by June 1994, both Emerald and the royalty owners had actual knowledge of the facts underlying their negligence and tortious interference claims.

The royalty owners argue that they did not appreciate the significance of the statements in

[9] Emerald argues that Exxon failed to preserve its argument that the tortious interference claims are time-barred. In its motion for directed verdict at trial, Exxon stated that "all of the claims asserted by the Plaintiffs . . . are barred by the applicable statutes of limitations." Exxon made the same argument before the court of appeals and raises the issue in this Court. Exxon preserved this issue for our review.

the letter they wrote to Exxon in 1990 and the letter Emerald sent to them in 1994. However, the 1990 letter threatened Exxon with a lawsuit for waste and violation of the law if it plugged the wells, and in the 1994 letter, Emerald told the royalty owners that Exxon cut casing and dumped junk in the wells that were plugged. Both the court of appeals and the jury concluded that Emerald and the royalty owners did not have actual knowledge of their claims until January 1995. The legal significance of the undisputed facts cannot be ignored. *See City of Keller v. Wilson*, 168 S.W.3d 802, 814–17 (Tex. 2005) (explaining that courts conducting a no-evidence review cannot ignore evidence that has one logical conclusion). The letters unequivocally and conclusively establish that the royalty owners and Emerald knew or suspected there was damage to their interests in the O'Connor Lease in 1990 and 1994.

Causes of action accrue when claimants are on notice of their injury and have the opportunity to seek a judicial remedy. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003). The claims have a two-year statute of limitations. Irrespective of whether fraudulent concealment or the discovery rule tolls any portion of an applicable limitations period, actual knowledge of the injury triggers the accrual of the cause of action. The limitations period on the royalty owners' breach of lease and waste claims began to run September 1990 and ended September 1992, and the limitations period on Emerald's and the royalty owners' negligence and tortious interference claims began to run June 1994 and ended June 1996, when the royalty owners had actual knowledge of their claims. Thus, Emerald's claims brought in July 1996 and the royalty owners' claims brought in September 1996 are time-barred. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a).

B. Breach of Lease

The leases' development clauses require Exxon to "prosecute diligently a continuous drilling and development program until [the tracts are] fully developed for oil and gas." The royalty owners claim that Exxon failed to develop two productive zones in violation of the development clauses. The court of appeals upheld the jury's verdict, holding that the testimony of the royalty owners' expert, George Hite, was some evidence that the leases were capable of producing in paying quantities until 1999 and that Exxon did not drill and complete wells in two productive zones, H12 and FS75.[10] 180 S.W.3d at 334–35. Exxon contends no evidence supports the jury's finding that Exxon failed to comply with the development clauses in the oil and gas agreement.[11]

Before we address Exxon's legal sufficiency argument, we must first determine the scope of Exxon's development obligations under the leases. "An oil and gas lease is a contract, and its terms are interpreted as such." *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 860 (Tex. 2005); *accord Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005) (interpreting an oil and gas lease using contract principles). "In construing an unambiguous oil and gas lease, . . . we seek to enforce the intention of the parties as it is expressed in the lease." *Tittizer*, 171 S.W.3d at 860. The development clauses state that the tracts are deemed "fully developed" when "at least one (1) well has been drilled and completed in each horizon or stratum capable of producing [oil or gas] in paying quantities" for a specified number of acres. This is a common definition of "fully developed" in an

[10] The royalty owners and their expert (Hite) used "horizon," "stratum," and "zone" interchangeably.

[11] The jury also found that Exxon fraudulently concealed its breach and that the royalty owners did not know, and could not have known with due diligence, that Exxon fraudulently concealed its failure to fully develop until February 1999 when Exxon produced previously requested documents during discovery. For the reasons that follow, we need not reach the royalty owners' fraudulent concealment claim.

oil and gas lease. 5 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 671.4, at 136.1 (3d ed. 2008). The parties' primary dispute is the meaning of "drill" and "complete" in the development clause of the lease agreement.

The leases do not define "drill" or "complete." "It is a well recognized canon of construction that technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless there is evidence that the words were used in a different sense." *Barrett v. Ferrell*, 550 S.W.2d 138, 142 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). In oil and gas parlance, "drill" refers to the "[a]ct of boring a hole through which oil and/or gas may be produced if encountered in commercial quantities." 8 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW: MANUAL OF OIL AND GAS TERMS at 281–82 (3d ed. 2008). A "completed well" refers to "a well *capable* of producing oil or gas." *Id.* at 171 (emphasis added). The "completion of a well" can also refer to "those processes necessary *before production occurs* [such as] perforating the casing and washing out the drilling mud." *Id.* at 174 (emphasis added). Certainly, the parties can define the operator's duty under the contract differently. For example,

> [c]ompensation for drilling an oil or gas well may be made contingent upon the discovery of oil or gas in paying quantities, but a contract will not be so construed in the absence of a clear expression or implication of such intent by the contract . . . . The courts in construing contracts for the drilling of wells are not disposed to imply warranties as to production.

Barrett, 550 S.W.2d at 142 (citing W.L. SUMMERS, THE LAW OF OIL AND GAS § 687 (perm. ed. 1938)). These definitions show that for a well to be considered "drilled and completed" as contemplated by the development clauses, a hole must be dug in the ground, and if oil or gas is encountered, the casing must be perforated or otherwise prepared for production. The definition of

a completed well in the treatises is also the one recognized by this Court. *Barrett*, 550 S.W.2d at 142 (citing *Cannon v. Wingard*, 355 S.W.2d 776, 780 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.)). A "well need not be a producing well to be completed;" it only needs to be capable of producing oil or gas. *Id.*

The royalty owners concede that Exxon complied with the spacing requirements and drilled the requisite number of wells per acre. The royalty owners, however, confuse Exxon's contractual obligation to fully develop the tract ("drill" and "complete" at least one well), per the terms of the lease, with an obligation to exploit the tracts fully. Under the royalty owners' interpretation, Exxon must produce and extract all the reserves in each zone capable of production in paying quantities. This obligation appears nowhere in the language of the development clauses. Exxon's development obligations only require it to drill a requisite number of wells per acre, and if oil or gas is encountered, Exxon must prepare the well for production in paying quantities. In the oil patch, mutual incentive of owners and operators to make a profit drives the operator, having sunk costs, to produce in paying quantities.

Having ascertained the scope of Exxon's development obligations, we now turn to the sufficiency of the evidence offered to support the breach of lease claim. Because Exxon is attacking the legal sufficiency of the evidence supporting an adverse finding on an issue for which it did not have the burden of proof, Exxon must show that no evidence supports the jury's adverse finding. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). Evidence is legally sufficient if it "would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller*,

168 S.W.3d at 827. We "credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *Id.* at 827.

Exxon argues that Hite's testimony that Exxon failed to develop the leases is conclusory and, therefore, insufficient to support the jury's verdict. "Opinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact 'more probable or less probable.'" *Coastal Trans. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232–33 (Tex. 2004) (quoting TEX. R. EVID. 401). Such conclusory evidence cannot support a judgment. *Id.* at 232.

Hite testified that "fully developed" means there are a "sufficient number of wells in it to get the reserves." And when asked whether Exxon completed "in the FS75 and the H12, in every well, that Exxon had good probability of producing oil and gas in those two zones," he answered "[n]o, they didn't." However, when asked whether "drilling the H12 and completing it in two wells complete[d] that zone in the wells on this tract that would penetrate that zone in paying quantities," he answered "[i]f your question is, did the two wells fully develop the lease, the answer is no." Asked whether the wells Emerald completed in FS75 were "completed in a fully-developed manner," he answered "[n]o, it was not." The evidence does not support his assertion. Hite's charts of the production from the wells in the O'Connor Lease were admitted at trial. The charts show that Exxon drilled at least one well in each zone and produced 3,651,850 cubic feet of gas and 78,746 barrels of oil in zone FS75 and 1,728,728 cubic feet of gas and 3,933 barrels of oil in zone H12. The royalty owners concede facts establishing that Exxon drilled at least one well in FS75 and at least one well

in H12 and both wells produced in paying quantities. The attempt to characterize these facts differently does not change the evidence.

Hite's subsequent testimony indicates that he too conflated "complete" with "produce" or "exploit." He argues that Exxon violated the development clauses because Exxon did not produce more extensively, or exhaust the production, from the wells in zones H12 and FS75. His testimony sidesteps the precedent question of whether Exxon drilled and completed the requisite number of wells per acre and, instead, focuses on whether zones FS75 and H12 would have supported further production in paying quantities. He testified that zones H12 and FS75 had remaining reserve potential and that Exxon had information indicating they "could be developed further." Evidence that further development potential existed when Exxon abandoned the leasehold in 1991 is no evidence that Exxon failed to comply with the parties' agreement embodied in the development clause. And evidence that Exxon did not fully exploit the reserves in FS75 and H12 is no evidence that Exxon did not "drill and complete" the requisite number of wells for zones FS75 and H12. The evidence conclusively proves that, as required by the contract, Exxon completed at least one well capable of producing in paying quantities in each zone. *See City of Keller*, 168 S.W.3d at 814–15. Therefore, we reverse the court of appeals' judgment and render judgment in favor of Exxon on the breach of lease claim.[12]

[12] Because we conclude no evidence supports the royalty owners' underlying breach of lease claim, we need not reach the issue of whether the claim is time-barred or whether the doctrine of fraudulent concealment tolls the statute of limitations. *See Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 n.1 (Tex. 1990) (holding that the doctrine of fraudulent concealment estops a defendant who conceals the existence of a cause of action from asserting the statute of limitations as an affirmative defense).

C. Fraud

Unlike most of Emerald and the royalty owners' other claims, which have a two-year statute of limitations, the statute of limitations for fraud is four years. TEX. CIV. PRAC. & REM. CODE § 16.004(a)(4). The statute of limitations for fraud begins to run from the time the party knew of the misrepresentation. *Little v. Smith*, 943 S.W.2d 414, 420 (Tex. 1997). The briefing on this issue does not identify when Emerald and the royalty owners learned of the allegedly false plugging reports. Emerald does acknowledge that "the first place subsequent operators turn is those very filings at the Railroad Commission when deciding whether redevelopment can be economically undertaken." It would seem that the royalty owners learned of the asserted misrepresentations in the June 1994 letter from Emerald. The letter states that Emerald encountered "junk" in the wells on the O'Connor Lease as early as August 1993. Thus, Emerald may have learned about the misrepresentations on or around that date. Based on either of these dates, the fraud claims filed by Emerald and the royalty owners were timely, and therefore, we reach the merits of the fraud claim.[13]

The court of appeals reversed the trial court's directed verdict on the fraud claim, holding that the jury should have been allowed to consider whether the evidence was sufficient to establish fraud. It asserted that the evidence did not conclusively disprove the intent-to-induce reliance element of the fraud claim. In reviewing a trial court's directed verdict, we examine the evidence in the light most favorable to the person suffering an adverse judgment and decide whether there is any evidence of probative value to raise an issue of material fact on the question presented. *Henderson v.*

[13] Nothing in this opinion precludes Exxon from claiming on remand that Emerald and the royalty owners learned of misrepresentations earlier.

Travelers Ins. Co., 544 S.W.2d 649, 650 (Tex. 1976). We do not hold that public filings, such as Railroad Commission reports, alone satisfy the intent-to-induce reliance element of fraud. We conclude there was some evidence presented at trial tending to show that Exxon knew, at the time it filed the plugging reports, of an especial likelihood that the royalty owners and the identified future operators would rely on the inaccurate plugging reports. We, therefore, agree with the court of appeals on this issue.

A plaintiff seeking to prevail on a fraud claim must prove that (1) the defendant made a material misrepresentation; (2) the defendant knew the representation was false or made the representation recklessly without any knowledge of its truth; (3) the defendant made the representation with the intent that the other party would act on that representation or intended to induce the party's reliance on the representation; and (4) the plaintiff suffered an injury by actively and justifiably relying on that representation. *See De Santis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983).

Emerald and the royalty owners[14] claim that Exxon committed fraud by misrepresenting material information in its plugging reports to the Railroad Commission with the intent that known lessees and lessors of such mineral interest would rely on the information in the future. The royalty owners and Emerald claim, as a result of their reliance, that they are entitled to "the lost wells and minerals, the additional cost of re-completing the improperly plugged wells and the increased risk

[14] Because the royalty owners only conditionally challenged the directed verdict at the court of appeals, and the court of appeals upheld the judgment in their favor, the royalty owners do not address the fraud claim in detail before this Court.

in loss of producing zones and wells." The court of appeals held that evidence that Exxon knew that unidentified, subsequent lessees and operators might rely on Railroad Commission filings to make business decisions was sufficient to satisfy the intent-to-induce reliance element of fraud. 180 S.W.3d at 337. Exxon argues that the court of appeals' decision is erroneous for two reasons. First, Exxon argues there is no evidence that future operators would rely on the plugging reports because the reports' only purpose is to allow the state to protect against pollution. Second, Exxon argues that Emerald's approach reduces the intent-to-induce reliance element of fraud to mere foreseeability, counter to the Court's analysis in *Ernst & Young*. 51 S.W.3d 573, 580 (Tex. 2001).

"Proper plugging is the responsibility of the operator of the well." 7 Tex. Reg. 3991 (1982) (16 Tex. Admin. Code § 3.14(c)(1)), *amended by* 23 Tex. Reg. 9304 (1998) (current version at 16 Tex. Admin. Code § 3.14(c)(1)). The Railroad Commission mandates:

> Non-drillable material that would hamper or prevent re-entry of a well shall not be placed in any wellbore during plugging operations . . . . Pipe and unretrievable junk shall not be cemented in the hole during plugging operations without prior approval by the district director.

7 Tex. Reg. 3991 (1982) (16 Tex. Admin. Code § 3.14(c)(9)), *amended by* 23 Tex. Reg. 9305 (1998) (current version at 16 Tex. Admin. Code § 3.14(d)(10)). Exxon argues that this section and similar plugging requirements are not intended to benefit future operators, but only to protect the environment. Thus, Exxon argues, no evidence supports Emerald's argument that there was an especial likelihood that Exxon knew future operators would rely on the reports because that is not the reports' purpose.

Although the Railroad Commission explained that it revised section 3.14 "to protect fresh water in the state from pollution," the plugging reports are not limited to this purpose. The Commission states that one of the objectives of the plugging regulations is to prevent plugging of wells that hinder or prevent reentering wells, which could be desired by the same or subsequent owners or operators. 7 Tex. Reg. at 3989. To police this regulation, the Commission requires that the plugging reports, or W-3s, be verified under oath, be filed within thirty days after the plugging is completed, and disclose the methods used to plug a well. *Id.* at 3991. Thus, the purpose of requiring operators to file plugging reports with the Commission is to ensure that operators follow a plugging procedure that not only prevents pollution, but also allows reentry into the wells for commercial purposes.

However, the mere fact that royalty owners and subsequent lessees might or should rely on statements in Exxon's plugging reports alone is not sufficient to establish an intent to induce reliance, as the court of appeals and Emerald argue. *Ernst & Young*, 51 S.W.3d at 580. In *Ernst & Young*, we considered the proof necessary to establish the intent-to-induce reliance element of a fraud claim. Although we declined to decide whether to adopt the reason-to-expect standard outlined in section 531 of the Restatement (Second) of Torts, we concluded that this standard is consistent with Texas fraud jurisprudence. *Id.* Section 531 provides:

> One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.

RESTATEMENT (SECOND) OF TORTS § 531 (1977). Like the defendants in *Ernst & Young*, Exxon argues that this approach reduces the intent-to-induce element to a foreseeability standard. We rejected that argument in *Ernst & Young*, holding that section 531's "reason-to-expect standard requires more than mere foreseeability; the claimant's reliance must be 'especially likely' and justifiable, and the transaction sued upon must be the type the defendant contemplated." *Ernst & Young*, 51 S.W.3d at 580. Evidence that reliance on false public information as part of a general industry practice is insufficient, as a matter of law, to prove an intent to induce reliance. *Id.* at 581–82. Even an obvious risk that a misrepresentation might be repeated to a third party is not sufficient to satisfy the reason-to-expect standard. A plaintiff must show that "[t]he maker of the misrepresentation [has] information that would lead a reasonable man to conclude that there is an especial likelihood that it will reach those persons and will influence their conduct." *Id.* at 581 (citing RESTATEMENT (SECOND) OF TORTS § 531 (1977)). The standard is not met if a plaintiff merely foresees that some party may rely on statements made in a public filing. In order to prove intent-to-induce reliance under this standard, the party must show an especial likelihood that the party who made the misstatement knew the claimant would rely on the information in the type of transaction the defendant contemplated. *See Ernst & Young*, 51 S.W.3d at 580.

Therefore, if the evidence shows that Exxon made material misrepresentations in its plugging reports to the Railroad Commission, and Exxon knew that lessors and operators in the future may rely on the filings, such evidence would fail as a matter of law under the *Ernst & Young* standard. *Id.* at 581–82. Such a holding would open the cause of action to any person who subsequently relied on any public filings—including stocks and bonds, security interests, real property deeds, and tax

filings—with few limits in sight. The intent-to-induce reliance element of fraud is a focused inquiry, more akin to a rifle shot than a shotgun blast. Intent-to-induce reliance is not satisfied by evidence that a misrepresentation may be read in the future by some unknown member of the public or of a specific industry.

Here, however, there is some evidence that Exxon knew of an especial likelihood that Emerald specifically would rely on the plugging reports in a transaction being considered at the time it filed the plugging reports. In 1989, Exxon concluded that it could no longer profitably operate the leases unless Exxon's royalty could be renegotiated. The negotiations failed, and Exxon plugged the wells in the O'Connor Lease between 1989 until 1991. In their letter of September 12, 1990, the royalty owners stated, "[W]e have located a group of oil and gas companies that are willing to accept the plugging obligations and an Assignment of the above referenced [six] wells [and certain acreage around each well]." They also offered their consent to assign all of Exxon's right, title, and interest in the leases to several companies and indicated their interest in future oil and gas operations in the Lease.

In 1989, Emerald expressed that it was "most anxious to proceed" with production in the O'Connor Lease and offered to purchase Exxon's interest. Emerald renewed its offer in January 1990. By letter of July 23, 1990, Exxon advised each of the royalty owners that Pace had expressed an interest in the Lease. On May 25, 1993, Emerald acquired the interest to develop the Lease.

Exxon knew the royalty owners had a continuing interest in further developing the O'Connor Lease, received offers from the putative subsequent lessee to purchase Exxon's interest in the Lease, and knew the transaction proposed by Miesch and Emerald was the continued production of oil and

gas in the Lease. Thus, legally sufficient evidence in the record supports the claim that Exxon had information that would lead a reasonable person to conclude there was an especial likelihood these plaintiffs would rely on Exxon's inaccurate filings with the Railroad Commission at the time it filed them. Accordingly, the trial court's grant of directed verdict on the fraud claim on this basis was in error.[15]

III. CONCLUSION

We hold the statutory and common law waste, negligence per se, negligent misrepresentation, and tortious interference claims are time-barred and reverse and render judgment in Exxon's favor with respect to those claims. We also hold no evidence supports the breach of lease claims and reverse and render judgment in Exxon's favor with respect to those claims. Finally, we affirm the court of appeals' judgment, for different reasons, reversing the trial court's directed verdict with respect to the fraud claim, and remand that claim to the trial court for further proceedings.

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Dale Wainwright
Justice

OPINION DELIVERED: March 27, 2009

[15] Emerald and the royalty owners claim that they are entitled to all of their damages, including lost wells and minerals, due to the alleged fraud. Because this issue was not presented to this Court, we need not address it in this opinion. However, we note that the "measure of damages in a fraud case is the actual amount of the plaintiff's loss that directly and proximately results from the defendant's fraudulent conduct." *Tilton v. Marshall*, 925 S.W.2d 672, 680 (Tex. 1996).

IN THE SUPREME COURT OF TEXAS

NO. 06-0034

DALLAS AREA RAPID TRANSIT, PETITIONER,

v.

AMALGAMATED TRANSIT UNION LOCAL NO. 1338, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued November 14, 2007

JUSTICE HECHT delivered the opinion of the Court.

Section 13(c) of the federal Urban Mass Transit Act of 1964 (the "UMTA", now the Federal Transit Act) conditions a public transportation authority's receipt of federal financial assistance on "arrangements the Secretary of Labor concludes are fair and equitable" to protect "the interests of employees affected by the assistance".[1] Such arrangements "shall include provisions that may be necessary for . . . the preservation of rights, privileges, and benefits . . . [and] the protection of individual employees against a worsening of their positions related to employment".[2]

[1] Pub. L. No. 88-365, § 10(c), 78 Stat. 302, 307, redesignated as § 13(c) by Pub. L. No. 89-562, § 2, 80 Stat. 715, 716, as amended, now codified at 49 U.S.C. § 5333(b) (2006) ("As a condition of financial assistance under . . . this title, the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. The agreement granting the assistance . . . shall specify the arrangements.").

[2] *Id.* § 5333(b)(2) ("Arrangements under this subsection shall include provisions that may be necessary for — (A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (B) the continuation of collective bargaining rights; (C) the protection of individual employees against a worsening of their positions related to employment; (D) assurances of employment to employees of acquired public transportation systems; (E) assurances of priority of reemployment of employees whose employment is ended or who are laid off; and (F) paid training or retraining programs.").

In this case, a public transportation authority and its employees' union, operating under a 13(c) arrangement, resolved a general grievance over wages and benefits. The authority did not adhere to the resolution, and the union sued for breach of contract. The lower courts concluded that the authority is not immune from suit.[3] The issue before us is whether section 13(c) preempts an authority's immunity from suit under state law. We hold that immunity is not preempted and that the union's recourse is to the procedures approved in the 13(c) arrangement. Accordingly, we reverse the judgment of the court of appeals and dismiss the case.

I

Petitioner Dallas Area Rapid Transit is a regional public transportation authority[4] that performs only governmental functions[5] and is immune from suit under Texas law.[6] Created in 1983 and funded with a one-cent sales tax,[7] DART assumed the operations of the Dallas Transit System, which the City of Dallas had acquired in 1963 from the privately owned Dallas Transit Company.[8] Company employees, and later System employees, were represented by Amalgamated Transit Union Local No. 1338, which now represents DART employees. ATU 1338 engaged in collective bargaining with the Company,[9] but Texas law prohibits a state political subdivision from collective

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[3] 173 S.W.3d 896, 900 (Tex. App.–Dallas 2005).

[4] *See* TEX. TRANSP. CODE §§ 452.001-.720.

[5] *Id.* § 452.052(c) ("An authority is a governmental unit . . . and the operations of the authority are not proprietary functions for any purpose . . . .").

[6] *See Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 812-815 (Tex. 1993) (treating a port authority with only governmental functions as a political subdivision of the State for purposes of governmental immunity).

[7] *See* DART HISTORY, DALLAS AREA RAPID TRANSIT, http://www.dart.org/about/history.asp (last visited October 31, 2008).

[8] *See Dallas Area Rapid Transit v. Plummer*, 841 S.W.2d 870, 872 (Tex. App.–Dallas 1992, writ denied), *disapproved in part on other grounds by Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 445-446, n. 17 (Tex. 1992); *Amalgamated Transit Union Local 1338 v. Dallas Public Transit Bd.*, 430 S.W.2d 107, 109 (Tex. Civ. App.–Dallas 1968, writ ref'd n.r.e.), *cert. denied*, 396 U.S. 838 (1969).

[9] *See Local 1338*, 430 S.W.2d at 109-110.

bargaining with public employees.[10] This prohibition has been held to apply to the System,[11] DART,[12] and their employees, and ATU 1338 does not challenge its application here.[13] But public employees may "present grievances concerning their wages, hours of employment, or conditions of work either individually or through a representative that does not claim the right to strike,"[14] and ATU 1338 has presented grievances for DART employees.

DART receives federal financial assistance conditioned on a 13(c) Arrangement that was negotiated with ATU 1338 and approved by the Secretary of Labor on September 30, 1991. Attachment B to the 1991 Arrangement sets out "general grievance procedures . . . for the purpose of giving an employee, individually or through such employee's representative, the opportunity to present grievances and appeals regarding establishment of, or failure to establish, specified wages, hours or conditions of work". For our purposes, those procedures may be summarized as follows:

- General grievances must be presented in writing to the human resources department head, who must meet with the employee or representative, provide a full hearing and review, and issue a written decision.
- The employee or representative may appeal to the executive director or invoke a fact-finding process.

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[10] TEX. GOV'T CODE § 617.002 ("(a) An official of the state or of a political subdivision of the state may not enter into a collective bargaining contract with a labor organization regarding wages, hours, or conditions of employment of public employees. (b) A contract entered into in violation of Subsection (a) is void. (c) An official of the state or of a political subdivision of the state may not recognize a labor organization as the bargaining agent for a group of public employees."), formerly TEX. REV. CIV. STAT. ANN. art. 5154c, first enacted by Act of April 17, 1947, 50th Leg., R.S., ch. 135, 1947 Tex. Gen. Laws 231.

[11] *Local 1338*, 430 S.W.2d at 113-114.

[12] *Stephens v. Dallas Area Rapid Transit*, 50 S.W.3d 621, 632-634 (Tex. App.–Dallas 2001).

[13] Similar governmental entities are treated as state political subdivisions. *See* TEX. GOV'T CODE § 791.003(5) ("In this chapter: . . . 'Political subdivision' includes any corporate and political entity organized under state law."); TEX. LOCAL GOV'T CODE § 335.075(a) (referring to "a political subdivision, including a metropolitan rapid transit authority created under Chapter 451, Transportation Code"); *id.* § 391.002(1) ("In this chapter: . . . 'Governmental unit' means a[n] . . . authority . . . or other political subdivision of the state."); TEX. NAT. RES. CODE § 11.082(d)(4) ("In this section: . . . 'Political subdivision' means a . . . special-purpose district or authority."); TEX. TRANSP. CODE § 228.251(2) ("In this subchapter: . . . 'Local governmental entity' means a political subdivision of the state, including . . . a transportation corporation created under Chapter 431."); *id.* § 366.003(8) (same); *id.* § 370.003(8) (same); *id.* 370.032(a) ("[A regional mobility authority] is a body politic and corporate and a political subdivision of this state.").

[14] TEX. GOV'T CODE § 617.005.

- The fact-finding process is conducted by a three-member panel. One member is selected by each side, and the third is selected from a list of neutrals. After gathering facts, conducting hearings, and considering the opposing positions, the panel must issue a written report, making recommendations on unresolved issues.

- If the panel is unanimous, "the recommendations shall be deemed agreed upon as a final resolution of the issues submitted, except as otherwise modified by the parties' mutual agreement." But either partisan member of the panel may dissent. The panel must publish its findings and recommendations, and any dissents, in the local media.

- "[T]he fact-finding report and recommendations shall be advisory only" and shall not be binding on either party.[15]

The provisions of Attachment B, with minor changes, were included as section 8.10 of DART's Hourly Employment Manual.

In April 2001, ATU 1338 filed a general group grievance on behalf of DART employees seeking wage increases and better benefits. The grievance did not result in a fact-finding panel report under the Attachment B procedures; instead, DART and ATU 1338 signed a "General Grievance Resolution" in June 2002. The Resolution provided, among other things, that hourly employees would receive three annual 4% pay increases effective October 2001, October 2002, and October 2003. The Resolution stated that it "constitute[d] a final resolution to the issues raised in the General Grievance", barred ATU 1338 from filing another general grievance "concerning terms and conditions of employment, specified wages, hours, and conditions of work" for three years, and stated that "DART agrees that for the three year period it will not make any unilateral changes to DART's Hourly Employment Manual except for those issues remaining open herein." But the Resolution also contained important reservations under the heading, "Management Rights":

> 1. DART, at its sole discretion, possesses the right in accordance with applicable laws, to manage all operations, including the direction of the working force and the right to plan, direct and control the operation of all equipment and other property of DART, except as modified by Section 8.10 of the DART Hourly Employment Manual and Section 617.005 of the Texas Government Code and DART's 13(c) Capital Arrangement certified by the Department of Labor on

[15] The clause adding that the report and recommendations "shall not be binding" appears in DART's Hourly Employment Manual.

> September 30, 1991 pursuant to USC § 5333(b), if applicable. . . . [N]othing herein changes DART's position that it has a unilateral right to establish employment conditions, set wages, hours of employment or conditions of work. In the event that DART makes any unilateral change except for issues remaining open herein during the term of this Resolution, such change relieves Local 1338 of its commitment not to file a General Grievance from October 1,2001 to September 30, 2004.
>
> 2. Matters of inherent managerial policy are reserved exclusively to DART under law. These include but shall not be limited to such areas of discretion or policy as the functions and programs of DART, standards of service, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel.
>
> 3. The listing of specific rights in this article is not intended to be, nor should be considered, restrictive or a waiver of any rights of management not listed and not specifically surrendered herein whether or not such rights have been exercised by DART in the past.
>
> 4. DART intends to abide by the provisions herein, and to resolve the general grievance as herein stated. By resolving this general grievance, DART does not intend to waive its legal obligations, including those set forth in its 13(c) Arrangement and its position that it may not legally enter into a legally binding and bilateral agreement with a labor organization regarding wages, hours, or conditions of employment of public employees. This general grievance is therefore resolved subject to all the foregoing limitations.

DART gave its employees the pay raises in 2001 and 2002, but not in 2003, and it unilaterally reduced other benefits, asserting that declining sales tax revenues required cost-saving measures. ATU 1338 sued for breach of contract based on DART's failure to comply with the 2002 Resolution. ATU 1338 sought money damages and injunctive relief. DART filed a plea to the jurisdiction claiming governmental immunity, which the trial court denied. On DART's interlocutory appeal, the court of appeals affirmed, holding that section 13(c) of the UMTA, as interpreted by the United States Supreme Court in *Jackson Transit Authority v. Local Div. 1285, Amalgamated Transit Union*,[16] preempted DART's immunity from ATU 1338's suit:

> Assuming state law provides that DART, as a governmental entity, is immune from suit, this immunity would obstruct accomplishing and executing Congress's full purposes and objectives under the UMTA. The UMTA, as interpreted in *Jackson Transit Authority,* is clear: state law is to control labor relations between local

[16] 457 U.S. 15 (1982).

governments and unionized transit workers, as long as the workers' collective-bargaining rights are preserved before a local government receives federal aid. Congress designed section 13(c) of the UMTA "as a means to accommodate state law to collective bargaining." *Jackson Transit Auth.,* 457 U.S. at 27, 102 S.Ct. 2202. Although section 13(c) may be narrowly drafted to minimize its effects on state labor law, Congress's clear intent was to preserve collective-bargaining rights. Where state immunity law would preclude enforcement of the rights preserved under section 13(c), Congress's objectives could not be accomplished. Therefore, state immunity law "is preempted and has no effect."[17]

We granted DART's petition for review.[18]

II

We begin with ATU 1338's argument that we lack jurisdiction over this interlocutory appeal. DART contends that we have jurisdiction because the court of appeals' decision conflicts with section 13(c) and *Jackson Transit Authority*. We first consider the extent of our jurisdiction and then how to apply it in this case.

A

Without an intermediate appellate court in Texas, this Court's workload soon became unmanageable.[19] The Constitution of 1876 limited the Supreme Court's appellate jurisdiction to civil cases and created a court of appeals for criminal cases and civil cases from county courts,[20] but this did little to alleviate the burden.[21] To preserve a right of appeal that was both broad and effective, constitutional amendments adopted in 1891 restructured the judiciary.[22] The Supreme Court's

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[17] 173 S.W.3d 896, 900 (Tex. App.–Dallas 2005) (citations omitted).

[18] 50 Tex. Sup. Ct. J. 929 (June 29, 2007).

[19] *See* 1 GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 399 (1977).

[20] TEX. CONST. art. V, §§ 3, 6 (1876).

[21] *See* 1 BRADEN, *supra* note 19, at 365 ("Despite the transfer of all criminal jurisdiction and some civil cases to the court of appeals in 1876, the supreme court's docket remained overcrowded.").

[22] *Id.* at 399 ("The supreme court was falling so far behind that either the right to appeal had to be severely curtailed or the system had to be radically revised.").

jurisdiction remained limited to civil cases.[23] The court of appeals became the Court of Criminal Appeals, with jurisdiction over criminal cases only.[24] The Legislature was required to divide the State into separate judicial districts and establish in each district a court of civil appeals with appellate jurisdiction over all civil cases in that district,[25] thereby placing appellate courts closer to the litigants and relieving the burden on the Supreme Court. To ensure uniformity in the development of the civil law, the 1891 constitutional amendments gave the Supreme Court appellate jurisdiction over "questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Court of Civil Appeals may hold differently on the same question of law".[26]

The enabling legislation enacted in 1892 reflected this constitutional priority while shifting the burden of appellate caseloads to the intermediate courts. The Supreme Court's jurisdiction was limited to cases in which the Courts of Civil Appeals had rendered a final judgment, as opposed to remanding for further proceedings, but there were exceptions to that limitation for cases in which Supreme Court review even at an intermediate stage was important. Three exceptions were for "[c]ases in which a civil court of appeals overrules its own decisions or the decision of another court of civil appeals or of the supreme court", "[c]ases in which the judges of any court of civil appeals may disagree", and "[c]ases in which any two of the courts of civil appeals may hold differently on the same question of law".[27] As we observed in 1895, these exceptions "were inserted for the purpose of enabling this court, *upon the first opportunity*, to settle questions of law upon which

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[23] TEX. CONST. art. V, § 3 (1891).

[24] *Id.* §§ 4-5.

[25] *Id.* § 6.

[26] *Id.* § 3.

[27] Act approved April 13, 1892, 22nd Leg., 1st C.S., ch. 14, § 1, 1892 Tex. Gen. Laws 19, 20, *reprinted in* 10 *H.P.N. Gammel, The Laws of Texas 1822-1897*, at 383, 384 (Austin, Gammel Book Co. 1898), formerly TEX. REV. CIV. STAT. ANN art. 1728 (1925).

conflicting opinions were held by any of the courts having appellate jurisdiction, — so far, at least, as the opinion of this court can settle such questions".[28] Obviously, allowing conflicts in the law among the Courts of Civil Appeals to go unresolved could generate confusion that would offset the gains in efficiency those courts were designed to accomplish. The Supreme Court's jurisdiction was enlarged to provide for resolution of such conflicts. In 1913, the Court's jurisdiction was extended to all cases from the Courts of Civil Appeals, even if remanded,[29] and that remains the law.[30]

The 1892 legislation made decisions in a few types of cases final in the Courts of Civil Appeals, irrespective of conflicts among the courts. These were boundary and election disputes, slander and divorce cases, interlocutory appeals, and cases within the constitutional county courts' jurisdiction except probate matters and cases involving revenue laws or the validity of a statute.[31] But by 1953, the Legislature had concluded that the Supreme Court's jurisdiction should extend to all cases "in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision, or in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals or of the Supreme Court upon a question of law".[32] That is the current law.[33]

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[28] *Sturgis Nat'l Bank v. Smyth*, 30 S.W. 898, 898 (Tex. 1895) (emphasis added).

[29] Act approved March 28, 1913, 33rd Leg., R.S., ch. 55, § 1, 1913 Tex. Gen. Laws 107, 107.

[30] TEX. GOV'T CODE § 22.001(a)(1)-(2).

[31] Act approved April 13, 1892, 22nd Leg., 1st C.S., ch. 15, § 5, 1892 Tex. Gen. Laws 25, 26, *reprinted in* 10 *H.P.N. Gammel, The Laws of Texas 1822-1897*, at 389, 390 (Austin, Gammel Book Co. 1898), formerly TEX. REV. CIV. STAT. ANN art. 1821 (1925).

[32] Act of May 19, 1953, 53rd Leg., R.S., ch. 424, § 2, 1953 Tex. Gen. Laws 1026, 1027; *see State v. Wynn*, 301 S.W.2d 76, 77-78 (Tex. 1957) (per curiam); *Cone v. Cone*, 266 S.W.2d 860, 861 (Tex. 1954) (per curiam).

[33] TEX. GOV'T CODE § 22.225(c). Pursuant to a constitutional amendment adopted in a 1980 election, the courts of civil appeals were renamed courts of appeals, and given criminal jurisdiction in 1981. TEX. CONST. art. V § 6; Tex. S. J. Res. 36, 66th Leg., R.S., §§ 5, 7, 1979 Tex. Gen. Laws 3223, 3224-3225, 3226 (effective Sept. 1, 1981); Act of June 1, 1981, 67th Leg., R.S., ch. 291, §§ 101-102, 149, 1981 Tex. Gen. Laws 761, 801-802, 820 (amending TEX. CODE CRIM. PROC. arts. 4.01, 4.03, effective Sept. 1, 1981).

Although the statutes governing this Court's jurisdiction have specifically addressed conflicts between our intermediate appellate courts and this Court, none has addressed conflicts between those courts and the United States Supreme Court. Such a conflict was presented in a 1979 divorce case, *Eichelberger v. Eichelberger*.[34] At that time, decisions in divorce cases were still final in the courts of civil appeals absent conflicts among Texas courts.[35] The court of civil appeals had held that federal law did not preempt a divorce court's division of future railroad retirement benefits between spouses.[36] While the case was pending in this Court, the United States Supreme Court reached the opposite conclusion.[37] Although there was no statutory basis for this Court to take jurisdiction of the case, we concluded that we were constitutionally required to do so:

> We hold that under Article V, Sections 1[38] and 3,[39] of the Constitution of Texas, the Supreme Court of Texas possesses the power, and thus the duty, to correct a decision of a Court of Civil Appeals that conflicts with the "supreme law of the land"[40] as established by the Congress and Supreme Court of the United States.[41]

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[34] 582 S.W.2d 395 (Tex. 1979).

[35] This finality was removed in 1987. Act of May 29, 1987, 70th Leg., R.S., ch. 1106, § 2, 1987 Tex. Gen. Laws 3804, 3804.

[36] *Eichelberger v. Eichelberger*, 557 S.W.2d 587, 589 (Tex. Civ. App.—Waco 1977), *rev'd and rendered in part and aff'd in part*, 582 S.W.2d 395 (Tex. 1979).

[37] *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 585-586 (1979).

[38] TEX. CONST. art. V, § 1 states in part: "The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law."

[39] *Id.* art. V, § 3 states in part: "The Supreme Court shall exercise the judicial power of the state except as otherwise provided in this Constitution. . . . Its appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or by law."

[40] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[41] *Eichelberger*, 582 S.W.2d at 397.

Consistent with the Supreme Court's decision, we reversed the judgment of the court of civil appeals in part and rendered judgment.[42]

In the nearly thirty years since we decided *Eichelberger*, we have not invoked our constitutional jurisdiction to remove a conflict between a Texas appellate court and the United States Supreme Court,[43] but we adhere to our holding that this Court has such jurisdiction. From 1892 to 1953, the decisions of the courts of civil appeals were final in some cases and not subject to this Court's review, but this Court has never lacked jurisdiction to prevent an intermediate appellate court from conflicting with one of this Court's decisions.[44] It is fundamental to the very structure of our appellate system that this Court's decisions be binding on the lower courts.[45] We have no less authority to ensure that the lower courts follows the United States Supreme Court.

Nor should our holding in *Eichelberger* apply with any less force in interlocutory appeals.[46] On the contrary, the fact that provision has been made for an interlocutory appeal indicates that the Legislature has determined that appellate review before a final judgment is important. It is surely no less important when a court of appeals' decision conflicts, not with another court of appeals' decision or a decision of this Court, but with a decision of the United States Supreme Court.

Accordingly, we conclude that we have jurisdiction over this case if the court of appeals's decision conflicts with the United States Supreme Court's decision in *Jackson Transit Authority*.

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[42] *Id.* at 403.

[43] *Cf. County of Dallas v. Sempe*, 262 S.W.3d 315, 315-316 (Tex. 2008) (per curiam) (concluding that the court of appeals' decision did not conflict with a decision of the United States Supreme Court).

[44] Even if appellate jurisdiction were restricted, we have noted that such a conflict could be corrected by writ of mandamus. *State v. Wynn*, 301 S.W.2d 76, 78 (Tex. 1957) (per curiam).

[45] *In re K.M.S.*, 91 S.W.3d 331, 331 (Tex. 2002) (per curiam) ("[I]n reaching their conclusions, courts of appeals are not free to disregard pronouncements from this Court . . . ."); *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 386 (Tex. 1989) ("This court need not defend its opinions from criticism from courts of appeals; rather they must follow this court's pronouncements.").

[46] *Cf. In re H.V.*, 252 S.W.3d 319, 323 n.26 (Tex. 2008) (expressly refusing to reach the issue).

B

We turn, then, to the question whether such a conflict exists. A court of appeals holds differently from this Court "when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants."[47] We use this same standard in determining whether the court of appeals in this case has held differently from the United States Supreme Court.

In *Jackson Transit Authority*, the public transportation authority in Jackson, Tennessee had a 13(c) arrangement that guaranteed its employees' collective-bargaining rights, but the authority later refused to abide by a collective-bargaining agreement.[48] The union sued the authority in federal court for breach of both the 13(c) arrangement and the collective-bargaining agreement, but the district court dismissed the suit for want of subject-matter jurisdiction.[49] The court of appeals reversed, holding that the district court had federal-question jurisdiction[50] because the union's claim arose under the laws of the United States, and additionally, that section 13(c) implicitly provides for a federal cause of action.[51] The Supreme Court agreed that the district court had federal-question jurisdiction[52] but held that section 13(c) did not create a federal cause of action for breach of either the 13(c) arrangement or the collective-bargaining agreement.[53]

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[47] TEX. GOV'T CODE § 22.001(e).

[48] 457 U.S. 15, 18-19 (1982). The authority contended that the union's agreement was with the authority's former manager, not with the authority itself. *Id*. at 19 n.3; *see Local Div. 1285, Amalgamated Transit Union v. Jackson Transit Auth.*, 1990 Tenn. App. LEXIS 901, at *5-*9, 1990 WL 210310, at *2-*4 (Tenn. Ct. App. Dec. 26, 1990).

[49] 457 U.S. at 19; 447 F. Supp. 88, 93-95 (W.D. Tenn. 1977).

[50] 28 U.S.C. § 1331 (2006).

[51] 457 U.S. at 19-20; 620 F.2d 11379, 1383 (6th Cir. 1981).

[52] 457 U.S. at 21 n.6.

[53] *Id*. at 29.

Under Tennessee law, the Jackson Transit Authority was authorized to enter into collective-bargaining agreements with its employees at the time its dispute with the union arose,[54] and the authority did not contend that it was immune from suit to enforce its agreements. Thus, the Supreme Court was not confronted with any issue of federal preemption of state governmental immunity. But DART and ATU 1338 argue that passages in the Supreme Court's opinion indicate its views on the subject. As DART points out, the Supreme Court emphasized that Congress intended section 13(c) arrangements and agreements under them to be governed by state law, not federal law:

> A consistent theme runs throughout the consideration of § 13(c): Congress intended that labor relations between transit workers and local governments would be controlled by state law.[55]
>
> * * *
>
> Thus, Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers. Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations. Congress intended that § 13(c) would be an important tool to protect the collective-bargaining rights of transit workers, by ensuring that state law preserved their rights before federal aid could be used to convert private companies into public entities. But Congress designed § 13(c) as a means to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law.[56]

DART argues that federal law should not preempt state immunity law any more than state labor law. But as ATU 1338 points out, other passages contemplate state-court actions to enforce section 13(c) arrangements and agreements under them:

> Indeed, since § 13(c) contemplates protective arrangements between grant recipients and unions as well as subsequent collective-bargaining agreements between those

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[54] *See* TENN. CODE ANN. §§ 7-56-101 to -109. Prior to 1971, when these statutes were enacted, one court had held in *Weakley County Mun. Elec. Sys. v. Vick,* 309 S.W.2d 792 (Tenn. Ct. App. 1957), that a governmental entity could not engage in collective bargaining with its employees. *See Local Div. 1285*, 1990 Tenn. App. LEXIS 901, at *4, 1990 WL 210310, at *1.

[55] 457 U.S. at 24.

[56] *Id*. at 27-28 (footnotes and citation omitted).

> parties, it is reasonable to conclude that Congress expected the § 13(c) agreement and the collective-bargaining agreement, like ordinary contracts, to be enforceable by private suit upon a breach. . . .
>
> The issue, then, is not whether Congress intended the union to be able to bring contract actions for breaches of the two contracts, but whether Congress intended such contract actions to set forth federal, rather than state, claims.[57]
>
> * * *
>
> Given this explicit legislative history, we cannot read § 13(c) to create federal causes of action for breaches of § 13(c) agreements and collective-bargaining contracts between UMTA aid recipients and transit unions. The legislative history indicates that Congress intended those contracts to be governed by state law applied in state courts.[58]

ATU 1338 argues that the right to sue a transportation authority to enforce its agreements is implicit in the Supreme Court's opinion.

The court of appeals agreed with ATU 1338, but we think both DART's and ATU 1338's arguments read far too much into the Supreme Court's opinion. The issue of federal preemption of state immunity law was simply not presented in the case, and we do not think the Supreme Court would have resolved it merely by implication. Even if we were mistaken about the Supreme Court's intention, we see no way to infer from its opinion what view it might take of the preemption issue. The court of appeals' decision is inconsistent with *Jackson Transit Authority* because the court of appeals read the opinion in that case to decide the preemption issue in the present case. The court of appeals' decision creates uncertainty in the law that is certainly unnecessary and may result in unfairness to litigants. The importance of clarity in the area is illustrated by the fact that the Supreme Court granted certiorari in *Jackson Transit Authority* "[b]ecause of the importance of the

[57] *Id.* at 20-21 (citation omitted).

[58] *Id.* at 29 (footnote omitted).

interpretation of § 13(c) for local transit labor relations".[59] For the same reason, we conclude it is important for this Court to reach the preemption issue presented in this case.

III

We come at last to the issue itself, which is a narrow one. DART, for its part, concedes that it would not be immune from suit by ATU 1338 to require that the grievance procedures laid out in the Arrangement be followed. If, for example, DART refused to provide the hearing called for, or to engage in the prescribed fact-finding process, DART acknowledges that ATU 1338 could sue to enforce the Arrangement. ATU 1338, on the other hand, does not challenge the adequacy of the 1991 Arrangement under section 13(c) or argue that Texas law prohibiting collective bargaining by public employees is inapplicable to DART or is preempted by section 13(c). And while ATU 1338 argued below that DART is not immune from suit on its agreements, it has abandoned those arguments in this Court. We accept without comment all these concessions for purposes of this case. The issue before us comes down to this: does section 13(c) preempt DART's immunity from ATU 1338's suit to enforce the 2002 Resolution?

Federal law can preempt state law expressly or implicitly.[60] ATU 1338 does not contend that the UMTA contains any express preemption of state law. The United States Supreme Court has summarized implicit preemption as follows:

> [A] federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[61]

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[59] *Id.* at 20 (footnote omitted).

[60] *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286-287 (1995); *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001).

[61] *Freightliner*, 514 U.S. at 287 (citations and internal quotation marks omitted); *see also Great Dane*, 52 S.W.3d at 743.

ATU 1338 focuses on the latter component of implied preemption, arguing that by preventing suit to enforce the 2002 Resolution, state immunity law stands as an obstacle to achieving the full purpose of section 13(c) to protect transit employees' interests.

But section 13(c) requires only that a transportation authority make arrangements that "the Secretary of Labor concludes are fair and equitable."[62] The 1991 Arrangement was negotiated with ATU 1338 and was approved by the Secretary of Labor. As we have noted, ATU 1338 does not argue that the Arrangement is less than fair and equitable as required by section 13(c). The Arrangement, which achieves the full purposes of section 13(c), does not provide for binding or judicially enforceable general grievance resolutions. Under Attachment B, a hearing must be conducted, and if the grievance is not resolved, a fact-finding process ensues. But the end result of that process is an arbitration panel's report and recommendations that are expressly "advisory only" and not binding on either party. The report must be published in the local media, suggesting that the parties' recourse is then through political processes. Municipalities that are part of DART may be pressured to instruct the members each appoints to DART's governing board to adopt certain policies,[63] and municipalities may withdraw from DART altogether.[64]

ATU 1338 acknowledges that a fact-finding report produced under Attachment B cannot be enforced in court but argues that the 2002 Resolution is different. ATU 1338 cannot explain, however, why it should be entitled to enforce a general grievance resolution to which DART agreed when the process would not have produced an enforceable result had it continued to the end. The Resolution expressly recognized that it did not change DART's "position that it has a unilateral right

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[62] Pub. L. No. 88-365, § 10(c), 78 Stat. 302, 307, redesignated as § 13(c) by Pub. L. No. 89-562, § 2, 80 Stat. 715, 716, as amended, now codified at 49 U.S.C. § 5333(b) (2006) ("As a condition of financial assistance under . . . this title, the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. The agreement granting the assistance . . . shall specify the arrangements.").

[63] *See* TEX. TRANSP. CODE §§ 452.571-.580.

[64] *Id.* §§ 452.651-.662.

to establish employment conditions, set wages, hours of employment or conditions of work." The Resolution also recognized that DART was not waiving "its position that it may not legally enter into a legally binding and bilateral agreement with a labor organization regarding wages, hours, or conditions of employment of public employees." Although the Resolution recited DART's intention to comply with its terms, it also provided that if DART made any unilateral change, the consequence would only be to relieve ATU 1338 of its commitment to a moratorium on filing general grievances.

ATU 1338 argues that for DART to be immune from this suit makes the Resolution pointless. But ATU 1338's complaint is with the 1991 Arrangement, not state immunity law. The Arrangement gave ATU 1338 no judicial recourse. DART's immunity from suit takes nothing away from ATU 1338 to which it was entitled under section 13(c). ATU 1338 argues that if it cannot sue to enforce the Resolution, it is left with no recourse at all. But the Resolution itself contemplates that if DART unilaterally failed to comply with its terms, ATU 1338 could simply file another general grievance and invoke the process provided by Attachment B.

Given that an arrangement can meet the requirements of section 13(c) without providing for judicial enforcement of grievance resolutions, nothing in that statute implicitly preempts state immunity law. Accordingly, we conclude that section 13(c) does not preempt DART's immunity from this suit.

* * *

The judgment of the court of appeals is therefore reversed and the case is dismissed.

Nathan L. Hecht
Justice

Opinion delivered: December 19, 2008

IN THE SUPREME COURT OF TEXAS

NO. 06-0074

PASTOR RICK BARR AND PHILEMON HOMES, INC., PETITIONERS,

v.

CITY OF SINTON, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued March 22, 2007

JUSTICE HECHT delivered the opinion of the Court.

The Texas Religious Freedom Restoration Act (TRFRA) provides that "a government agency may not substantially burden a person's free exercise of religion [unless it] demonstrates that the application of the burden to the person . . . is in furtherance of a compelling governmental interest [and] is the least restrictive means of furthering that interest."[1] TRFRA does not immunize religious conduct from government regulation; it requires the government to tread carefully and lightly when its actions substantially burden religious exercise.

In this case, a city resident, as part of a religious ministry, offered men recently released from prison free housing and religious instruction in two homes he owned. In response, the city passed a zoning ordinance that not only precluded the use of the homes for that purpose but effectively banned the ministry from the city. The trial court found that the city had not violated TRFRA, and the court of appeals affirmed.[2] We reverse and remand to the trial court for further proceedings.

[1] TEX. CIV. PRAC. & REM. CODE § 110.003(a)-(b).

[2] ___ S.W.3d ___ (Tex. App.–Corpus Christi-Edinburg 2005).

I

In 1998, Pastor Richard Wayne Barr began a religious halfway house ministry through Philemon Restoration Homes, Inc., a nonprofit corporation he directed. The purpose of the ministry was to offer housing, biblical instruction, and counseling to low-level offenders released from prison on probation or parole in transition back into the community. For the most part, men accepted by the ministry had been convicted of drug-related crimes; the ministry would not accept men convicted of violent crimes or sex offenses. In application forms for would-be residents, Philemon described its function as "[c]reating bridges to enable the Christian inmate to go from prison to the local church through Biblical discipleship". Applicants were asked to respond in writing to several pages of questions inquiring about such things as family background, drug usage, mental health, and religious faith. Applicants were also required to sign a "statement of faith" in basic Christian beliefs[3] and to agree to a long list of behavioral rules characterized as "biblical guidelines for Christian living".[4] The guidelines emphasized to prospective residents that Philemon was "a biblical ministry, NOT a social service agency". Each morning began with group prayer and Bible study.

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[3] The "statement of faith" provided: "We believe the Bible to be the inspired, infallible, and authoritative Word of God. We believe that there is one God, eternally existent in three persons: Father, Son, and Holy Spirit. We believe in the Deity of our Lord Jesus Christ, in His virgin birth, His sinless life, His atoning death on the cross, and His bodily resurrection from the grave. We believe that Jesus Christ ascended to the right hand of the Father, now rules as Head of His Body, the Church, and will personally return in power and glory. We believe that man in his natural state is lost and thus alienated from God, and that salvation through personal faith in the person and work of Jesus Christ is essential. We believe in the present ministry of the Holy Spirit, by whose indwelling a Christian is made spiritually alive and enabled to live a godly life. We believe in the resurrection of both the saved and the lost, they who are saved into the resurrection of life, and they who are lost unto the resurrection of damnation. We believe in the spiritual unity of believers in Christ. I understand that my signature indicates my agreement with the above statement of faith."

[4] The guidelines included: "Substance abuse of any nature is not permitted in Philemon Restoration Homes. A violation in or outside of the home is cause for termination of your residency. . . . Smoking anywhere is not allowed. . . . Possession of weapons of any nature will terminate your residency. . . . Be respectful of the property of other residents. . . . Attend and be on time for all family and biblical discipleship meetings . . . . Gambling or playing the lottery is not allowed. . . . Fights, threats, or aggressive behavior is not allowed . . . . Do not engage in illicit sexual activity anywhere nor in sexual activity within the house. . . . Borrowing or lending money is not allowed between residents or between residents and staff. . . . Being truthful about everything during your stay at Philemon Restoration Homes is expected. . . . In consideration of others, keep noise levels down and activities to a minimum after 11:00 p.m. . . . You are here because the Lord placed you here. . . ."

Barr lived and operated his ministry in the City of Sinton, a town 2.2 square miles in size with a population of 5,676 (2000 census), the county seat of San Patricio County, not far from Corpus Christi. Barr owned two homes besides his residence, both of them within a block of the church he attended, Grace Christian Fellowship, which appears to have been supportive of Barr's ministry. Barr housed and taught Philemon residents in those homes, which together could hold up to sixteen men at one time. Though the men were unsupervised, neither Barr nor the city manager was aware of any complaint of disturbance. Barr's commitment to the ministry was personal; he himself is an ex-con.

When Barr began his ministry, the City imposed no zoning or other restrictions on his use of the homes. In January 1999, Barr discussed his ministry with Sinton's mayor, city manager, and police chief, and a few weeks later he presented his ministry before the city council. In response to questions whether Philemon was in compliance with state law, Barr researched the matter and concluded that it was.[5] In April, the city council held a public hearing at which a large number of people expressed both opposition to as well as support of Barr's ministry. A few days later, the city council passed Ordinance 1999-02, which added to the City Code a section that provided as follows:

> A correctional or rehabilitation facility may not be located in the City of Sinton within 1000 feet of a residential area, a primary or secondary school, property designated as a public park or public recreation area by any governmental authority, or a church, synagogue, or other place of worship.
>
> For the purposes of this section distance is measured along the shortest straight line between the nearest property line of the correctional or rehabilitation facility and the nearest property line of the residential area, school, park, recreation area, or place of worship, as appropriate.
>
> For the purposes of this section "Correctional or rehabilitation facility" means a residential facility that is not operated by the federal government, the state of Texas,

[5] Specifically, the questions concerned chapter 244 of the Local Government Code, relating to the location of correctional or rehabilitation facilities, and chapter 509 of the Texas Government Code, relating to the operation of community corrections facilities. Both chapters apply to facilities operated by the government or under government contract. TEX. LOC. GOV'T CODE § 244.001(1)(A); TEX. GOV'T CODE § 509.001(1). Barr and Philemon have never operated under government contract.

nor San Patricio County, and that is operated for the purpose of housing persons who have been convicted of misdemeanors or felonies or children found to have engaged in delinquent conduct, regardless of whether the persons are housed

(i) while serving a sentence of confinement following conviction of an offense;

(ii) as a condition of probation, parole, or mandatory supervision; or

(iii) within one (1) year after having been released from confinement in any penal institution.

For the purposes of this section "residential area" means

(i) any area designated as a residential zoning district by this ordinance, and

(ii) any area in which the principal permitted land use by this ordinance is for private residences.

The City Council finds the requirements of this section are reasonably necessary to preserve the public safety, morals, and general welfare.

As the city manager later confirmed, Ordinance 1999-02 targeted Barr and Philemon.[6] The

[6] At trial, Jackie Knox, the city manager at the time Ordinance 1999-02 was passed, testified as follows:

"Q. Was this ordinance written in response to activities of the home that Mr. Barr and Philemon operates?

"A. That was probably one of the agents of doing this, yes, sir.

"Q. That was the purpose of the ordinance?

"A. Probably so.

"Q. I'm sorry?

"A. For an establishment like that, yes.

"Q. Was there any other establishment to your knowledge —

"A. No, sir.

"Q. — being targeted?

"A. No, sir.

"Q. So this one was specifically targeted?

"A. For that type of establishment, yes."

halfway houses they operated were unquestionably within 1,000 feet of a church; indeed, they were across the street from the Grace Fellowship Church, which was helping to support the ministry. But the ordinance was broader, and was intended to be. Because Sinton is small, it would be difficult for a halfway house to be located anywhere within the city limits. The city manager later testified:

> Q. Is there any property within the city limits of Sinton that you are aware of that would qualify not being 1000 feet from any church, school, park — right — or residential area?
>
> A. I have not checked it out, but it would probably be minimal locations.
>
> Q. In other words, probably pretty close to nonexistent?
>
> A. Possibly.
>
> Q. Would that be a fair statement?
>
> A. A fair statement.

There was no evidence that any specific site within the city was available.[7]

Despite the ordinance, Barr continued to conduct his ministry as he had before. Though violations were punishable by a civil fine of $500 per day, neither Barr nor Philemon was ever cited. By the summer of 2000, Barr had taken in fifteen men altogether. Then in October 2000, the Sinton police chief complained to the Texas Board of Pardons and Paroles that Barr and Philemon were housing parolees in violation of a city ordinance, and for awhile parole officials refused to approve

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[7] The city manager testified briefly about a facility located outside the City:

"Q. You were asked a question about the detention facilities in the city. Is there some type of facility that is very near the city limits that is used by other state agencies for —

"A. Yes, sir, the restitution center there on 77 Business.

"Q. How far is that from the city limits?

"A. It's just outside the city limits.

"Q. Did the city also have public hearings on that?

"A. That I have no idea. I think that was prior to any knowledge I would have of that. That was before my time."

the arrangement. Philemon residents went to live with members of the Grace Fellowship Church.

In June 2001, Barr's attorney notified the City by letter that Barr claimed Ordinance 1999-02 violated TRFRA.[8] The City did not respond, and in August, Barr and Philemon sued the City under TRFRA, seeking injunctive relief, a declaratory judgment, monetary damages, and attorney fees.[9] In October, state officials withdrew objections to Philemon's halfway house operation, and parolees were again permitted to stay in the homes. But after the trial court denied Barr and Philemon's request for a temporary injunction in January 2002,[10] the Texas Board of Pardons and Paroles for the second time stopped approving parolees to live in Barr's homes and had the residents removed. Since then, Barr and Philemon have been unable to continue their ministry.

The parties agreed to a bifurcated trial to the bench, reserving the issues of damages and attorney fees pending the court's ruling on whether Ordinance 1999-02 violated the TRFRA. In November 2003, the court rendered judgment for the City. The court found that Barr and Philemon had operated "a correctional or rehabilitation facility" in violation of Ordinance 1999-02's 1,000-foot restriction, and that the ordinance did not violate TRFRA in any respect: that is, the ordinance did

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[8] The attorney's letter to the City referred to the ordinance as 156.026, the number of the section that Ordinance 1999-02 added to the City Code. Although the trial court found that "[p]laintiffs failed to give notice as required by the Religious Freedom Act", the City does not argue that here. *See* TEX. CIV. PRAC. & REM. CODE § 110.006(a) ("A person may not bring an action to assert a claim under this chapter unless, 60 days before bringing the action, the person gives written notice to the government agency by certified mail, return receipt requested: (1) that the person's free exercise of religion is substantially burdened by an exercise of the government agency's governmental authority; (2) of the particular act or refusal to act that is burdened; and (3) of the manner in which the exercise of governmental authority burdens the act or refusal to act.").

[9] *See* TEX. CIV. PRAC. & REM. CODE § 110.005(a)-(b) ("(a) Any person, other than a government agency, who successfully asserts a claim or defense under this chapter is entitled to recover: (1) declaratory relief under Chapter 37; (2) injunctive relief to prevent the threatened violation or continued violation; (3) compensatory damages for pecuniary and nonpecuniary losses; and (4) reasonable attorney's fees, court costs, and other reasonable expenses incurred in bringing the action. (b) Compensatory damages awarded under Subsection (a)(3) may not exceed $10,000 for each entire, distinct controversy, without regard to the number of members or other persons within a religious group who claim injury as a result of the government agency's exercise of governmental authority. A claimant is not entitled to recover exemplary damages under this chapter.").

[10] On interlocutory appeal, the court of appeals affirmed the trial court's order. *Barr v. City of Sinton*, No. 13-02-079-CV, 2003 Tex. App. LEXIS 2311, 2003 WL 1340689 (Tex. App.—Corpus Christi Mar. 20, 2003) (op. on reh'g). We dismissed the petition for review for want of jurisdiction. *Barr v. City of Sinton*, 46 Tex. Sup. Ct. J. 1062 (Aug. 28, 2003).

not substantially burden Barr's and Philemon's free exercise of religion, it was in furtherance of a compelling governmental interest, and it was the least restrictive means of furthering that interest.[11] Given the court's ruling, the issues of damages and attorney fees were never reached.

The court of appeals affirmed, concluding that Ordinance 1999-02 does not violate TRFRA because

> there is nothing in the ordinance that precludes [Barr] from providing his religious ministry to parolees and probationers, from providing instruction, counsel, and helpful assistance in other facilities in Sinton, or from housing these persons outside the City and providing his religious ministry to them there.
>
> * * *
>
> Moreover, Texas courts have long applied zoning ordinances to church-operated schools and colleges, supporting the conclusion that zoning ordinances do not substantially burden such auxiliary religious operations.[12]

We granted Barr and Philemon's petition for review.[13] Because petitioners' arguments are identical, we refer to petitioners collectively as "Barr".[14]

II

In 1997, the United States Supreme Court in *City of Boerne v. Flores*[15] recounted its 1990 decision in *Employment Division, Department of Human Resources v. Smith*[16] and Congress's

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[11] The trial court also found that Barr and Philemon's "facility" violated the 1,000-foot restriction imposed on certain correctional or rehabilitation facilities under section 244.003 of the Texas Local Government Code, and the minimum standards for certain community correction facilities under section 509.006(c) of the Texas Government Code. Both statutes apply only to facilities operated by the government or under contract with the government. TEX. LOC. GOV'T CODE § 244.003; TEX. GOV'T CODE § 509.001. Although the trial court found that Barr and Philemon operated under contract with the government, there is no evidence they did.

[12] ___ S.W.3d ___, ___ (Tex. App.–Corpus Christi-Edinburg 2005).

[13] 50 Tex. Sup. Ct. J. 218 (Tex. Dec. 15, 2006).

[14] We have received amicus briefs from the American Center for Law and Justice, the American Civil Liberties Union Foundation of Texas, Senator David Sibley, Representative Scott Hochberg, and Prison Fellowship, all in support of petitioners.

[15] 521 U.S. 507 (1997).

[16] 494 U.S. 872 (1990).

reaction to it. *Smith* had held that under the Free Exercise Clause of the First Amendment,[17] "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[18] Specifically, the Court held that a generally applicable Oregon statute criminalizing the use of peyote did not violate the Free Exercise rights of members of the Native American Church who ingested the drug for sacramental purposes.[19] *City of Boerne* explained that in *Smith*, the Court had "declined to apply the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), under which we would have asked whether Oregon's prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest."[20] *Sherbert* had held that under the Free Exercise Clause, a member of the Seventh-day Adventist Church who refused to work on Saturday, the Sabbath Day of her faith, could not be denied unemployment benefits because she was not "available for work" as required by generally applicable state law.[21] *Smith* also distinguished another case involving a generally applicable law, *Wisconsin v. Yoder*,[22] in which the Court "invalidated Wisconsin's mandatory school-attendance law as applied to Amish parents who refused on religious grounds to send their children to school. That case implicated not only the right to free religious exercise but also the right of parents to control their children's education."[23]

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[17] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[18] *City of Boerne*, 521 U.S. at 514.

[19] *Id.* at 513.

[20] *Id.*

[21] 374 U.S. 398, 399-402 (1963).

[22] 406 U.S. 205 (1972).

[23] *City of Boerne*, 521 U.S. at 514.

Four Members of the Court in *Smith* contended that the majority's decision "dramatically departs from well-settled First Amendment jurisprudence . . . and is incompatible with our Nation's fundamental commitment to individual religious liberty."[24] They were not alone in that view. The Court in *City of Boerne* acknowledged that "[m]any criticized the Court's reasoning [in *Smith*]," and this disagreement resulted in the passage of RFRA"[25] — the Religious Freedom Restoration Act of 1993.[26] While Congress could not, of course, alter *Smith*'s reading of the First Amendment, it could provide more protection by statute. In enacting RFRA, Congress found that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise",[27] and that "governments should not substantially burden religious exercise without compelling justification".[28] The purpose of RFRA, Congress declared, was "to restore the compelling interest test as set forth in [*Sherbert* and *Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened; and . . . to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[29] Thus, RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless it] demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest."[30]

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[24] *Smith v. Employment Div., Dep't of Human Res.*, 494 U.S. 872, 891 (1990) (O'Connor, J., concurring in the judgment).

[25] *City of Boerne*, 521 U.S. at 515.

[26] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

[27] *Id*. § 2000bb(a)(2).

[28] *Id.* § 2000bb(a)(3).

[29] *Id*. § 2000bb(b).

[30] *Id*. § 2000bb-1(a) to (b).

As originally enacted, RFRA applied to the States as well as the federal government,[31] but *City of Boerne* held that in extending RFRA to the States, Congress exceeded its enforcement authority under Section 5 of the Fourteenth Amendment.[32] In response, Congress amended RFRA to limit its application to the governments of the United States, its territories and possessions, and the District of Columbia and Puerto Rico.[33] But at the same time, Congress enacted the Religious Exercise in Land Use and by Institutionalized Persons Act of 2000 (RLUIPA),[34] which applied the RFRA standard to land use regulation.[35] RLUIPA applies not only to the federal government but to state and local governments when the activity is federally funded or affects interstate commerce.[36]

States also reacted to *Smith*. *Smith*'s construction of the Free Exercise Clause does not preclude a state from requiring strict scrutiny of infringements on religious freedom, either by statute or under the state constitution,[37] and many states have done just that, Texas among them.[38] The

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[31] §§ 5(1), 6(a), 107 Stat. at 1489.

[32] 521 U.S. 507, 532-534 (1997); *see Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 424 n.1 (2006) ("As originally enacted, RFRA applied to States as well as the Federal Government. In [*City of Boerne*], we held the application to States to be beyond Congress' legislative authority under § 5 of the 14th Amendment.").

[33] Religious Land Use and Institutionalized Person Act of 2000, Pub. L. No. 106-274, § 7, 114 Stat. 803, 806 (2000) (codified at 42 U.S.C. § 2000bb-2(1) to (2) (2006)); *see also Cutter v. Wilkinson*, 544 U.S. 709, 715 n.2 (2005) ("RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions. This Court, however, has not had occasion to rule on the matter." (citations omitted)).

[34] §§ 2-6, 8, 114 Stat. at 803-807 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5).

[35] 42 U.S.C.§ 2000cc(a)(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution — (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.").

[36] *Id*. §§ 2000cc(b), -2(g), -5(4).

[37] Although this Court applied *Smith* in *HEB Ministries, Inc. v. Texas Higher Education Coordinating Board*, 235 S.W.3d 627 (Tex. 2007), we found it unnecessary to decide in that case whether to construe article I, section 6 of the Texas Constitution as *Smith* construed the federal Free Exercise Clause. We have not addressed that issue and do not do so here.

[38] *See* WILLIAM W. BASSETT, RELIGIOUS ORGANIZATIONS AND THE LAW § 2:54 (2008) (listing 13 states that have adopted statutes and 17 in which courts have adopted a stricter standard than *Smith*).

Texas Legislature enacted TRFRA in 1999,[39] which like RFRA provides in part, that government "may not substantially burden a person's free exercise of religion [unless it] demonstrates that the application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that interest."[40] The Act states that "[t]he protection of religious freedom afforded by this chapter is in addition to the protections provided under federal law and the constitutions of this state and the United States."[41]

Because TRFRA, RFRA, and RLUIPA were all enacted in response to *Smith* and were animated in their common history, language, and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statutes germane in applying the Texas statute.[42]

III

At the outset, the City argues, and the court of appeals concluded, that TRFRA's strict scrutiny does not apply to zoning ordinances. The court of appeals reasoned simply that nothing prevented Barr from relocating elsewhere in the City or moving outside.[43] But ease of relocation

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[39] Act of May 30, 1999, 76th Leg., R.S., ch. 399, 1999 Tex. Gen. Laws 2511.

[40] TEX. CIV. PRAC. & REM. CODE § 110.003(a)-(b).

[41] *Id*. § 110.009(b).

[42] *See, e.g.*, *R.R. Street & Co. Inc. v. Pilgrim Enters., Inc.*, 166 S.W.3d 232, 241 (Tex. 2005) (stating that construction of the Texas Solid Waste Disposal Act would be guided by federal cases construing its federal counterpart, the Comprehensive Environmental Response, Compensation, and Liability Act); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001) (stating that because the purposes of the Texas Commission on Human Rights Act and Title VII of the federal Civil Rights Act of 1964 are similar, federal case law is instructive in applying the state statute); *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360-361 (Tex. 2000) (plurality opinion) (stating that the federal Freedom of Information Act is instructive in construing the Texas Public Information Act); *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 202 (Tex. 1993) (stating that because the work product doctrine is similar in Texas and federal courts, federal case law is instructive).

[43] ___ S.W.3d at ___ ("Assuming without determining that Pastor Barr's ministry is substantially motivated by sincere religious belief, we nonetheless conclude that while the ordinance precludes Pastor Barr from operating a correctional or rehabilitation facility within 1000 feet of residential areas, schools, parks, recreation areas, and places of worship, which may include most of the City, there is nothing in the ordinance that precludes him from providing his religious ministry to parolees and probationers, from providing instruction, counsel, and helpful assistance in other facilities in Sinton, or from housing these persons outside the City and providing his religious ministry to them there." (footnote omitted)).

goes to whether the burden of a zoning ordinance on a person's free exercise of religion is substantial, not to whether zoning ordinances are categorically exempt from TRFRA. The court of appeals added that zoning laws have long been applied to religious education facilities.[44] But that generalization shows only that it is possible for zoning laws not to substantially burden free religious exercise. The opposite is also possible. This Court, for example, has held that zoning laws cannot be used to exclude churches from all residential districts in some circumstances.[45] In any event, not only is the court of appeals' analysis flawed, it is contradicted by TRFRA's express terms, which require strict scrutiny of "*any* ordinance, rule, order, decision, practice, or other exercise of governmental authority."[46] Zoning ordinances easily fall into this group.

Unlike the court of appeals, the City relies on TRFRA's text, specifically, the first sentence of section 110.010, which states: "Notwithstanding any other provision of this chapter, a municipality has no less authority to adopt or apply laws and regulations concerning zoning, land use planning, traffic management, urban nuisance, or historic preservation than the authority of the municipality that existed under the law as interpreted by the federal courts before April 17, 1990" — the date the Supreme Court issued its decision in *Smith*. The statute thus preserves the authority municipalities had under "the law" interpreted by the federal courts pre-*Smith*. The only restriction on the governing law is that it come from pre-*Smith* federal case law. Guidance may be drawn from cases involving constitutional limits on zoning and land-use ordinances as well as from cases

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[44] *Id*. at ___ ("Moreover, Texas courts have long applied zoning ordinances to church-operated schools and colleges, supporting the conclusion that zoning ordinances do not substantially burden such auxiliary religious operations." (citing *Fountain Gate Ministries, Inc., v. City of Plano,* 654 S.W.2d 841, 844 (Tex. App.–Dallas 1983, writ ref'd n.r.e.), and *Heard v. City of Dallas,* 456 S.W.2d 440, 444 (Tex. App.–Dallas 1970, writ ref'd n.r.e.))).

[45] *See City of Sherman v. Simms*, 183 S.W.2d 415, 416-417 (Tex. 1944) ("[T]he power to establish zones is a police power and its exercise cannot be extended beyond the accomplishment of purposes rightly within the scope of that power. To exclude churches from residential districts does not promote the health, the safety, the morals or the general welfare of the community, and to relegate them to business and manufacturing districts could conceivably result in imposing a burden upon the free right to worship and, in some instances, in prohibiting altogether the exercise of that right. An ordinance fraught with that danger will not be enforced.").

[46] TEX. CIV. PRAC. & REM. CODE § 110.002(a) (emphasis added).

applying the Free Exercise Clause, or even the First Amendment generally, in other contexts. For example, *Sherbert* involved unemployment laws, and *Yoder* involved compulsory school attendance laws; both involved the Free Exercise Clause, while *Yoder* also involved parental rights; but each demonstrates the balancing of interests that *Smith* eschewed and that the statutes enacted in response — RFRA, TRFRA, and RLUIPA — all require.

The City argues first that the impact of zoning on the free exercise of religion is never subject to strict scrutiny. The Supreme Court has clearly refuted this argument. In *Schad v. Borough of Mount Ephraim*, the Supreme Court wrote:

> The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it must be exercised within constitutional limits. . . .
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> * * *
>
> [A]s is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. . . . Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of First Amendment rights. . . . [T]he Court must not only assess the substantiality of the governmental interests asserted but also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment: [a municipality] may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. . . . Precision of regulation must be the touchstone.[47]

Schad held that a borough could not use zoning laws to prohibit all live entertainment, including live adult entertainment, within its borders.[48] Surely the free exercise of religion is entitled to no less protection than adult entertainment.

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[47] 452 U.S. 61, 68-70 (1981) (citations, footnotes, and internal quotation marks and brackets omitted).

[48] *Id*. at 65.

In *Sherbert*, the Supreme Court held that denying unemployment benefits to someone because she would not work on Saturday, a religious day for her, was a "substantial infringement" of her rights that could be justified only by "some compelling state interest".[49] "It is basic", the Court wrote, "that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation'".[50] There is no reason to require strict scrutiny of unemployment compensation laws but not zoning laws.

The City argues more narrowly that pre-*Smith* federal cases specifically involving conflicts between zoning ordinances and the Free Exercise Clause do not require strict scrutiny when a zoning ordinance is facially neutral with respect to religion and impacts free exercise only in its across-the-board application, even if the impact is substantial. The City cites five cases, each of which involved the application of zoning laws to places of worship: *Christian Gospel Church, Inc. v. City and County of San Francisco*;[51] *Messiah Baptist Church v. County of Jefferson*;[52] *Islamic Center of Mississippi, Inc. v. City of Starkville*;[53] *Grosz v. City of Miami Beach*;[54] and *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*.[55] *Islamic Center* appears to have applied a standard similar to that required by TRFRA, stating that zoning laws that infringe upon First Amendment rights "must be narrowly drawn in furtherance of a substantial government

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[49] 374 U.S. 398, 406 (1963).

[50] *Id*. (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

[51] 896 F.2d 1221 (9th Cir. 1990).

[52] 859 F.2d 820 (10th Cir. 1988).

[53] 840 F.2d 293 (5th Cir. 1988).

[54] 721 F.2d 729 (11th Cir. 1983).

[55] 699 F.2d 303 (6th Cir. 1983).

interest"[56] that could not be served "by a means less burdensome to the exercise of religion."[57] Although far less clear, *Grosz* referred to a "principle that has emerged in free exercise doctrine, the 'least restrictive means test,'"[58] and "[a]nother principle" that "a showing of 'compelling state interest' on the government side will justify inroads on religious liberty."[59] Two other cases, *Christian Gospel Church*[60] and *Lakewood Jehovah's Witnesses*,[61] required that the government have a "compelling interest" in zoning restrictions that impact free religious exercise. In *Messiah Baptist Church*, the court found that zoning regulations had no significant impact on the free exercise of religion and therefore did not state a standard.[62] In sum, four of the five cases the City cites contradict its contention that pre-*Smith* federal cases did not strictly scrutinize zoning ordinances that impact free religious exercise.

None of the arguments made by the City or the court of appeals supports the assertion that zoning ordinances are exempt from TRFRA. Accordingly, we turn to the Act's application in this case.

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[56] *Islamic Ctr.*, 840 F.2d at 299.

[57] *Id*. at 300.

[58] *Grosz*, 721 F.2d at 734.

[59] *Id*. at 737 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

[60] *Christian Gospel Church, Inc., v. City & County of San Francisco*, 896 F.2d 221, 1223-1224 (9th Cir. 1990) ("We have articulated a general standard for evaluating the impact of a government provision on the exercise of religion and we find that this test is appropriate for analyzing a challenge to zoning laws. This test involves examining the following three factors: (1) the magnitude of the statute's impact upon the exercise of the religious belief; (2) the existence of a compelling state interest justifying the imposed burden upon the exercise of the religious belief; and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.").

[61] *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 305 (6th Cir. 1983) ("If the ordinance does infringe the Congregation's first amendment right, the City must justify the ordinance by a compelling governmental interest.").

[62] 859 F.2d 820, 824-825 (10th Cir. 1988).

IV

Applying TRFRA to this case raises four questions, each succeeding question contingent on an affirmative answer to the one preceding:

- Does the City's Ordinance 1999-02 burden Barr's "free exercise of religion" as defined by TRFRA?
- Is the burden substantial?
- Does the ordinance further a compelling governmental interest?
- Is the ordinance the least restrictive means of furthering that interest?

We consider these questions in the order presented. While we must accept the trial court's fact findings supported by the evidence, the ultimate answers determine the legal rights protected by the Act and are thus matters of law.[63]

A

The City argues that Barr's free exercise of religion is not involved because a halfway house need not be a religious operation. But the fact that a halfway house *can be* secular does not mean that it *cannot be* religious. TRFRA defines "free exercise of religion" as "an act or refusal to act that is substantially motivated by sincere religious belief", adding that "[i]n determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief."[64] Not only is such a determination unnecessary, it is impossible for the judiciary. As the Supreme Court stated in a part of *Smith* unaffected by RFRA:

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[63] *See, e.g., Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932-933 (Tex. 1998) ("Although determining whether a property regulation is unconstitutional requires the consideration of a number of factual issues, the ultimate question of whether a zoning ordinance constitutes a compensable taking or violates due process or equal protection is a question of law, not a question of fact. . . . While we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property, the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law." (citations omitted)).

[64] Tex. Civ. Prac. & Rem. Code § 110.001(a)(1).

> It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner,* 490 U.S. [680,] 699 [1989]. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.[65]

We agree.

The trial court appears to have been troubled that an operation which can be and often is conducted for purely secular purposes could be entitled to increased protection from government regulation if conducted for religious reasons. But TRFRA guarantees such protection. Just as a Bible study group and a book club are not treated the same, neither are a halfway house operated for religious purposes and one that is not. Under *Smith*, the Free Exercise Clause does not require strict scrutiny for religious activity affected by neutral laws of general application,[66] but TRFRA imposes the requirement by statute.

The City does not dispute that the purpose of Barr's ministry was to provide convicts a biblically supported transition to civic life. Applicants were required to sign a statement of faith, agree to abide by stated biblical principles, and commit as a group to daily prayer and Bible study. They were specifically told that the Barr's halfway house was "a biblical ministry, NOT a social service agency". Barr considered the halfway house a religious ministry, and it appears to have been

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[65] *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 886-887 (1990) (citation omitted).

[66] *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 424 (2006) ("In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), this Court held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws.").

supported by his church. The record easily establishes that Barr's ministry was "substantially motivated by sincere religious belief" for purposes of the TRFRA.

B

TRFRA does not elaborate on what it means to "substantially burden" the right to free religious exercise, and that particular phrase is not used elsewhere in Texas statutes, unlike the words "substantial" and "substantially", which are used thousands of times. So far as we have been able to find, however, they are never defined. The same phrase is used in RFRA and RLUIPA, but it is not defined in those statutes, either. Absent any special meaning, we use ordinary meanings in common parlance.[67] *Webster's Third New International Dictionary* defines "substantial" in part as "material", "not seeming or imaginary", "real", "true", "being of moment", "important".[68] Thus defined, "substantial" has two basic components: real vs. merely perceived, and significant vs. trivial. These limitations leave a broad range of things covered.

To determine whether a person's free exercise of religion has been substantially burdened, some courts have focused on the burden on the person's religious beliefs rather than the burden on his conduct. Under what have been referred to as the compulsion and centrality tests, the issue is whether the person's conduct that is being burdened is compelled by or central to his religion.[69] The problems with these approaches are the same as those in determining whether conduct is religious. It may require a court to do what it cannot do: assess the demands of religion on its adherents and the importance of particular conduct to the religion. And it is inconsistent with the statutory directive that religious conduct be determined without regard for whether the actor's motivation is

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[67] TEX. GOV'T CODE § 312.002 (stating that "words shall be given their ordinary meaning" except when "a word is connected with and used with reference to a particular trade or subject matter or is used as a word of art").

[68] WEBSTER'S THIRD NEW INT'L DICTIONARY 2280 (1961).

[69] *See Coronel v. Paul*, 316 F. Supp. 2d 868, 876-880 (D. Ariz. 2004) (discussing cases and commentaries).

"a central part or central requirement of the person's sincere religious belief."[70] These problems are avoided if the focus is on the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression. The burden must be measured, of course, from the person's perspective, not from the government's. Thus, the United States Court of Appeals for the Fifth Circuit, after surveying decisions by other courts, recently held that under RLUIPA, "a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."[71] Amici curiae suggest the following: "A person's religious exercise has been substantially burdened under the Texas RFRA when his ability to express adherence to his faith through a particular religiously-motivated act has been meaningfully curtailed or he has otherwise been truly pressured significantly to modify his conduct."[72] Like the Fifth Circuit, however, "we make no effort to craft a bright-line rule" or one that will apply in every context.[73] TRFRA, like its federal cousins, "requires a case-by-case, fact-specific inquiry".[74]

Ordinance 1999-02 prohibited Barr from operating his halfway house ministry in the two homes he owned adjacent his supporting church, and the city manager testified that it was "a fair statement" that alternate locations were "probably . . . minimal" and "possibly" "pretty close to nonexistent". The court of appeals stated that "there is nothing in the ordinance that precludes Barr from providing his religious ministry to parolees and probationers, from providing instruction, counsel, and helpful assistance in other facilities in Sinton, or from housing these persons outside

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[70] TEX. CIV. PRAC. & REM. CODE § 110.001(a)(1).

[71] *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004).

[72] Brief of the American Center for Law and Justice, the American Civil Liberties Union Foundation of Texas, Senator David Sibley, and Representative Scott Hochberg as Amici Curiae Supporting Petitioners at 3.

[73] *Adkins*, 393 F.3d at 571.

[74] *Id*.

the City and providing his religious ministry to them there."[75] But there is no evidence of any alternate location in the City of Sinton where the ordinance would have allowed Barr's ministry to operate, or of possible locations outside the city. Moreover, while evidence of alternatives is certainly relevant to the issue whether zoning restrictions substantially burden free religious exercise, evidence of *some* possible alternative, irrespective of the difficulties presented, does not, standing alone, disprove substantial burden.[76] In a related context, the Supreme Court has observed that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[77] As a practical matter, the ordinance ended Barr's ministry, as the City Council surely knew it would.[78] We therefore have no hesitation in concluding that Ordinance 1999-02 substantially burdened Barr's ministry. The trial court's unexplained finding to the contrary has no support in the evidence.

The City argues that its zoning restrictions on locating Barr's ministry inside city limits could not have been a substantial burden because the City is so small that excluding the ministry from inside the city limits was inconsequential. But size alone is not determinative. The *Schad* case involved the Borough of Mount Ephraim,[79] a municipality about half the size of Sinton in area, with roughly the same population at the times relevant to that case and this one.[80] The Supreme Court did not consider the small size of the municipality to be important and specifically rejected the argument

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[75] ___ S.W.3d at ___.

[76] *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005) (holding that requiring church to relocate, while not an insuperable burden, was substantial).

[77] *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

[78] *See supra* note 6.

[79] *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

[80] *See* Borough of Mount Ephraim, New Jersey, http://www.mountephraim-nj/statistics.html (last visited June 12, 2009).

that the adult entertainment business at issue could simply move elsewhere.[81] Moreover, as we have noted, there is no evidence regarding alternative locations for Barr's ministry.

The City also argues that Barr could have continued his ministry as long as each person he desired to help either owned his own home or was a guest in another's home. The City points out that the residents in Barr's homes eventually moved in with members of Barr's church. But of course, that occurred as the ministry came to an end. There is no evidence that Barr could have continued his ministry one-on-one to probationers and parolees scattered out in different homes. In any event, a burden on a person's religious exercise is not insubstantial simply because he could always choose to do something else.

The City argues that Barr's ministry was not substantially burdened because he was never cited or charged with a crime, but nothing in TRFRA suggests that either is necessary for a burden to be substantial. The City contends that no requirement imposed on the operation of a correctional institution can substantially burden religious exercise, pointing to statutes passed with TRFRA that create a rebuttable presumption that such requirements meet strict scrutiny.[82] But the presumption those statutes create is rebuttable, and in any event, they do not apply to Barr's halfway houses because Barr did not operate under contract with the government.

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[81] *Schad*, 452 U.S. at 76-77.

[82] TEX. GOV'T CODE § 76.018 ("For purposes of Chapter 110, Civil Practice and Remedies Code, an ordinance, rule, order, decision, or practice that applies to a person in the custody of a correctional facility operated by or under a contract with a community supervision and corrections department is presumed to be in furtherance of a compelling governmental interest and the least restrictive means of furthering that interest. The presumption may be rebutted."); *id.* § 493.024 ("For purposes of Chapter 110, Civil Practice and Remedies Code, an ordinance, rule, order, decision, or practice that applies to a person in the custody of a jail or other correctional facility operated by or under a contract with the department is presumed to be in furtherance of a compelling governmental interest and the least restrictive means of furthering that interest. The presumption may be rebutted."); TEX. HUM. RES. CODE § 61.097 ("For purposes of Chapter 110, Civil Practice and Remedies Code, an ordinance, rule, order, decision, or practice that applies to a person in the custody of a juvenile detention facility or other correctional facility operated by or under a contract with the commission, a county, or a juvenile probation department is presumed to be in furtherance of a compelling governmental interest and the least restrictive means of furthering that interest. The presumption may be rebutted."); TEX. LOC. GOV'T CODE § 361.101 ("For purposes of Chapter 110, Civil Practice and Remedies Code, an ordinance, rule, order, decision, or practice that applies to a person in the custody of a municipal or county jail or other correctional facility operated by or under a contract with a county or municipality is presumed to be in furtherance of a compelling governmental interest and the least restrictive means of furthering that interest. The presumption may be rebutted.")

The City argues that its position finds support in the five pre-*Smith* federal cases it cites regarding the impact of zoning laws on the location of worship facilities. While four of the cases found no substantial burden on religious practice, they are readily distinguished. In two of the cases, relatively small groups in large cities — in *Grosz*, an orthodox Jewish group of usually ten to twenty people in Miami Beach,[83] and in *Christian Gospel Church* a group of about fifty people in San Francisco[84] — sought to meet in homes in areas zoned residential, asserting that home-worship was important to their religious beliefs. In *Grosz*, churches were permitted by zoning in half the city, including an area just four blocks from the home sought to be used.[85] In *Christian Gospel Church*, the group had been meeting in a hotel banquet room, and there were areas throughout the city, including residential areas, where churches might meet.[86] Two other cases involved larger groups who sought to build facilities. In *Lakewood*, a Jehovah's Witness congregation that had been meeting in a commercial area wanted to relocate to a residential area.[87] Although zoning in only about ten percent of the city permitted churches, the court concluded that the congregation could easily find a location in those areas or purchase a church building in a residential area.[88] In *Messiah Baptist Church*, a church bought 80 acres in an area zoned for agricultural use, intending to construct a 12,000-square-foot facility, including a worship area, administrative office, and a gymnasium, along with a 151-car parking lot and an amphitheater for drive-in worshipers.[89] The court concluded

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[83] *Grosz v. City of Miami Beach*, 721 F.2d 729, 731 (11th Cir. 1983).

[84] *Christian Gospel Church, Inc. v. City & County of San Francisco*, 896 F.2d 1221, 1222-1223 (9th Cir. 1990).

[85] *Grosz*, 721 F.2d at 739.

[86] *Christian Gospel Church*, 896 F.2d at 1224.

[87] *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303, 304-305 (6th Cir. 1983).

[88] *Id.* at 307.

[89] *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 821 (10th Cir. 1988).

that the church's religious practice was not unduly burdened merely because it was denied such use of land that was inexpensive and attractive.[90]

The fifth case, *Islamic Center*, held that the use of zoning restrictions to exclude Muslims at Mississippi State University from worshiping in a home in a residential area in Starkville, Mississippi, violated the Free Exercise Clause.[91] The court concluded that the zoning restrictions were impermissibly burdensome because they "force[d] Muslims to worship in the least acceptable parts of the City or in the county outside the City's boundaries".[92] The court rejected the city's argument that the Muslims could simply go elsewhere:

> And a city may not escape the constitutional protection afforded against its actions by protesting that those who seek an activity it forbids may find it elsewhere. By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of their religion.
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> * * *
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> As the Supreme Court observed in *Schad,* the availability of other sites outside city limits does not permit a city to forbid the exercise of a constitutionally protected right within its limits. "[One] is not to have the exercise of his liberty of expression [and, we add, his freedom of religion] in appropriate places abridged on the plea that it may be exercised in some other place."[93]

Although the zoning ordinance did not foreclose all locations, the court determined "relatively impecunious Muslim students" were left with "no practical alternatives for establishing a mosque in the city limits."[94]

The City argues that the decision in *Islamic Center* was based on the use of zoning to discriminate against a particular religion, something that it did not do in the present case. The City

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[90] *Id*. at 824-825.

[91] *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 294 (5th Cir. 1988).

[92] *Id*. at 298.

[93] *Id*. at 299, 300 (brackets in original, footnotes omitted, quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939))).

[94] *Id.* at 302.

of Starkville had permitted a large number of Christian churches in the same area from which the Muslim mosque was prohibited;[95] indeed, a Pentecostal church met right next door to the Muslims' property.[96] But these facts were pertinent to the city's justification of the zoning ordinance, not to whether ordinance substantially burdened the Muslim group. As the court stated: "The City's approval of applications for zoning exceptions by other churches suggests that it did not treat all applicants alike. This undermines the City's contention that the Board denied a zoning exception to the Muslims solely for the purposes of traffic control and public safety."[97] Irrespective of the city's possible motivation, the burden on the Muslims' use of their property for religious purposes was substantial.

All five of the cases on which the City relies illustrate that the existence and degree of a zoning restriction's burden on religious exercise are practical matters to be determined based on the specific circumstances of a particular case. A restriction need not be completely prohibitive to be substantial; it is enough that alternatives for the religious exercise are severely restricted. The City notes that no one in the present case was prohibited from attending church, but religious exercise is not so confined. The cases support our conclusion that Ordinance 1999-02 substantially burdened Barr's religious exercise.

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[95] *Id*. at 294 ("While the city ordinance restricts the use of any property in this type of residential area or in the City's commercial district as a church, 25 churches, all Christian, are located in similarly regulated areas. Sixteen of these churches occupied their present sites before the ordinance became effective, and nine moved in thereafter with the benefit of an exception. Only the Islamic Center has ever been denied an exception.").

[96] *Id*. at 296 ("Next door to the Islamic Center is an impressive brick two-story building, graced by stately white columns and a broad veranda, once occupied as a fraternity house. This is now Maranatha House, a residence and worship center for a Pentecostal Christian denomination. Five more churches lie within a quarter mile of these two religious centers.").

[97] *Id.* at 302.

C

"To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct."[98] The government may regulate such conduct in furtherance of a compelling interest.

Consistent with its contention that TRFRA does not apply to zoning, the City asserts in its brief: "Zoning itself is a compelling state interest." That position, as we have already discussed, has been rejected by this Court and by the Supreme Court.[99] Although the government's interest in the public welfare in general, and in preserving a common character of land areas and use in particular, is certainly legitimate when properly motivated and appropriately directed, the assertion that zoning ordinances are per se superior to fundamental, constitutional rights, such as the free exercise of religion, must fairly be regarded as indefensible.

The Supreme Court held in *Smith*, not that the government's interest in neutral laws of general application is always compelling when compared to the people's interest in fundamental rights, but only that the United States Constitution does not require the two interests to be balanced every time they conflict. RFRA, RLUIPA, and TRFRA, as well as laws enacted other states, now require that balance by statute when government action substantially burdens the free exercise of religion. The government's interest is compelling when the balance weighs in its favor — that is, when the government's interest justifies the substantial burden on religious exercise. Because religious exercise is a fundamental right, that justification can be found only in "interests of the highest order",[100] to quote the Supreme Court in *Yoder*, and to quote *Sherbert*, only to avoid "'the

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[98] *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring in the judgment).

[99] *See supra* Part III.

[100] *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

gravest abuses, endangering paramount interest[s]'".[101] Thus, in *Yoder*, the state's interest in children attending the first two years of high school was not sufficiently compelling to justify the substantial burden on the Amish people's religious conviction that children be taught at home.[102] And in *Sherbert*, the state's interest in a uniform unemployment compensation system and the reduced possibility of fraudulent claims was not compelling enough to deny benefits to a claimant who had refused to work on Saturday because of her religious beliefs.[103]

The Supreme Court recently explained in *Gonzales v. O Centro Espírita Beneficente União do Vegetal* that "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' — the particular claimant whose sincere exercise of religion is being substantially burdened."[104] To satisfy this requirement, the Supreme Court stated, courts must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants."[105] Acknowledging that there is "no cause to pretend that the task . . . is an easy one",[106] the Court held that RFRA requires that "courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue."[107]

In this regard, there is no basis for distinguishing RFRA from TRFRA; the same requirement verbatim is in both. The Sinton City Council's recitation in Ordinance 1999-02 — that "the

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[101] *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

[102] *Yoder*, 406 U.S. at 228-229.

[103] *Sherbert*, 374 U.S. at 407.

[104] 546 U.S. 418, 430-431 (2006).

[105] *Id.* at 431.

[106] *Id*. at 439.

[107] *Id.*

requirements of this section are reasonably necessary to preserve the public safety, morals, and general welfare" — is the kind of "broadly formulated interest[]" that does not satisfy the scrutiny mandated by TRFRA. Likewise, the trial court's brief finding — that "[t]he ordinance was in furtherance of a compelling government interest" — falls short of the required scrutiny. As Professor Douglas Laycock has observed regarding TRFRA and state RFRAs generally: "the compelling interest test must be taken seriously. Courts and litigants must focus on real and serious burdens to neighboring properties, and not assume that zoning codes inherently serve a compelling interest, or that every incremental gain to city revenue (in commercial zones), or incremental reduction of traffic (in residential zones), is compelling."[108]

Although TRFRA places the burden of proving a substantial burden on the claimant, it places the burden of proving a compelling state interest on the government. The City argues that its compelling interest in Ordinance 1999-02 is established by statutes providing that correctional facility regulations presumptively meet strict scrutiny. As we have already explained, however, these statutes are inapplicable.[109]

The City also asserts that Ordinance 1999-02 serves a compelling interest in advancing safety, preventing nuisance, and protecting children. But there is no evidence to support the City's assertion with respect to "the particular practice at issue" — Barr's ministry. In fact, the only evidence is to the contrary: Barr testified that he admitted only nonviolent offenders to his program, and no aspect of his operation ever presented a safety problem, a nuisance, or a threat to children. He and the city manager both testified that they were not aware of any complaints of disturbance. The City cites no studies or experiences with halfway houses to support its professed concerns. The City was not, of course, required to wait until disturbances occurred, possibly causing significant

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[108] Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 784 (1999).

[109] *See supra* note 82 and accompanying text.

harm, before taking measures to prevent them, but neither could it assert a compelling interest in practically excluding a religious ministry from operating within the city limits based on nothing more than speculation.

The City argues that the restrictions in Ordinance 1999-02 are similar to those imposed by state law on facilities run by or under contract with the government.[110] But the State is free to impose whatever restrictions it chooses on itself and local governments;[111] those governments have no Free Exercise rights of their own. The State's interest in restricting halfway houses run by or for itself or local governments when no fundamental right is implicated does not suddenly become compelling when free religious exercise is substantially burdened. Moreover, the City's argument is undercut by the fact that it made no effort to enforce Ordinance 1999-02 for over a year after it was adopted. An interest that need not be enforced against the very thing it is adopted to prevent can hardly be considered compelling.

None of the four federal cases decided before *Smith* upholding the application of zoning laws to worship facilities supports the City's arguments regarding compelling interest. Because those cases found no substantial burden on religious exercise, the government's interest was not required to be compelling. In the fifth case, *Islamic Center*, the court held that the city's failure to produce evidence of a compelling interest in denying permission for a Muslim mosque in a residential area was fatal to the application of the zoning ordinance. The City's cases do not support its position.

In addressing the cases on which the City relies, we should not be read to suggest that worship facilities and halfway houses are no different, or that the balancing of interests required by strict scrutiny is the same, regardless of the nature of the religious conduct. TRFRA's requirement

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[110] *See supra* note 11.

[111] *See Ysursa v. Pocatello Educ. Ass'n*, ___ U.S. ___, ___ (2009) ("'Political subdivisions of States — counties, cities, or whatever — never were and never have been considered as sovereign entities.'" (quoting *Reynolds v. Sims*, 377 U.S. 533, 575 (1964))).

of an assessment of the burden "to the person" necessitates taking into account the individual circumstances. We have focused on the five cases the City cites because of its reliance on them, but as we have noted, the applicable principles must also be drawn from other contexts.

The City's failure to establish a compelling interest in this case in no way suggests that the government never has a compelling interest in zoning for religious use of property or in regulating halfway houses operated for religious purposes.[112] TRFRA guarantees a process, not a result. The City's principal position in this case has been that it is exempt from TRFRA. We do not hold that the City could not have satisfied TRFRA; we hold only that it failed to do so.

D

Finally, TRFRA requires that even when the government acts in furtherance of a compelling interest, it must show that it used the least restrictive means of furthering that interest. The City has made no effort to show that it complied with this requirement. Ordinance 1999-02 is very broad. If as the city manager testified, locations in the City of Sinton more than 1,000 feet from a residential area, school, park, recreational area, or church are "pretty close to nonexistent", the ordinance effectively prohibits any private "residential facility . . . operated for the purpose of housing persons . . . convicted of misdemeanors . . . within one . . . year after having been released from confinement in any penal institution" inside the city limits. Read literally, this would prohibit a Sinton resident from leasing a room to someone within a year of his having been jailed for twice driving with an invalid license.[113] Such restrictions are certainly not the least restrictive means of insuring that religiously operated halfway houses do not jeopardize children's safety and residents' wellbeing.

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[112] *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981) (stating that it "may very well be true" that "if there were countywide zoning, it would be quite legal to allow live entertainment in only selected areas of the county and to exclude it from primarily residential communities, such as the Borough of Mount Ephraim").

[113] A second conviction for driving with an invalid license is a Class B misdemeanor. TEX. TRANSP. CODE § 521.457(f). The maximum punishment for a Class B misdemeanor is a $2,000 fine and 180 days' imprisonment. TEX. PENAL CODE § 12.22.

V

We conclude, based on the record before us, that Ordinance 1999-02, as applied to Barr's ministry, violates TRFRA. Accordingly, we reverse the judgment of the court of appeals. Because the trial court did not reach the issues of appropriate injunctive relief, actual damages, and attorney fees, we remand the case to the trial court for further proceedings in accordance with this opinion.

Nathan L. Hecht
Justice

Opinion delivered: June 19, 2009

IN THE SUPREME COURT OF TEXAS

No. 06-0097

GILBERT KERLIN, INDIVIDUALLY, GILBERT KERLIN, TRUSTEE, WINDWARD OIL & GAS CORP., AND PI CORP, PETITIONERS,

v.

GLORIA SOTO ARIAS, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

PER CURIAM

This is another suit claiming title to a substantial part of Padre Island. Unlike our recent case concerning heirs of Juan Jose Balli, *see Kerlin v. Sauceda*, 263 S.W.3d 920 (Tex. 2008), this one was brought by heirs of his nephew, Jesus Balli. The heirs seek to set aside an 1847 deed (and thus all sales in the ensuing 161 years) on the basis of fraud. The trial court granted summary judgment against the heirs, but the court of appeals reversed. ___ S.W.3d ___. As the only evidence of fraud in 1847 is an affidavit by one of the current heirs — who could not possibly have personal knowledge of those events — we reverse.

The 72 alleged heirs asserted in their petition that the 1847 deed was fraudulent because it was signed by Jesus Balli's father, even though Jesus was not a minor under either Texas or Mexican law at the time. They sued Gilbert Kerlin, who apparently had no contact with them or their

ancestors, but owned substantial acreage in South Padre Island from 1942 until 1961. *But cf. Strong v. Garrett*, 224 S.W.2d 471, 476 (Tex. 1949) (holding judgment for title could not be entered against nonparties in actual possession).

Kerlin moved for summary judgment on several grounds, including that the deed was valid. In support, Kerlin tendered the deed — not the original in Spanish signed in Matamoros in 1847, but a certified English translation filed in the Nueces County deed records later that same year. The translated deed affirmatively states that:

- Jesus Balli was a minor at the time the deed was signed;
- his lawful guardian was his father, who had the power to administer and convey his son's property;
- it was in his son's best interest to sell the land because the war between the United States and Mexico made it uncertain whether his title would be recognized; and
- his father accordingly sold the Padre Island property to Nicolas Grisanti on his son's behalf.

The heirs did not contest this document's authenticity. *See* TEX. R. EVID. 901(b)(7)–(8), 902(3)–(4) (authenticating ancient documents, public records, and foreign public documents). Nor did they challenge the accuracy of the translation. The statements in the translated deed are competent to prove the facts stated therein under the rules of evidence. *See* TEX. R. EVID. 803(14), (16).

The heirs' only responsive summary judgment evidence was a 2003 affidavit by Eva Castillo, in which she avers that Jesus Balli was not a minor in 1847 because he was 22 years old and had married. Kerlin objected to the affidavit on several grounds, including lack of personal knowledge and hearsay.

We agree with Kerlin that this affidavit creates no fact issue on fraud. Summary judgment affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." TEX. R. CIV. P. 166a(f). This affidavit fails on each count.

First, the only representation Castillo makes about the truth of her affidavit is that "[a]ll statements contained herein are true and correct to the best of my personal knowledge and belief." To have probative value, an affiant "must swear that the facts presented in the affidavit reflect his personal knowledge." *In re E.I. DuPont de Nemours and Co.*, 136 S.W.3d 218, 224 (Tex. 2004). An affiant's *belief* about the facts is legally insufficient. *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

Second, Castillo says she is competent to make the affidavit because she "heard testimony" in the Juan Jose Balli case, "reviewed documents" related to the heirs' claims, and "read historical accounts about Padre Island." Her testimony about these out-of-court sources was hearsay and carries no probative weight over Kerlin's objection. *See* TEX. R. EVID. 802; *Gracey v. West*, 422 S.W.2d 913, 916 (Tex. 1968).

Third, nothing in the affidavit affirmatively shows how Castillo could possibly have personal knowledge about events occurring in the 1840s. An affidavit showing no basis for personal knowledge is legally insufficient. *Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994); *Radio Station KSCS v. Jennings*, 750 S.W.2d 760, 762 (Tex. 1988). Accordingly, Castillo's affidavit does not raise a fact issue about whether Jesus Balli was a minor at the time his father sold his interest in Padre Island.

The court of appeals held otherwise, noting first that Kerlin attached only a copy of a translation of the original deed rather than the original itself. ___ S.W.3d at ___. But the heirs did not challenge the authenticity of this copy from the Nueces County deed records, and the best evidence rule does not apply to originals located outside Texas. *See* TEX. R. EVID. 1004(c).

The court of appeals also faulted Kerlin for not responding to the heirs' assertions by providing "evidence of Jesus' age or marital status at the time of the deed signing." ___ S.W.3d at ___. But Kerlin presented prima facie evidence that the 1847 deed was valid; he did not have any duty to prove these additional details unless the heirs could raise a fact question regarding them. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) ("Once the defendant produces sufficient evidence to establish the right to summary judgment, the plaintiff must present evidence sufficient to raise a fact issue."). This they did not do.

The summary judgment record here raises no fact question that the 1847 deed was fraudulent. Accordingly, we grant Kerlin's petition for review, and without hearing oral argument, we reverse the court of appeals' judgment and render judgment that the heirs take nothing. TEX. R. CIV. P. 59.1.

OPINION DELIVERED: November 14, 2008

IN THE SUPREME COURT OF TEXAS

NO. 06-0162

DONALD DAVIS, PETITIONER,

v.

FISK ELECTRIC COMPANY, FISK TECHNOLOGIES & FISK MANAGEMENT INC., RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued April 10, 2007

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE WILLETT.

JUSTICE BRISTER delivered a concurring opinion, in which JUSTICE MEDINA joined as to Part III.

Our rules generally permit each party in a civil action to exercise six peremptory strikes, which are challenges "made to a juror without assigning any reason therefor." TEX. R. CIV. P. 232, 233. But peremptories exercised for an improper reason, like race or gender, are unconstitutional. In this case, the African American petitioner asserted that he was terminated based on his race. The respondents used peremptory challenges at trial to exclude five of six African Americans from the venire but contend that their reasons for doing so had nothing to do with the potential jurors' race.

The stated reasons, however, when viewed in conjunction with the 83% removal rate and a comparative juror analysis, defy neutral explanation. Because we conclude that at least two of the strikes were based on race, we reverse in part the court of appeals' judgment and remand the case for a new trial.

I
Factual Background

Donald Davis, an African American, worked for Fisk Electric Company as an assistant project manager. In February 2001, Fisk was awarded the contract to install cables at Goodson Middle School, in the Cypress Fairbanks School District. After problems arose on the Goodson project, Fisk terminated Davis. Davis asserts that his termination was based on his race, as evidenced in part by his supervisor's alleged use of the "n-word" when planning Davis's termination.

Davis sued Fisk,[1] claiming violations of 42 U.S.C. § 1981 and the Texas Labor Code. Fisk denied liability. The case was called for trial, and at the conclusion of voir dire, Fisk peremptorily struck six venire members, five of whom were African American and all of whom were minorities. Davis objected, citing *Batson v. Kentucky*, 476 U.S. 79 (1986),[2] and the trial court, after a hearing, overruled the objection. The jury returned a defense verdict, the trial court signed a take-nothing judgment, and the court of appeals affirmed. 187 S.W.3d 570, 577. We granted Davis's petition for

[1] Davis sued Fisk Electric Company, Fisk Technologies, and Fisk Management Inc. For simplicity, we refer to respondents simply as "Fisk."

[2] In *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 616 (1991), the Supreme Court extended *Batson*'s prohibition on race-based strikes to civil cases. In *Powers v. Palacios*, 813 S.W.2d 489, 491 (Tex. 1991), we followed *Edmonson* and held that "equal protection is denied when race is a factor in counsel's exercise of a peremptory challenge to a prospective juror." For ease of reference, we will refer to the challenge raised in this case as simply a *Batson* challenge.

review to apply the United States Supreme Court's most recent guidance on peremptory challenges that are allegedly race-based. 50 Tex. Sup. Ct. J. 446 (Feb. 23, 2007).

II
Batson Challenge

Davis raises a single complaint: that Fisk struck prospective jurors based on race, in violation of *Batson*. We last wrote on *Batson* challenges in *Goode v. Shoukfeh*, 943 S.W.2d 441 (Tex. 1997), and in the intervening years, the landscape has evolved. Significantly, after the trial in this case, the Supreme Court decided *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), a case in which the Court concluded that a habeas petitioner was entitled to relief because prosecutors in his criminal trial peremptorily struck potential jurors based on race. Although *Miller-El II* is a criminal case, it involves many of the same factors at issue here, and we examine it in some detail.

The case began with Miller-El's 1986 capital murder trial in a Texas trial court. During jury selection, prosecutors used peremptory strikes to remove ten African Americans from the venire. Miller-El objected that the strikes were improperly based on race, given the Dallas County District Attorney's Office's historic practice of excluding blacks from criminal juries. The trial court concluded that, under *Swain v. Alabama*, which was then the governing standard for complaints of racially based jury selection, there had been no "systematic exclusion of blacks as a matter of policy" by that office and thus no entitlement to a new jury. *Miller-El II*, 545 U.S. at 236 (quoting *Swain v. Alabama*, 380 U.S. 202 (1965)). Miller-El was convicted and sentenced to death. *Id*.

While his appeal was pending, the Supreme Court decided *Batson*, "which replaced *Swain*'s threshold requirement to prove systemic discrimination under a Fourteenth Amendment jury claim,

with the rule that discrimination by the prosecutor in selecting the defendant's jury sufficed to establish the constitutional violation." *Id*. The Court of Criminal Appeals remanded the case to the trial court to determine whether Miller-El could prove a *Batson* violation. *Miller-El v. State*, 748 S.W.2d 459 (Tex. Crim. App. 1988) (en banc).

The trial court reviewed the voir dire record, and one of the prosecutors provided his rationale for previously unexplained strikes. The trial court deemed the explanations "completely credible [and] sufficient" and found there was "no purposeful discrimination." *Miller-El II*, 545 U.S. at 236. The Court of Criminal Appeals affirmed, stating that the voir dire record provided "ample support" for the prosecutor's race-neutral explanations. *Miller-El v. State*, No. 69,677 (Tex. Crim. App. Sept 16, 1993) (per curiam), p. 2.

Miller-El then sought habeas relief under 28 U.S.C. § 2254, again raising his *Batson* claim. *Miller-El II*, 545 U.S. at 237. The federal district court denied relief, and the Fifth Circuit refused to certify appealability. *Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001). The Supreme Court granted certiorari to consider whether Miller-El was entitled to review of his *Batson* claim and, determining that "the merits of the *Batson* claim were, at the least, debatable by jurists of reason," held that Miller-El was entitled to a certificate of appealability. *Miller-El II*, 545 U.S. at 237 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*")). After granting that certificate, the Fifth Circuit rejected Miller-El's *Batson* claim. *Miller-El v. Dretke*, 361 F.3d 849 (5th Cir. 2004). The Supreme Court again granted certiorari, *Miller-El v. Dretke*, 542 U.S. 936 (2004), and again reversed, *Miller-El II*, 545 U.S. at 237, this time on the merits of Miller-El's *Batson* challenge.

Noting that a *Batson* challenge requires an examination of "'all relevant circumstances,'" the Court examined five factors in determining that jury selection in Miller-El's criminal trial violated the Equal Protection Clause. *Miller-El II*, 545 U.S. at 240 (quoting *Batson*, 476 U.S. at 96-97). The first involved an analysis of the statistical data pertaining to the prosecution's peremptory strikes. The Court noted that prosecutors used peremptory strikes to exclude 91% of the eligible African-American venire members—a percentage too great to attribute merely to "[h]appenstance." *Id*. at 241.

The Court then conducted a comparative juror analysis, noting that "[m]ore powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists who were allowed to serve." *Id.* The Court explained that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id.* In conducting this analysis, the Court rejected the notion that struck venire members must be compared only to jurors who are identical in all respects (save race): "A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Id*. at 247 n.6. The Court focused on the prosecution's questioning of two black venire members—Billy Jean Fields and Joe Warren—and compared their answers to those given by whites. With regard to Fields, the Court determined that:

> nonblack jurors whose remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence were not questioned further and drew no objection, but the prosecution expressed apprehension about a black juror's belief

> in the possibility of reformation even though he repeatedly stated his approval of the death penalty and testified that he could impose it according to state legal standards even when the alternative sentence of life imprisonment would give a defendant (like everyone else in the world) the opportunity to reform.

Id. at 245.

As for Warren, the Court noted that the State's proffered reason—that Warren's voir dire answers were inconsistent—seemed plausible, but "its plausibility [was] severely undercut by the prosecution's failure to object to other panel members who expressed views much like Warren's." *Id*. at 248. After comparing his answers to panel members who expressed similar conclusions, the Court decided that race was significant in determining who was challenged and who was not. *Id*. at 252. The Court also rejected the court of appeals' independent conclusion that Warren expressed general ambivalence about the death penalty, because the prosecutor's stated reasons for striking Warren did not allude to any such ambivalence. *Id.* at 250. The Court then noted:

> [T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it. It is true that peremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. ***A Batson challenge does not call for a mere exercise in thinking up any rational basis.*** If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

Id. at 251-52 (citations omitted) (emphasis added).

A third factor the Court considered was the prosecution's use of the jury shuffle, a practice unique to Texas,[3] and one that the Court held could "indicate decisions probably based on race." *Id*. at 253. The *Miller-El* jury was shuffled some eight times, at the request of both the prosecution (three times) and the defense (five times). *Miller-El II*, 545 U.S. at 255 n.14. The Court noted that "'the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury.'" *Id*. at 254 (quoting *Miller-El I*, 537 U.S. at 346). This was amplified by testimony that the Dallas County District Attorney's Office had previously admitted to using the shuffle to manipulate the racial makeup of juries. *Id*. The Court concluded:

> The State notes in its brief that there might be racially neutral reasons for shuffling the jury, and we suppose there might be. But no racially neutral reason has ever been offered in this case, and nothing stops the suspicion of discriminatory intent from rising to an inference.

Id. at 254-55 (citation omitted).

A fourth factor the Court relied on was the "contrasting voir dire questions posed respectively to black and nonblack panel members." *Id*. at 255. Prosecutors gave black panel members a vivid, graphic account of the death penalty before asking about the member's feelings on the subject, while it gave nonblacks a "bland description." *Id*. While the State conceded that disparate questioning

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[3] *See* Elaine A. Carlson, Batson*,* J.E.B.*., and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 981 (1994).

occurred, it asserted that the disparity was based on panel members' differing views of the death penalty—those who expressed ambivalence received the "graphic script," while those who did not received the watered-down version. *Id*. at 256-57. Based on the record, however, the Court concluded that black venire members were more likely to receive the graphic script regardless of their expressions of ambivalence, and the State's explanation failed for four of the eight black panel members who received that script. *Id.* at 258. Additionally, four out of five nonblacks who were given the graphic script were not those who had expressed ambivalence but were instead unambiguously in favor of, or vehemently opposed to, the death penalty. *Id*. at 259. The Court also noted that the State disparately used manipulative questioning regarding minimum punishments. *Id.* at 261. The State conceded that practice but argued that it was premised on opposition to or ambivalence regarding the death penalty, rather than race. *Id.* at 261-62. The Court disagreed, noting that "only 27% of nonblacks questioned on the subject who expressed these views were subjected to the trick question, as against 100% of black members. Once again, the implication of race in the prosecutors' choice of questioning cannot be explained away." *Id*. at 263.

Finally, the Court considered the Dallas County District Attorney's Office's history of "systematically excluding blacks from juries." *Id*. Specifically, the defense presented evidence that the DA's office had adopted a formal policy to exclude minorities from jury service, and that policy was summarized in a "'manual entitled 'Jury Selection in a Criminal Case' [sometimes known as the Sparling Manual]'" that was distributed to prosecutors. *Id.* (quoting *Miller-El I*, 537 U.S. at 335). Although the manual was written in 1968, the evidence showed it was available to at least one

of Miller-El's prosecutors. *Id*. The Court also observed that prosecutors had noted the race of each prospective juror on their juror cards. *Id*.

Considering the totality of the circumstances, the Court held:

> It blinks reality to deny that the State struck Fields and Warren, included in [the] 91% [of black venire members who were struck], because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.

Id. at 266. Holding that the state court's conclusion about the prosecutors' strikes of those two jurors was wrong "to a clear and convincing degree," the Court reversed the court of appeals' judgment and remanded the case for entry of judgment for Miller-El, "together with orders of appropriate relief." *Id.*

III
Batson Procedure

With this context in mind, we turn to the *Batson* challenge at issue in this case, but first address a procedural matter. Davis presented his *Batson* objection at the conclusion of voir dire, after both sides exercised their peremptory challenges. Fisk then defended its strikes, beginning with Juror No. 5, Michael Pickett. The trial court immediately overruled the *Batson* objection upon hearing Fisk's explanation. Davis's counsel asked to address Fisk's reasons, "to preserve the record here." The trial court answered: "You've raised the objection. That burden shifts. The burden has shifted. I overruled the objection. No. 9. Let's move on. If you want to put something on the

record at the conclusion of this, we can do so. No. 9?" A similar procedure was followed for Fisk's justification for each of the remaining strikes.

By overruling the objection before permitting Davis to rebut Fisk's explanations, the trial court overlooked part of Batson's third step.[4] *See Goode*, 943 S.W.2d at 445-46. We do not doubt the trial court's full engagement in the voir dire and *Batson* proceedings, but it nonetheless should have permitted Davis's counsel to rebut Fisk's explanations, rather than ruling before she had the opportunity to do so. *Id.* at 452 ("Because the party challenging the peremptory strikes has the ultimate burden of persuasion, we conclude that the trial court should provide the party challenging the strikes . . . a reasonable opportunity to rebut the race-neutral explanations.") (citation omitted). Davis complains of the trial court's evading the third step, and the court of appeals held that Davis waived the objection by not raising it in the trial court. 187 S.W.3d at 581. To the contrary, Davis's counsel specifically asked the trial court to address Fisk's explanations for the strikes. The trial court refused her request but said that she could "put something on the record at the conclusion of this."

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[4] As we have noted:

> At the first step of the process, the opponent of the peremptory challenge must establish a prima facie case of racial discrimination. . . . During the second step of the process, the burden shifts to the party who has exercised the strike to come forward with a race-neutral explanation. . . . It is not until the third step that the persuasiveness of the justification for the challenge becomes relevant. At the third step of the process, the trial court must determine if the party challenging the strike has proven purposeful racial discrimination, and the trial court may believe or not believe the explanation offered by the party who exercised the peremptory challenge. It is at this stage that implausible justifications for striking potential jurors "may (and probably will) be found [by the trial court] to be pretexts for purposeful discrimination." Nevertheless, the Supreme Court has emphasized that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the [peremptory] strike."

Goode, 943 S.W.2d at 445-46 (citations omitted).

We conclude that Davis's request was sufficient to advise the trial court of the complaint, and Davis did not waive the objection.

Nonetheless, the error in failing to follow proper procedure was harmless in this case. The trial court permitted Davis to make a bill after the *Batson* hearing, and Davis's counsel addressed Fisk's strikes and the explanations given. After listening to this argument, the trial court again overruled the *Batson* objection, "find[ing] that the Defense has articulated reasons, at least for their decisions on particular jurors on a nonrace basis for striking them."

IV
Standard of Review

In contrast to the federal system, which employs a "clearly erroneous" standard of review, we review a trial court's *Batson* ruling for abuse of discretion. *Goode*, 943 S.W.2d at 446 (noting that "[a] trial court abuses its discretion if its decision 'is arbitrary, unreasonable, and without reference to guiding principles'" and observing that standard is "similar, although not identical to," federal "clearly erroneous" standard); *cf. Hernandez v. New York*, 500 U.S. 352, 369 (1991) (holding that a trial court's finding will not be disturbed unless the appellate court is "'left with a definite and firm conviction that a mistake has been committed'") (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)); *Young v. State*, 826 S.W.2d 141, 144 (Tex. Crim. App. 1991) (noting that "[a] reviewing court should reverse [trial court's] findings only when they are not supported by sufficient evidence or, as we often say, for an 'abuse of discretion'"). In *Miller-El II*, a habeas proceeding governed by the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996, the Supreme Court noted that it would "presume the Texas court's factual

findings to be sound unless Miller-El rebut[ted] the 'presumption of correctness by clear and convincing evidence.'" *Miller-El II*, 545 U.S. at 240 (citing 28 U.S.C. § 2254(e)(1)). Like our abuse of discretion standard, *see Goode*, 943 S.W.2d at 447, the standard applied in *Miller-El II* was "demanding but not insatiable," and "'[d]eference does not by definition preclude relief.'" *Miller-El II*, 545 U.S. at 240 (quoting *Miller-El* v. *Cockrell*, 537 U.S. at 340); *see also United States v. Williamson*, 533 F.3d 269, 274 (5th Cir. 2008) (noting that, although "'[t]he trial court has a pivotal role in evaluating *Batson* claims,' . . . we are also cognizant that the Supreme Court has made plain that appellate review of alleged *Batson* errors is not a hollow act") (quoting *Snyder v. Louisiana*, 552 U.S. ___, ___, (2008)). We now turn to an analysis of "all relevant circumstances."

V
Analysis
A
Statistical Disparity

Here, as in *Miller-El*, the statistics are "remarkable." *Miller-El II*, 545 U.S. at 240 (noting that prosecutors used peremptory strikes to exclude 91% of eligible black venire members). Jurors were chosen from the first twenty-eight members of the venire. At the conclusion of the parties' questioning, four panelists were struck for cause or by agreement, and the parties then submitted their peremptory challenges. Fisk struck five of the six African Americans (83%) but only one

(5.5%) of the eligible nonblack prospective jurors,[5] and "[h]appenstance is unlikely to produce this disparity."[6] *Miller-El I*, 537 U.S. at 342.

B
Comparative Juror Analysis

Beyond the raw statistics, a comparative juror analysis is similarly troubling. Fisk struck Juror No. 12, Patrick Daigle, and provided the following explanation:

> Of all the jurors, juror No. 12, who initially I thought would be good a good [sic] juror for us, reacted that corporations should be punished with the use of punitive damages. He was the most clear on that subject. In addition, I attempted to draw out of him a discussion from him about his involvement in this management-employee committee thing at Continental, something that would make me think he recognized that many of the discrimination claims that they deal with — I know he said he didn't have any personal involvement with race discrimination cases; but he seemed to be too ready to believe that Continental has discriminatory employment practices; which, you know, I could be totally wrong about this, Your Honor; but my belief is that I tend to have a high degree of skepticism about that, about Continental and the fact that he didn't have that same skepticism caused me to believe they we should exercise a challenge on him.

The trial court then immediately overruled Davis's *Batson* objection to the strike.

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[5] Fisk used its sixth strike to remove a venire member of Asian descent. Davis initially included this juror within the *Batson* challenge but later abandoned the claim. We note, however, that Davis could have challenged this juror's exclusion as well, even though he and the venire member were not the same race. *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (holding that a defendant may object to race-based peremptory challenges whether or not he and the excluded juror share the same race).

[6] The concurrence's focus on *Davis's* strikes misses the mark, as they do not answer whether *Fisk's* strikes were improperly based on race. *Cf. Miller-El II*, 545 U.S. at 255 n.14 (criticizing the Fifth Circuit for declining to give much weight to the evidence of racially motivated jury shuffles because Miller-El had shuffled the jury five times and prosecutors shuffled only twice: "Miller-El's shuffles are flatly irrelevant to whether prosecutors' shuffles revealed a desire to exclude blacks.").

Davis's counsel conducted the only questioning on punitive damages, and, as is evident from the colloquy,[7] Daigle never verbally responded to the questions about punitive damages. Fisk

[7] The entire exchange consisted of the following:

Davis counsel: Does anybody here feel that punitive damages do what they're meant to do, punish the person and stop the person from doing the same thing again? That's what punitive damages are. Do people think that in certain cases punitive damages should be awarded? Do you think that punitive damages is something that always compensates a victim? You feel that? Let's have you hold up your card, and I want everybody who feels that punitive damages always compensates a victim. Juror No. 26 [Vinzant], 13 [Parker], 7 [Johnson].

Donaldson: I have to qualify that.

Prescott: I'll qualify my answer.

Davis counsel: I'd like your qualifications.

Donaldson: It depends on the amount.

Davis counsel: I can't see. Can you hold it up, please? 47? My eyes are getting bad with old age. 44. All right. Juror No. 35, what's your qualification?

Donaldson: I'm just saying that there is a dollar limit. I mean, we're talking reasonable sums of money here.

Davis counsel: Yes.

Donaldson: That's fine. If we're talking about $80 million, okay, that's absurd.

Davis counsel: Would the reasonableness of the sum, would you agree with me, depends upon the facts?

Donaldson: Yes.

Davis counsel: And y'all understand that with every question I'm asking you the judge is going to give you the instructions very specifically on every aspect of the question that I've asked in this case; and all you'll have to do is follow the law, right? Juror No. 26, will you have a problem with awarding punitive damages?

Vinzant: No, but I think the amount of punitive damages required to punish a company is often not the same as should be awarded to the individual. It's a different scale.

Davis counsel: Juror No. 13, you're opposed to punitive damages?

Parker: Yes.

Davis counsel: Juror No. 26? I've already talked to you, sorry. 47? What was your opinion on the punitive damage question? You said that they overcompensated—

nonetheless asserted in the trial court that Daigle nonverbally "reacted that corporations should be punished with the use of punitive damages." Fisk did not elaborate on the type of nonverbal conduct that Daigle manifested, other than to say Daigle was "most clear" on the subject. Davis's counsel objected that "the nonverbal cues that Defense Counsel has cited throughout are not supported by the record" and also noted that Fisk never attempted to question Daigle about any alleged "nonverbal cues."[8]

Last term, the Supreme Court decided a *Batson* case involving nonverbal conduct. In *Snyder v. Louisiana*, the Court held that the prosecution improperly struck a potential juror. *Snyder*, 552 U.S. at ___. The prosecution gave two reasons for its strike, one of which was that Brooks, the potential juror, looked "very nervous" throughout the questioning. *Id*. at ___. The Court noted that the "record [did] not show that the trial judge actually made a determination concerning Mr. Brooks' demeanor." *Id*. at ___. Absent such a finding, the Court concluded that it could not "presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous." *Id.* Thus, while "deference [to the trial court] is especially appropriate where a trial judge has made a finding that

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Prescott: If it's an absurd amount, it would be overcompensated.

Davis counsel: And Juror No. 44, you said you would qualify your answer too, correct? And does the qualification depend on the facts, depends on the amount?

Prescott: Yes.

[8] The concurrence's statement that "no one denied at trial, or denies even today, that the struck jurors reacted just as Fisk's counsel said they did" unfairly narrows Davis's objection that the nonverbal conduct was "not supported by the record."

an attorney credibly relied on demeanor in exercising a strike," *id*. at ___, here there was no such finding, and we cannot presume the trial court credited Fisk's explanation.

Additionally, the lack of further detail about Daigle's purported reaction, Fisk's failure to question Daigle about it, and the failure to strike a white juror who expressed verbally what Daigle purportedly did nonverbally, give us pause. Peremptory strikes may legitimately be based on nonverbal conduct, but permitting strikes based on an assertion that nefarious conduct "happened," without identifying its nature and without any additional record support, would strip *Batson* of meaning. Opposing counsel must have an opportunity to rebut the accusation, the trial court must be enabled to decide whether the charge accurately describes what happened during voir dire, and the appellate court must have a record on which to base its analysis. Verification of the occurrence may come from the bench if the court observed it; it may be proved by the juror's acknowledgement; or, it may be otherwise borne out by the record as, for example, by the detailed explanations of counsel. We do not think *Snyder* excludes sources of verification other than an explicit trial court finding. *See, e.g., People v. Davis*, 78 Cal. Rptr.3d 809, 817 (Cal. Ct. App. 2008) (*Snyder* did not require reversal based on demeanor-related strike even though trial court did not make an explicit finding as to demeanor, as juror's "demeanor [was] shown on the record from her lateness and inability to follow the court's instructions" and thus "[n]o further finding was needed"). The point, instead, is that the communication be proved and reflected in an appellate record, and counsel must, therefore, identify that conduct with some specificity.

Nonverbal conduct or demeanor, often elusive and always subject to interpretation, may well mask a race-based strike. For that reason, trial courts must carefully examine such rationales. Our

sister court which, as we have noted, has a much more developed *Batson* jurisprudence than we do, *see Goode*, 943 S.W.2d at 450,[9] has held that a prosecutor's statements that he didn't like a venireman's "attitude, his demeanor" were pretextual when his verbal answers failed to show hostility, and the prosecutor "never mentioned any specific body language, or any other non-verbal actions which led him to believe the venireman was biased against his case."[10] *Hill v. State*, 827 S.W.2d 860, 869-70 (Tex. Crim. App. 1992) (noting that "the record speaks for itself"); *accord Brown v. Kelly*, 973 F.2d 116, 121 (2d Cir. 1992) (noting that demeanor-related reasons may be legitimate basis for peremptory challenge "if they are sufficiently specific to provide a basis upon which to evaluate their legitimacy"); *Mack v. Anderson*, 861 N.E.2d 280, 297 (Ill. App. Ct. 2006) (noting that "conduct and demeanor must be given close scrutiny because such perceptions may easily be used as a pretext for discrimination" and, because attorney "did not make a record by

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[9] Some research suggests that over 94% of *Batson* complaints occur in criminal cases. See Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 458 (1995).

[10] In a later case, the Court of Criminal Appeals found the following "demeanor" explanation to be sufficiently specific to survive a *Batson* challenge:

> Prosecutor: Mr. Martinez, quite frankly, Judge, the notes I put down when I got through talking to him was he has poor facial expressions. He's very inattentive, looks unhappy to be here, body language, posture was such that just made him feel he was uncomfortable. The only way I can characterize it is he had a very long, unhappy face, mouth down-turned at the corners, eyes downcast. And he was, quite frankly, that way not only to the State, but when being addressed by Defense Counsel.
>
> My feelings were is that [sic] he just wasn't -- didn't want to be here, wasn't happy to be here, and I just felt like he was an unknown quantity rather than risk having an unhappy person on the jury or somebody that didn't respond readily to questions that were asked, would be to strike him, Judge.

Yarborough v. State, 947 S.W.2d 892, 893, 896 (Tex. Crim. App. 1997).

providing a clear and reasonably specific explanation of what he perceived to be" the struck juror's "disinterest," the record failed to support the race neutral explanation given); *Zakour v. UT Med. Group, Inc*., 215 S.W.3d 763, 774-75 (Tenn. 2007) (holding that "to avoid a *Batson* violation, it is important that counsel specifically state the particular body language that forms the basis for the peremptory challenge"; lawyer's identification of body language must be "sufficiently specific to provide a basis upon which to evaluate [its] legitimacy," and "body mechanics" was not detailed enough to survive *Batson* objection) (citation omitted); *see also Blades v. Miller*, 261 F. App'x 314, 315-16 (2d Cir. 2008) (affirming trial court's acceptance of specific body language, including crossed arms, as a race-neutral explanation, as well as trial court's rejection of strike based on "body language in a formulaic, non-specific way"), *cert. denied*, ___ U.S. ___ (2008). *Batson* requires a "clear and reasonably specific explanation" of the legitimate reasons for a strike, *Batson*, 476 U.S. at 98 n.20 (quoting *Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)), and merely stating that a juror nonverbally "reacted" is insufficient.

Fisk's failure to question Daigle about his purported reaction also suggests that Daigle's reaction had little to do with Fisk's strike. *Miller-El II*, 545 U.S. at 246 (noting that the prosecution's failure to question prospective juror about reason given for strike suggested pretext; prosecutor "probably would have [questioned him] if the family history had actually mattered") (citing *Ex parte Travis*, 776 So.2d 874, 881 (Ala. 2000) ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.")); *Alex v. Rayne Concrete Serv.*, 951 So.2d 138, 154 (La. 2007) (noting that "the lack of questioning or mere cursory

questioning before excluding a juror peremptorily is evidence" of pretext). Moreover, Fisk did not strike Vinzant, a white juror who stated that he would not have a problem awarding punitive damages. *See Miller-El II*, 545 U.S. at 248 (holding that evidence of pretext exists if a reason applies equally to other panel members, who were not minorities and not struck). These factors suggest that the stated reason—Daigle's "reaction" to punitive damages—was pretextual.

Thus, we turn to the remaining reason offered for striking Daigle: that he seemed too eager to believe that his employer, Continental Airlines, discriminated against employees and that he did not express sufficient skepticism about discrimination claims. Daigle, a seventeen-year employee of Continental, listed his occupation as "customer service manager" and explained his job as follows:

> Daigle: It's called aide-of-counsel. It's just like having a union without the union. We're the representative between management and the person. But every time we hear a case we don't hear it from our office. We have to judge the case from someone else's office. So like in this case, I don't know either party, which is what we do over there; so it doesn't give us a bias about somebody that we work with. We have to judge their performance and have that bias about, "Well, I know this individual. Can I judge fairly?" We deal with different offices. We have three offices, Tampa, Salt Lake, and Houston. So they'll send us a case from another office versus here at home.
>
> Fisk counsel: And by separating it out so that you don't know the people, that way they're limiting the bias that somebody might have from knowing the party?
>
> Daigle: Yes.
>
> Fisk counsel: Then you know exactly what we're doing with this voir dire process?
>
> Daigle: Yes.

Fisk counsel: Do you deal with the cases sometimes where an employee says they're being discriminated against because of race?

Daigle: We deal with all of it.

Fisk counsel: Race?

Daigle: Race discrimination, everything.

Fisk counsel: And are there times when employees have said, "Something happened to me because of race" at Continental where the panel you were on agreed with that?

Daigle: That we agreed on it?

Fisk counsel: Right.

Daigle: I've never been on a case of race myself.

Fisk counsel: You've never been on a case of race yourself?

Daigle: No.

Fisk counsel: But what you do in these cases though is listen to both sides and try to determine whether there is a basis in fact for the belief that an adverse job determination was discriminatory.

Daigle: Yes, well, have to decide whether management was right or the employee was right.

Fisk counsel: Okay.

Daigle: Either management right [sic] on their decision or the employee has a right to come back.

Fisk counsel: And I do understand correctly what you're telling us is there's nothing about either that or your feelings with regard to a prior employment situation that makes you feel inclined to start this case, giving the Plaintiff a little bit of a head start?

Daigle: No.

The court of appeals held that Fisk's explanation for striking Daigle sufficed, because even though Daigle stated he could be fair, "counsel is not required to take all voir dire answers at face value." 187 S.W.3d at 585. While that is true, there is nothing in the voir dire record to support counsel's explanation that Daigle believed Continental discriminated against employees—indeed, Daigle, a longtime employee, stated that leaving his old job for Continental was "a better move for [him]," and the only thing he said about race discrimination cases was that he had never been involved with one. At best, the record shows that Daigle was neutral about employment discrimination issues, providing no support for Fisk's asserted reason for striking him. Even if Fisk were concerned about Daigle's description of his aide-of-counsel position as "like having a union without the union" (a concern that was never expressed at trial), it does not explain why Fisk failed to strike (or even question) juror 27, a white woman, about her membership in a union.

On appeal, Fisk cites Daigle's voir dire responses about past personal experiences with discrimination as a basis for the strike.[11] This reason—never advanced in the trial court—may not now be used to justify the strike. *See, e.g., Miller-El II*, 545 U.S. at 252 (noting that, "when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives"); *see also id.* (noting that reason given during *Batson* hearing but after State's initial reasons were shown to be incorrect "reeks of afterthought" and showed "pretextual timing"). On balance, we conclude that Fisk's reasons for striking Daigle "cannot reasonably be accepted." *Miller-El II*, 545 U.S. at 247 (citing *Miller-El I*,

[11] The court of appeals noted this "completely new" reason but did not reach the question of whether Fisk could rely on that reason, as that court concluded that the reasons advanced at trial justified the strike. 187 S.W.3d at 585 n.3.

537 U.S. at 339 (noting that the credibility of reasons given can be measured by "how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy")).

Although the improper exclusion of even one juror is unconstitutional, *Snyder*, 552 U.S. at ___, we also find troubling Fisk's strike of Michael Pickett, juror no. 5. Fisk explained its reasons for striking Pickett as follows:

> Before I ever came to court today, I had a problem with Juror No. 5 because he is a musician. And the fact that that is his only employment causes me to believe that he would not be a very good Defense juror in any case and certainly in this case where the issue is people getting laid off over job performance and things of that nature. Also when Juror 29 made a — I don't remember whether it was a solicited or unsolicited comment about having friends of African-American race, he was one of the jurors who noticeably laughed at that; and it was clear from his reaction he did not believe that. And there were two or three other people who were challenged on that same basis. He also is one of the people who appeared to us to have the strongest reaction to this whole "N" word issue. And whether or not his feelings about the company, if there is testimony that one of the people in the company used the "N" word — you want me to keep going?

We note that Fisk never questioned Pickett about his job but instead relied on Pickett's juror information card, which stated that Pickett was a musician employed by Pleasant Hill Baptist Church. *Miller-El II*, 545 U.S. at 244. Moreover, while facially race-neutral, this reason becomes less so when Pickett is compared to other jurors who were not struck. Juror No. 2 was unemployed; Juror No. 26 had been terminated and then sued his employer to enforce an employment contract; Juror No. 4's husband had been laid off repeatedly from construction jobs, and she stated that in the last two years he had experienced "really bad" problems in finding new employment; Juror No. 10 had been terminated. It is difficult to imagine that Pickett, who was employed and who did not

respond affirmatively when Fisk inquired whether anyone had been terminated or when Fisk asked the panel whether, if they were involved in industries in which there were layoffs, they could not be fair and impartial, was less desirable than these jurors because of his musical career. Instead, it seems that the strike was "based on a group bias where the group trait is not shown to apply to the challenged juror specifically," *Whitsey v. State*, 796 S.W.2d 707, 716 (Tex. Crim. App. 1989) (holding that prosecutor's strike of black female juror because she was a teacher and teachers were "liberal," when nothing in the record bore out that characterization, was "insufficient as a matter of law"), and suggests pretext.

Another proffered reason for striking Pickett was that he reacted strongly when asked about the "n-word." The anticipated trial evidence included testimony that Davis's supervisor had referred to him using "the n-word." Davis's counsel mentioned this during voir dire, and Fisk's attorney conducted follow-up questioning on the matter. Fisk explained its strikes of three African-American jurors (Pickett, Euline Edmund, and Mary Harts) in part based on their verbal and nonverbal responses to the n-word questioning. Counsel stated that Pickett was "one of the people who appeared to us to have the strongest reaction to this whole 'N' word issue"; Edmund "[o]f all of the people on the panel, . . . appeared to us to have the strongest feelings on the subject of the 'N' word"; and Harts was "also one of the jurors who had the strongest reactions to the subject use of the 'N' word."

But an examination of the voir dire on the n-word issue shows that Pickett, Edmund, and Harts were no more offended by the n-word than Martha Ann Stehling, Clara Reynaga, and John David Vinzant, three nonblack venire members who were not struck and who were seated on the

jury.[12] While Edmund stated that she had "a real hard time with" Davis's supervisor's use of the n-word, Reynaga immediately agreed, stating "I also feel the same way, and we all know that words are preceded by thoughts. So even before he said it, those thoughts were there." The remainder of Fisk's questioning on the n-word follows:

> Fisk counsel: Okay. Anybody else who feels that way? Juror No. 5?
>
> Pickett: Well, I have to qualify that. Depending on what the evidence was, just because he said that didn't necessarily mean that was the reason he was terminated; but the fact that he said that is a real big problem.
>
> Fisk counsel: But the fact is you don't like it, right? If he said it, you don't like it?
>
> Pickett: It's not whether or not I like him or not.
>
> Fisk counsel: No, I'm not talking about him, it. You don't like it, that he said it, right? Is that what you're saying?
>
> Pickett: Correct.
>
> Fisk counsel: But you would say that that's a different question from how the decision was made and why the Plaintiff was discharged, and you would listen to that evidence?
>
> Pickett: If the evidence pointed to that, it is possible to make that kind of a decision.
>
> Fisk counsel: And Juror No. 3., Ms. Reynaga, do you agree with that?
>
> Reynaga: Yes.
>
> Fisk counsel: Anybody else who feels like they couldn't, based on what they've heard so far, listen to the Court's instructions, follow the Court's instructions? Juror No. 26, you were raising your card there?

[12] Indeed, it would be surprising if venire members did not react to what is, particularly in this day and age, a universally offensive epithet.

Vinzant: I mean, I agree. I can listen and follow the Court's instructions, but the way you've been saying it, that the company has a problem with people using that word, to me that's a cultural management company problem. I don't know that people's roles — and I'm sure that will come out in evidence. But if it's a systemic cultural problem with the company, am I going to be predisposed one way or the other? I am.

Fisk counsel: If you find out that that is a cultural systemic problem in the company and that there are a bunch of people besides Mr. Blanton who are alleged to have said that and you hear that evidence, that's going to be important evidence to you, is what you're saying?

Vinzant: Extremely important.

Fisk counsel: Number one, y'all know I'm not and neither is counsel for the Plaintiff, giving you the evidence in this case. You'll hear the evidence from the witness stand. Everybody understands that, right? And then, number two, I think it's significant at this point for me to say that Mr. Blanton doesn't work for this company anymore. He's going to testify. But I want to get it back on track here a second, okay, because I said this a minute ago: I don't think whether — now, listen to me here. I'm going to remind you of this: In closing arguments I'll say this again. I don't think whether Mr. Blanton is a raving racist or not — and I don't think he is — but if he is, I don't think it has anything to do with the discharge decision in this case. And that's because I think when you hear all of the evidence — in fact, things I'm not sure Ms. Jain even knows right now — you'll realize when you hear how the decision was made and now just how, who made the decision, then you're going to realize we're in a smoke screen here. Okay. Juror No. 25?

Stehling: I think you've already prejudiced — you're making us question the credibility of your witness already.

Fisk counsel: You're talking about Mr. Blanton?

Stehling: Yes.

Fisk counsel: Well, that's a fair comment. Why do you feel that way?

Stehling: Because you've already presented this information about what's happened. It's inappropriate.

Fisk counsel: It was inappropriate to say that he said the "N" word?

Stehling: Well, we're going to have to keep hearing about someone using the "N" word.

Fisk counsel: Well, actually what I believe the testimony was was that after the discharge decision was made Mr. Blanton was having a conversation with someone where he said basically, "We're going to do this. We're going to have to be careful how we do it because he's an 'N' person." Now, that's based on testimony that was given.

Stehling: I don't think you made a good impression of the credibility of your witness.

Fisk struck the three African-American venire members who participated in this colloquy but not their white and Hispanic counterparts, who responded at least as strongly to the n-word issue. Fisk's stated reasons for the strikes included the venire members' reactions to the n-word issue. "The fact that [a given] reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext."[13] *Miller-El II*, 545 U.S. at 248; *see also United States v. Huey*, 76 F.3d 638, 641-42 (5th Cir. 1996) (holding that defendant's assumption that minority jurors would be biased after hearing racial slurs on tape recordings was "nothing more than an assumption of partiality based on race and a form of racial stereotyping, both of which have been repeatedly condemned"; excluding minority venire members on that basis violated *Batson*). Pickett's "strong

[13] This is nowhere more obvious than in Fisk's strike of Harts, based in part on Fisk's claim that she was "one of the jurors who had the strongest reactions to the subject of the use of the 'N' word." In fact, Harts never verbally responded to any of the questions regarding the n-word, including Fisk's direct questions about whether Blanton's use of the n-word would impact the venire's consideration of the evidence. To the extent Fisk is relying on nonverbal conduct, merely stating that Harts had a strong "reaction" to the n-word is insufficient, for the reasons outlined above.

reaction" in the form of his verbal responses to Fisk's questions was no stronger than some of his nonblack counterparts, and Fisk's strike on this basis suggests pretext.

The final reason given for striking Pickett was that he laughed when Juror 29 said he had African American friends. Davis disagrees that Pickett's laughter was based on that statement but instead asserts that it was in response to Juror 29's joke about a friend who was more successful than he. Even assuming Fisk's explanation was correct, Fisk also claimed to have challenged two or three other venire members for the same reason. But, in fact, Fisk cited laughter as a basis for striking only one other venire member, also African American. And Fisk never questioned Pickett about his laughter, another indication that this reason may be pretextual, as more fully explained above. While Pickett's laughter appears at first blush to be a plausible, race-neutral reason for striking him, when we examine the totality of the circumstances (including Fisk's strike of Daigle),[14] we cannot agree that Pickett's race was irrelevant. *Powers*, 813 S.W.2d at 491 (holding that equal protection is denied if "race is a factor" in a peremptory challenge).

In concluding that Fisk's reasons for striking Pickett were non-pretextual, the court of appeals erroneously relied on Pickett's statements during voir dire that he had been the victim of racial discrimination. 187 S.W.3d at 582-83. While Pickett did make such an assertion, Fisk did not cite Pickett's experience with discrimination as a basis for the strike. Thus, the court of appeals should not have relied upon these statements as supporting Pickett's strike. *See Miller-El II*, 545 U.S. at 252 (lawyer must "state his reasons as best he can and stand or fall on the plausibility of the reasons

[14] S*ee Snyder*, 552 U.S. at ___ (noting that "all of the circumstances that bear upon the issue of racial animosity must be consulted," and "if there [are] persisting doubts as to the outcome, a court would be required to consider the strike of [one challenged juror] for the bearing it might have upon the strike of [another]")

he gives"; if stated reason does not hold up, it is immaterial that "an appeals court can imagine a reason that might not have shown up as false"). In sum, none of Fisk's reasons for striking Pickett can "reasonably be accepted." *Miller-El II*, 545 U.S. at 247.

VI
Conclusion

Despite its laudable goal, *Batson* has been difficult to enforce. In *Miller-El II*, decided a year after this case was tried, the Supreme Court noted that *Batson*'s "individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give." *Miller-El II*, 545 U.S. at 239-40.

> If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence, *Batson*'s explanation that a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination.

Id. at 240 (quoting *Batson*, 476 U.S. at 96-97). *Miller-El II*'s "totality of the circumstances" analysis places a heavy burden on trial courts, and we acknowledge that some of the factors that Court examined—most especially the comparative juror analysis—are perhaps more easily reviewed on appeal, with the benefit of a transcript from which such comparisons may most accurately be drawn. But without *Miller-El II*'s searching inquiry into the basis of the challenged strikes, *Batson* would become a "mere exercise in thinking up any rational basis." *Id*. at 25.

Unlike *Miller-El II*, there is no evidence here of a historical pattern of excluding blacks from juries. But *Miller-El II* made it clear that the five factors it considered were neither exhaustive nor mandatory; courts must consider "all relevant circumstances" when reviewing *Batson* challenges.

Miller-El II, 545 U.S. at 240 (quoting *Batson*, 476 U.S. at 96-97); *see also Snyder*, 552 U.S. at ___ ("In *Miller-El v. Dretke*, the Court made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances . . . must be consulted."). And here, the relevant circumstances include many of those pertinent in *Miller-El II*, including a statistical disparity and unequal treatment of comparable jurors.

We acknowledge that peremptory strikes, often based on instinct rather than reason, can be difficult to justify. *Miller-El II*, 545 U.S. at 252. The trial lawyer's failure to do so here does not suggest personal racial animosity on his part. *See, e.g.,* Antony Page, Batson*'s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 160-61, 184 (2005) (noting that "research has compellingly demonstrated the existence of unconscious race- and gender-based stereotyping"). A zealous advocate will seek jurors favorably inclined to his client's position, and race may even serve as a rough proxy for partiality. *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 139 (1986) (Rehnquist, J., dissenting) (noting that factors like race are often a "proxy" for potential juror bias). But whatever the strategic advantages of that practice, the Constitution forbids it.

The concurrence suggests that we ascribe sinister motives to Fisk's counsel. The question presented, however, is not whether this particular advocate harbors ill will, but whether the record explains, on neutral grounds, a statistically significant exclusion of black jurors. It is not enough, under the Supreme Court precedent we examine here, that the lawyer be pure of heart. We assume that he is. Our holding depends not on the personal sentiments of the advocate but on the state of the record. *Miller-El II* and *Snyder* emphasize that *Batson*'s promise cannot be fulfilled if its requirements may be satisfied merely by ticking off a race-neutral explanation from a checklist.

After examining the totality of the circumstances, we conclude that race explains Fisk's strikes of Daigle and Pickett better than any other reason, and the trial court abused its discretion in failing to sustain Davis's *Batson* challenge. *Miller-El II*, 545 U.S. at 266; *Powers*, 813 S.W.2d at 491. We reverse in part[15] the court of appeals' judgment and remand the case to the trial court for a new trial. TEX. R. APP. P. 60.2(d).

_____
Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: September 26, 2008

[15] In the trial court, Davis unsuccessfully moved for sanctions against Fisk, and the court of appeals affirmed the trial court's order. Davis does not challenge that portion of the court of appeals' judgment.

IN THE SUPREME COURT OF TEXAS

NO. 06-0162

DONALD DAVIS, PETITIONER,

v.

FISK ELECTRIC COMPANY, FISK TECHNOLOGIES & FISK MANAGEMENT INC., RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued April 10, 2007

JUSTICE BRISTER, joined by JUSTICE MEDINA as to Part III, concurring.

I disagree with the Court's conclusion that defense counsel's peremptory strikes were racially motivated. Neutral reasons were given for them but were not properly preserved, in part because the rules changed during this appeal. The difference between not having neutral reasons and merely not preserving them is no technicality; charges of discrimination (like discrimination itself) can have far-reaching effects, including use in future trials.[1]

If we are to blame rather than just decide, we ought to be more even-handed. The plaintiff's strikes here were even more "remarkable" than the defendant's, as plaintiff's counsel used all six of

[1] *See Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) ("*Miller-El II*") (holding discrimination could be inferred from policies that existed decades earlier in Dallas County District Attorney's office, as discrimination may be inferred from "all relevant circumstances" including "look[ing] beyond the case at hand").

her peremptory strikes (100 percent) to exclude white males.[2] In Harris County, where this case was tried, every racial group is a minority.[3] The Court's extra effort to censure one counsel after disregarding his explanations on procedural grounds is simply too one-sided.

I agree that peremptory strikes provide an opportunity for discrimination. But they also provide an opportunity to accuse an opponent of discrimination and get a new trial if the first one turns out badly. As these strikes have outlived their original purpose, it is time we did something about them. Rather than using this case as an opportunity to disparage one attorney, I would use it as an opportunity to discontinue a practice inherently based on stereotypes. As the Court misses that opportunity, I concur only in the judgment.

I. "Guilty" or "Not Proven"?

Davis established a prima facie *Batson* violation by showing that 5 of Fisk's 6 strikes were used against African-Americans.[4] But disproportionate impact alone does not violate *Batson*.[5]

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[2] One of these six had a Hispanic surname, but identified his race on his juror card as "white."

[3] *See* U.S. Census Bureau, State & County Quickfacts, *available at* http://quickfacts.census.gov/qfd/states/48/48201.html (reporting 2006 demographic figures for Harris County, Texas as: Hispanic/Latino 38.2%, White non-Hispanic 36.9%, Black 19.0%, Asian 5.4%).

[4] *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) ("*Miller-El I*") ("[S]tatistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors."); *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) ("For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination.").

[5] *See Hernandez v. New York*, 500 U.S. 352, 359-60 (1991) ("[A]ction will not be held unconstitutional solely because it results in a racially disproportionate impact . . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.") (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977)).

Instead, it shifts the burden to the striking party to "come forward with a neutral explanation."[6] Fisk did so, but procedural errors require us to disregard those explanations with respect to at least one juror, which is all it takes.[7]

Fisk's first explanation for striking Patrick Daigle was nonverbal conduct suggesting he strongly favored punitive damages. But two years after this trial occurred, the Supreme Court held in *Snyder v. Louisiana* that a juror's nonverbal conduct can support a strike only if the trial judge expressly states that the *Batson* challenge was denied on that basis.[8] The trial judge here expressly denied the challenge regarding Michael Pickett based on nonverbal conduct, but he did not say the same regarding Daigle. While the nonverbal conduct might have been an entirely valid and neutral explanation for this strike at the time of trial, we cannot consider it now because the trial judge's findings do not comply with the new rule.

Fisk's second explanation was that Daigle did not seem sufficiently skeptical about the potential for racial discrimination by his employer, Continental Airlines. Nothing in the written record supports this explanation. Perhaps it was based on nonverbal conduct, but if so it again cannot count in the absence of an express trial court finding.

Fisk's final explanation is that Daigle said he had been the victim of job discrimination — the precise claim made by the plaintiff. It goes without saying that peremptory strikes are often used

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[6] *Batson*, 476 U.S. at 97 ("Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."); *see also Miller-El II*, 545 U.S. at 252.

[7] *Snyder v. Louisiana*, ___ U.S. ___, ___ (2008).

[8] *Id*. at ___.

against jurors whose personal experiences (as opposed to their race or gender) might cause them to identify with an opposing party.[9] But this ground was first stated after trial, not during the *Batson* hearing. As a party must come forward with a neutral explanation during the *Batson* hearing, we cannot consider this ground either.

Rather than acknowledging that Fisk's counsel may have had perfectly neutral reasons but simply failed to preserve them (in part because the rules for doing so changed), the Court seems to go out of its way to heap up arguments that Fisk's strikes were racially motivated. In fact, there is little reason to doubt the neutral explanations by Fisk's counsel, except that those grounds were not properly preserved.

It is one thing to hold that an attorney failed to prove a neutral explanation, and quite another to hold that an attorney excluded black jurors solely because of their race. On this record, the former is established but the latter is not. Davis is entitled to a new trial because Fisk did not carry its burden. But I would not be so certain that we know defense counsel's true motives.

II. Scrutinizing Jurors' Shrugs

The Court also goes overboard by prohibiting peremptory strikes based on a juror's nonverbal conduct unless (1) the conduct is identified on the record "with some specificity," and (2) the juror is questioned about it.[10] Neither has ever been required by any constitutional or procedural rule, and both exalt appellate-level clarity over trial-level reality.

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[9] In fact, Daigle's discrimination complaint was unusual, as it involved the "havoc" that resulted when his non-black co-supervisors found out he was making more money than they were. But his perception of himself as a victim of discrimination provided a neutral reason for a strike.

[10] ___ S.W.3d ___, ___.

The United States Supreme Court has never imposed these restrictions. For example, in *Rice v. Collins,* the Court upheld an explanation that a juror "rolled her eyes" during voir dire, even though the trial judge did not see it and no one questioned the juror about it.[11] In *Snyder v. Louisiana*, there again was no questioning about physical conduct that "looked very nervous to me"; the Court rejected this explanation only because the trial judge did not expressly adopt it.[12] If the Constitution requires precise specification and explicit interrogation about nonverbal reactions, it is odd that the Supreme Court has never said so.

Nor has the Court of Criminal Appeals, despite what the Court claims. *Hill v. State* cannot support such a claim, as the reason our sister court rejected the explanation that "He's black, he's male, and I didn't like the way he responded to my questions,"[13] had nothing to do with body language. The actual rule in Texas criminal courts is that claims about a juror's nonverbal conduct are taken as true if: (1) the conduct could not have been missed, and (2) opposing counsel would have denied the claim had it been untrue.[14] Here, no one denied at trial, or denies even today, that the struck jurors reacted just as Fisk's counsel said they did. Davis's only response has been that the conduct was "not supported by the record" — which of course nonverbal conduct rarely is. If we

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[11] 546 U.S. 333, 339 (2006).

[12] ___ U.S. ___, ___ (2008).

[13] 827 S.W.2d 860, 869 (Tex. Crim. App. 1992).

[14] *Thieleman v. State*, 187 S.W.3d 455, 458 (Tex. Crim. App. 2005).

adopt our sister court's rules, not only is Fisk's explanation of the jurors' nonverbal conduct sufficiently specific, it is (as the court of appeals held) established as a matter of law.[15]

The Court's new requirements are completely impractical. Most of us recognize surprise, disgust, or eagerness when we see it, but giving a "clear and reasonably specific" explanation of which muscles twitched is another matter. Yet the Court says attorneys must publicly announce any reaction they saw on the record, question the juror about it, allow opposing counsel to rebut, and obtain a ruling that the conduct occurred. This sounds like a good way to antagonize jurors; any attorney who complies can expect exchanges like the following:

Counsel:	Juror No. 7, I notice that you are yawning. Why is that?
Juror No. 7:	I wasn't yawning.
Counsel:	Judge, I want the record to reflect that Juror No. 7 was yawning, even though he denies it.
Opposing Counsel:	No he was not.
Counsel:	Yes he was. Judge, may I have a ruling?
Court:	I wasn't watching him, so your request is denied. And now you can't strike Juror No. 7, even though you have thoroughly embarrassed him.

This will never work. If the Court wants to prohibit peremptory strikes based on nonverbal conduct, it should say so directly rather than imposing an impractical test that does so indirectly.

[15] 187 S.W.3d 570, 584.

III. Ending Peremptory Strikes

Yet the Court's opinion does not go far enough to ensure every American citizen the opportunity to sit on a jury.

If the composition of a jury is a matter of pure chance, neither litigants nor jurors can complain that the system has treated them unfairly.[16] But peremptory strikes allow litigants to change the complexion of a jury, which is why they provoke charges and suspicions of discrimination. The only way to reduce or eliminate discrimination and suspicion is to reduce or eliminate these strikes.

Texas allows more peremptory strikes than most of our sister states.[17] Twenty years after *Batson*, it is now clear we cannot always detect how many of those strikes are racially motivated, no matter how hard we try. Nor can we guarantee equal protection if we focus only on cases like this one where "too many" minority jurors were struck.[18] In the meantime, we are doing neither the jury system nor racial harmony any favors by encouraging lawyers to accuse each other of racial motives so they can get a second trial if they lose the first one.

Haphazard success in removing race from jury selection might be the best we could expect if peremptory strikes were absolutely necessary for a fair and impartial jury. But they are not.

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[16] *See Holland v. Illinois*, 493 U.S. 474, 499 (1990) (Marshall, J., dissenting) ("Public confidence is undermined by the appearance that the government is trying to stack the deck against criminal defendants and to remove Afro-Americans from jury service solely because of their race. No similar inference can be drawn from the operations of chance.").

[17] *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 90 (Tex. 2005).

[18] *See Batson*, 476 U.S. at 105 (Marshall, J., concurring) ("Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an 'acceptable' level.").

Peremptory strikes were an important part of older jury systems in which panels were not randomly selected. Each side in ancient Rome could strike 50 jurors because each side got to propose 100 jurors for the panel.[19] Parties needed peremptory strikes in early Texas because potential jurors were hand-picked by the local sheriff,[20] and later by jury commissioners,[21] and tended to reflect a limited part of the community.[22]

But today jury venires are randomly selected,[23] and anyone who is related to, interested in, or biased against a party or case is disqualified.[24] It is hard to see why litigants need to remove *half* of the *unbiased* jurors to get an impartial jury — especially when peremptories are based mostly on instinct, intuition, and inference.[25] This is especially true in civil cases, as a fractious juror or two cannot keep the rest from rendering a verdict.[26]

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[19] *See id.* at 119 (Burger, C.J., dissenting).

[20] *See Gulf, C. & S.F. Ry. Co. v. Greenlee*, 8 S.W. 129, 130 (Tex. 1888) ("[T]he leading object of our present jury law was to avoid the evils resulting from the summoning of juries by sheriffs . . . .").

[21] *See* Act approved Aug. 1, 1876, 15th Leg., R.S., ch. 76, §§ 4, 7, 1876 Tex. Gen. Laws 78, 79 *reprinted in* 8 *H.P.M.N. Gammel*, *The Laws of Texas 1822-1897*, at 914, 915 (Austin, Gammel Book Co. 1898), available at http://texashistory.unt.edu/permalink/ meta-pth-6731:916?search=peremptory]. *See also* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 99 (1994) (noting that the federal courts used the "key man" system of selecting notable citizens who were "men of recognized intelligence and probity" as recently as 1960).

[22] *See Swain v. Alabama*, 380 U.S. 202, 207 (1965); Joanna Sobol, Note, *Hardship Excuses and Occupational Exemptions: The Impairment of the "Fair Cross-Section of the Community*", 69 S. CAL. L. REV. 155, 161 n.17 (1995).

[23] *See* TEX. GOV'T CODE § 62.004.

[24] *See* TEX. GOV'T CODE § 62.105.

[25] Because each side gets six peremptory strikes against a twelve person jury, *see* TEX. R. CIV. P. 233, the two sides can remove half of the eligible jurors.

[26] *See Powers v. Ohio*, 499 U.S. 400, 425 (1991) (Scalia, J., dissenting) ("In a criminal-law system in which a single biased juror can prevent a deserved conviction or a deserved acquittal, the importance of [peremptory challenges] should not be minimized.").

There is no constitutional right to peremptory strikes.[27] Indeed, recent cases suggest the opposite may be true, as several justices have already concluded.[28] The Equal Protection Clause protects citizens from arbitrary and capricious state action.[29] In 1991 peremptory challenges were declared to be "state action";[30] they have always been recognized as "arbitrary and capricious" by their very nature.[31] As Justice Scalia has written, "[t]o affirm that the Equal Protection Clause applies to strikes of individual jurors is effectively to abolish the peremptory challenge."[32]

A majority of this Court could curb peremptory strikes today, as they stem entirely from our Rules of Civil Procedure.[33] The reason we hesitate to do so is that lawyers are tenaciously protective of them, believing they can use these strikes to mold a favorable jury.[34] Study after study has shown

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[27] *See Georgia v. McCollum*, 505 U.S. 42, 57 (1992) ("[P]eremptory challenges are not constitutionally protected fundamental rights . . . . This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial."); *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) ("[T]he Constitution does not confer a right to peremptory challenges"); *Tamburello v. Welch*, 392 S.W.2d 114, 117 (Tex. 1965) (noting that peremptory challenges in Texas are provided solely by rules of civil procedure).

[28] *See Rice v. Collins*, 546 U.S. 333, 344 (2006) (Breyer, J., concurring); *Batson*, 476 U.S. at 102-03 (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.").

[29] *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 320-21 (2004); *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, W. Va.*, 488 U.S. 336, 344 (1989); *Baker v. Carr*, 369 U.S. 186, 207 (1962).

[30] *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991).

[31] *Lewis v. United States*, 146 U.S. 370, 378 (1892) (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 346 (1769)); *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (same).

[32] *Powers v. Ohio*, 499 U.S. 400, 425 (1991) (Scalia, J., dissenting).

[33] *See* TEX. R. CIV. P. 223, 232, 233.

[34] *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 750 (Tex. 2006) ("Peremptory challenges allow parties to reject jurors they perceive to be unsympathetic to their position."); *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 919 (Tex. 1979) (noting that peremptory challenges "are intended to permit a party to reject certain jurors based upon a subjective perception that those particular jurors might be unsympathetic to his position") (emphasis omitted);

this belief to be unfounded.[35] But even if it were true, that reason is not enough: "Peremptory strikes are not intended . . . to permit a party to 'select' a favorable jury."[36]

All these problems — discriminating against minorities, disrupting trial, and discarding perfectly good jurors — are particularly acute in Texas. Whether because of the state's diversity, the generous allowance of peremptory strikes, or something else, *Batson* challenges are far more frequent here than anywhere else. A recent Westlaw search for state court cases citing to *Batson* yields:

- 4 cases from Idaho,
- 17 from Alaska,
- 43 from Colorado,

Tamburello v. Welch, 392 S.W.2d 114, 117 (Tex. 1965) (noting that peremptory challenges are used to ensure "that the controversy is decided by a jury whose members are not predisposed by reason of temperament or prior experience to look with disfavor upon his side of the case"); *see also J.E.B. v. Alabama*, 511 U.S. 127, 160 (1994) (Scalia, J., dissenting) (noting that peremptory strikes reflected "each side's desire to get a jury favorably disposed to its case"); *Edmonson*, 500 U.S. at 642 (O'Connor, J., dissenting) ("[A] peremptory strike is a traditional adversarial act; parties use these strikes to further their own perceived interests . . . .").

[35] *See* Reid Hastie, *Is Attorney-Conducted Voir Dire An Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 722 (1991) ("[A]ttorney-conducted voir dire is not an effective procedure for selection of impartial juries. Although none of the empirical studies is perfect, all evidence demonstrates a consistent lack of impressive attorney performance in this regard. Attorneys disagree substantially about what information to rely on and which jurors to select, and consistently produce low levels of accuracy in judging juror verdict preference prejudices."); Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 699 (1991); Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 OHIO N. U. L. REV. 229, 250 (1990); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 232 (1989); Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 517 (1978); Michael J. Saks, *The Limits of Scientific Jury Selection: Ethical and Empirical*, 17 JURIMETRICS J. 3, 21–22 (1976); Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505-06 (1965).

[36] *Hyundai*, 189 S.W.3d at 750; *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 94 (Tex. 2005) ("Litigants have the right to an impartial jury, not a favorable one.").

- 58 from Oklahoma.
- 74 from Minnesota,
- 90 from Florida,
- 181 from Pennsylvania,
- 342 from Illinois,
- 676 from California, and
- 1,364 cases from Texas.

More than any other state, we in Texas must consider whether peremptory strikes are worth the price they impose.

_____
Scott Brister, Justice

OPINION DELIVERED: September 26, 2008

IN THE SUPREME COURT OF TEXAS

NO. 06-0372

COLUMBIA RIO GRANDE HEALTHCARE, L.P. D/B/A RIO GRANDE REGIONAL HOSPITAL, PETITIONER,

v.

ALICE H. HAWLEY AND JAMES A. HAWLEY, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued January 17, 2008

JUSTICE JOHNSON delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE GREEN and JUSTICE WILLETT joined, and in all but Part II-D 2 of which JUSTICE O'NEILL and JUSTICE MEDINA joined.

In this health care liability case against a hospital we consider whether the trial court erred by refusing to give jury instructions as to new and independent cause, a physician's status as an independent contractor, and lost chance of survival. Concluding the trial court erred by refusing instructions on the physician's independent contractor status and lost chance of survival, we reverse and remand for a new trial.

I. Background

On November 22, 2000, Alice Hawley visited Dr. Armando Arechiga, complaining of cramps, nausea, and vomiting. Dr. Arechiga admitted her to Columbia Rio Grande Regional Hospital ("Columbia" or "the hospital"). The next day Dr. Jesus Rodriguez operated on Alice,

performed a colon resection, and sent a tissue specimen to the hospital's pathology laboratory. There, Dr. Jose Valencia, an independent pathologist whose office was located inside the hospital, discovered Alice had cancer. He diagnosed its severity as Stage 3, or what is known as Duke's C cancer.

Because some doctors had complained of not receiving pathology reports, the hospital had adopted a written policy (the policy) in regard to notifying patients' doctors of cancer diagnoses. The policy was in place at the time of Alice's surgery and called for a copy of the pathology report to be placed in the patient's hospital record. It also specified the following:

> A. PATHOLOGIST WILL VERBALLY NOTIFY PHYSICIAN(S) OF RECORD.
> B. PATHOLOGY SECRETARY WILL FAX REPORT TO PHYSICIAN(S) OF RECORD.
> C. REPORTS WILL BE DELIVERED TO PHYSICIAN(S) OF RECORD VIA CERTIFIED MAIL.

The policy identified the "physician(s) of record" as the admitting physician and the surgeon, if the surgeon was not the admitting physician. In this case, the physicians of record were Drs. Arechiga and Rodriguez.

Alice's medical records and the pathology lab records showed the pathology report was placed in her hospital chart one day before she was discharged, although Dr. Arechiga did not see it when he completed his discharge summary. The hospital disputes whether all parts of its written notification policy must be complied with as to each cancer diagnosis, and the parties disagreed as to whether all parts were actually complied with in Alice's particular case. However, there is no dispute that Alice was not told she had cancer and did not receive treatment for cancer until long after the initial diagnosis by Dr. Valencia.

During a routine checkup in the summer of 2001, Dr. Arechiga found Alice's liver enzymes to be elevated. The enzymes were much higher when she returned for another appointment in September, so Dr. Arechiga ordered tests that revealed she had liver cancer. Even though treatment began immediately, the disease was terminal.

Alice and her husband, James Hawley, sued the hospital, Dr. Rodriguez, and Dr. Valencia. They alleged the hospital was negligent in failing to timely and properly convey the cancer diagnosis to Alice and Drs. Rodriguez and Arechiga and in failing to follow its policies and procedures for reporting the pathology results. The Hawleys nonsuited the doctors before trial.

The case was tried to a jury. The jury found that Columbia's negligence was a proximate cause of Alice's injuries. The trial court entered judgment against Columbia based on the jury verdict. The court of appeals affirmed. 188 S.W.3d 838.

Columbia argues that the trial court erred in charging the jury, failing to cap the damages, and applying an improper interest rate to the judgment. It asserts charge error based on the trial court's refusal to give jury instructions as to: (1) new and independent cause, (2) the independent contractor status of Dr. Valencia, and (3) lost chance of survival.

II. The Jury Charge

A. General Law

A trial court must, when feasible, submit a cause to the jury by broad-form questions. TEX. R. CIV. P. 277. It is also required to give "such instructions and definitions as shall be proper to enable the jury to render a verdict." *Id.* An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence. *Tex. Workers' Comp.*

Ins. Fund v. Mandlbauer, 34 S.W.3d 909, 912 (Tex. 2000). Determining necessary and proper jury instructions is a matter within the trial court's discretion, and appellate review is for abuse of that discretion. *Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006). One way in which a trial court abuses its discretion is by failing to follow guiding rules and principles. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

A judgment will not be reversed for charge error unless the error was harmful because it probably caused the rendition of an improper verdict or probably prevented the petitioner from properly presenting the case to the appellate courts. TEX. R. APP. P. 61.1. Charge error is generally considered harmful if it relates to a contested, critical issue. *See Bel-Ton Elec. Serv., Inc. v. Pickle*, 915 S.W.2d 480, 481 (Tex. 1996) (per curiam); *Sw. Bell Tel. Co. v. John Carlo Tex., Inc.*, 843 S.W.2d 470, 472 (Tex. 1992).

B. New and Independent Cause

New and independent cause is a component of the proximate cause issue. *See Dallas Ry. & Terminal Co. v. Bailey*, 250 S.W.2d 379, 383-84 (Tex. 1952) ("The theory of new and independent cause is not an affirmative defense; it is but an element to be considered by the jury in determining the existence or non-existence of proximate cause."). A new and independent cause of an occurrence is the act or omission of a separate and independent agent, not reasonably foreseeable, that destroys the causal connection, if any, between the act or omission inquired about and the occurrence in question. *See Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450-51 (Tex. 2006); *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429, 432 n.3 (Tex. 2005).

Columbia contends the trial court should have instructed the jury on new and independent cause because the doctors' failure to review the pathology report was a new and independent cause that produced injuries which otherwise would not have occurred. It asserts evidence showed the pathology report was sent to Dr. Arechiga, and his failure to review that report, as well as the doctors' failure to review the report in the hospital records for eleven months, was not reasonably foreseeable. Columbia further points out that although the laboratory employees responsible for faxing and mailing the report could not specifically recall mailing and faxing Alice's report to the doctors, the employees testified that they invariably followed laboratory procedures in cancer cases because they recognized the importance of getting reports to the doctors. The hospital had a certified mail return receipt that correlated to Alice's pathology report number and was signed by the receptionist in Dr. Arechiga's office, but the hospital did not have a certified mail return receipt from Dr. Rodriguez's office. Both Drs. Arechiga and Rodriguez denied having seen the report even though each attended to Alice when she was hospitalized after the November 2000 surgery, and Dr. Arechiga's receptionist said she had received and filed the report in his office records on Alice. Both doctors denied having been told of the cancer diagnosis.

The Hawleys argue that the trial court properly refused the instruction because it was not supported by pleadings and because it was foreseeable that the doctors would not learn Alice had cancer unless the hospital ensured they actually received the pathology report or were told about it. The Hawleys also assert that if the trial court erred in refusing the instruction, the error was harmless because the charge permitted Columbia to argue that only the doctors caused Alice's injuries.

We first consider whether Columbia's pleadings supported the instruction. After the Hawleys nonsuited Drs. Rodriguez and Valencia, Columbia pled, in part, new and independent cause. The Hawleys specially excepted to the pleadings because Columbia did not specify what the alleged new and independent causes were. Columbia amended and alleged various specific acts of negligence by Drs. Arechiga, Rodriguez, and Valencia as new and independent causes. The trial court ruled that evidence of the physicians' actions would be admissible, but their actions could not be characterized to the jury as negligence. Later, when Columbia requested the new and independent cause instruction at the charge conference, the Hawleys did not object on the basis that there were no pleadings to support it. We conclude Columbia's pleadings were sufficient to support the instruction if it was otherwise proper.

We next address whether the failure to submit the instruction was error. Columbia contends that even assuming it failed to completely comply with the different parts of its notification policy, it was not foreseeable that Alice's doctors would be unaware of her cancer because (1) the pathology report was unquestionably placed in Alice's hospital records before she was dismissed from the hospital in November and before Dr. Arechiga prepared her discharge summary; (2) a certified mail return receipt showed the report had been timely received by Dr. Arechiga's office; (3) Alice was hospitalized for additional surgery by Dr. Rodriguez in January 2001 to close the colostomy left from the November surgery, and at that time the pathology report was in her records from the earlier surgery; and (4) Alice returned to the hospital on several other occasions between November 2000

and October 2001[1] under the care and treatment of Drs. Arechiga and Rodriguez and neither doctor requested or reviewed her complete medical chart that contained the cancer diagnosis.

If the act or omission alleged to have been a new and independent cause is reasonably foreseeable at the time of the defendant's alleged negligence, the new act or omission is a concurring cause as opposed to a superseding or new and independent cause. *Dew*, 208 S.W.3d at 451. A new and independent cause alters the natural sequence of events, produces results that would not otherwise have occurred, is an act or omission not brought into operation by the original wrongful act of the defendant, and operates entirely independently of the defendant's allegedly negligent act or omission. *Id.* In analyzing whether an intervening cause is new and independent, rather than superseding, we have looked for guidance to factors set out in section 442 of the Restatement (Second) of Torts:

> (a) the fact that the intervening force brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
>
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
>
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

[1] For example, the record reflects that Dr. Arechiga hospitalized Alice in March 2001 for deep vein thrombosis.

> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

See RESTATEMENT (SECOND) OF TORTS § 442 (1965); *Phan Son Van v. Pena*, 990 S.W.2d 751, 754 (Tex. 1999).

In this case, the alleged intervening forces are the failure of Alice's treating doctors to review her hospital records and see the pathology report, their failure to fulfill their independent duties to inquire about the pathology results, and the failure of Dr. Arechiga to review his own office records and see the pathology report filed there by his office staff. In substance, the alleged intervening forces are the failures of the treating doctors to make inquiry and find out the results of the pathology laboratory's examination. There was evidence the treating doctors had an independent duty to do so.

The doctors' failures to independently follow up, analyzed according to the above factors, respectively, (a) did not implicate a different risk of harm than the hospital's failure to ensure the doctors knew of the pathology report because both failures implicated the risk that Alice's cancer would go untreated; (b) did not later appear to yield extraordinary consequences in view of the circumstances at the time of the cancer diagnosis because the cancer predictably progressed as a result of both failures; and (c) were not completely independent from the risk created by the hospital's negligence – that Alice's cancer would go untreated – even though the doctors' actions and failures to act were independent of Columbia's actions. The doctors' failures to discover the cancer report were (d) due to their own lack of inquiry about the report and (e) wrongful toward Alice and could have possibly subjected them to liability. However, the doctors' alleged negligent

actions and omissions, even assuming they made the doctors culpable, did not necessarily make their conduct a superseding cause. The "threshold and controlling" inquiry when determining whether a cause is new and independent remains "'whether the intervening cause and its probable consequences were such as could reasonably have been anticipated by the original wrongdoer.'" *Dew*, 208 S.W.3d at 452 (quoting *Bell v. Campbell*, 434 S.W.2d 117, 120 (Tex. 1968)); *see also* RESTATEMENT (SECOND) OF TORTS § 447 (1965) ("The fact that an intervening act of a third person is negligent in itself . . . does not make it a superseding cause . . . if the actor at the time of his negligent conduct should have realized that a third person might so act."). The doctors' alleged culpability in failing to follow up and inquire as to the pathology report did not change the risk–that Alice's cancer would go untreated–created by the hospital's actions in November 2000.

In regard to whether the hospital should have foreseen the failures of Drs. Arechiga and Rodriguez to inquire about or review the report, Dr. Stephen Tucker testified that it was within the scope of a physician's responsibility to follow up on a pathology report and that it was unforeseeable a doctor would not do so. However, his testimony must be considered in light of uncontroverted evidence that the hospital was aware doctors did not always follow up on specimens sent to the pathology lab. According to the laboratory medical director, the hospital implemented its written notification policy due to complaints from doctors that for some reason they were not getting pathology reports. The written policy with redundant notification measures was adopted to ensure appropriate doctors were aware of cancer diagnoses. Thus, the evidence conclusively established it was reasonably foreseeable to the hospital that some physicians might be unaware, and remain unaware, of a cancer diagnosis unless Columbia ensured the physicians were aware of it.

Finally, where the risk resulting from the intervening act is the same risk resulting from the original actor's negligence, the intervening act cannot be classified as a superseding cause. *Dew*, 208 S.W.3d at 453. Here, the risk of harm from the doctors' failure to determine the results of the pathology examination was the same risk that the hospital's notification procedures were designed to eliminate: lack of timely treatment for a patient's cancer. But while the circumstances surrounding these doctors' lack of knowledge as to the cancer diagnosis might be highly unusual, the risk of harm from the report remaining undetected by the doctors for eleven months is the same as the risk of harm created by the hospital's failure to notify the doctors of the cancer finding in the beginning: Alice's cancer was not treated timely.

We conclude that because the doctors' extended failures to become, or be made, aware of Dr. Valencia's cancer diagnosis were reasonably foreseeable to the hospital, they were concurring, not superseding, causes of the delay in Alice's cancer treatments. Thus, the trial court did not abuse its discretion by refusing to submit a new and independent cause instruction.

C. Loss of Chance

1. Failure to Give the Instruction

The court's charge in this case defined "proximate cause" as follows:

> "Proximate cause," when used with respect to the conduct of [the hospital], means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a hospital using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of any event.

Columbia argues that because the evidence of Alice's chance of survival at the time of Dr. Valencia's cancer diagnosis was conflicting, the court erred in refusing to give the following additional instruction:

> You are instructed that Alice H. Hawley must have had greater than a fifty percent (50%) chance of survival on November 28, 2000 for the negligence of Rio Grande Regional Hospital to be a proximate cause of injury to Alice H. Hawley.

The Hawleys do not assert that Columbia's requested instruction was an incorrect statement of the law or that the issue was not raised by the evidence. Rather, they argue (1) because the court's proximate cause definition specified that Columbia's negligence could not be a proximate cause of Alice's injuries unless her injuries would not have occurred absent the negligence, the definition adequately instructed the jury on the issue of causation and the requested instruction would have been redundant and would not have further assisted the jury; and (2) the lawyers argued to the jury that under the law, the Hawleys had the burden to prove Alice probably would have survived the cancer if the defendant's negligence had not resulted in delayed treatment. Citing *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984), the Hawleys urge the charge was sufficient and should not have been embellished because it tracked the language of the pattern jury charge. *See id.* ("Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges."). We disagree with the Hawleys' contentions.

Recovery in a medical malpractice case requires proof to a reasonable medical probability that the injuries complained of were proximately caused by the negligence of a defendant. *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 511 (Tex. 1995). Proximate cause includes two

components: cause-in-fact and foreseeability. *LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 688 (Tex. 2006) (per curiam). Proof that negligence was a cause-in-fact of injury requires proof that (1) the negligence was a substantial factor in causing the injury, and (2) without the act or omission, the harm would not have occurred. *Id.* These standards bar recovery by a patient if a condition preexists the negligence of a health care provider and at the time of the negligence, the condition resulted in the patient having a 50% or less chance of cure or survival. *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 400 (Tex. 1993).

The parties address the loss of chance question as a lost chance of survival even though Alice was alive at the time of trial. We will address the issue as the parties have briefed and presented it for two reasons. First, no one disputed that at the time of trial Alice's disease was terminal. Second, whatever injuries she suffered from the alleged negligence of the hospital, the Hawleys' burden of proof was the same—they had to prove that the hospital's actions were a cause-in-fact of injuries above and beyond those Alice would have suffered even if she had received treatment promptly after Dr. Valencia's diagnosis in November 2000. *See id.* at 398 ("The principal issue presented in this case is whether Texas permits recovery for lost chance of *survival or cure* in medical malpractice cases; that is, whether there is liability for negligent treatment that decreases a patient's chance of avoiding *death or other medical conditions* in cases where the adverse result probably would have occurred anyway.") (emphasis added).

In *Kramer*, the Court was faced with the issue of whether to adopt the loss of chance doctrine as part of Texas common law:

> [T]he Survival Statute does not create a new cause of action. Rather, it simply provides that "[a] cause of action for personal injury to the health, reputation, or person of an injured person" survives the death of the injured party "to and in favor of the heirs, legal representatives, and estate of the injured person." TEX. CIV. PRAC. & REM. CODE § 71.021. Assuming we were to adopt the loss of chance doctrine as part of the common law, Ms. Kramer's cause of action for damages from her lost chance, if any existed, would survive under this statute. Therefore, to determine whether the court of appeals erred in refusing to reverse the trial court's denial of the Kramers' proposed special issue 8, *we must consider whether Texas should adopt the loss of chance doctrine as a part of its common law.*

Id. at 404 (emphasis added). The Court held that recovery for a loss of chance required proof that at the time of the defendant's alleged negligence, there was less than a 50% chance the claimed injuries would have occurred without that defendant's negligence. *Id.* at 406-07. In reaching its holding, the Court reviewed various approaches taken by jurisdictions and commentators in valuing and proving a lost chance of avoiding harm when a condition such as cancer preexisted the defendant's alleged negligence. *Id.* at 405-06. It considered and rejected an approach that

> conceptualizes the lost chance of survival or improved health as a distinct, compensable injury, creating a separate cause of action for its recovery. As one commentator explained:
>
> > To illustrate, consider a patient who suffers a heart attack and dies as a result. Assume that the defendant-physician negligently misdiagnosed the patient's condition, but that the patient would have had only a 40% chance of survival even with a timely diagnosis and proper care. Regardless of whether it could be said that the defendant caused the decedent's death, he caused the loss of a chance, and that chance interest [would] be completely redressed in its own right.

Id. at 402 (citations omitted) (quoting Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1382 (1981)). Under such an approach, damages are awarded based on valuation of any loss

of chance, even if the lost chance was as small as 1%. The Court rejected that approach as well as similar ones allowing recovery without proof that the defendant's negligence caused more than a 50% loss of chance of avoiding injuries above and beyond those that would have occurred anyway. *Id.* at 400-02, 407. Thus, proof that a patient lost *some* chance of avoiding a medical condition or of surviving the cancer because of a defendant's negligence is not enough for recovery of damages.

The testimony as to Alice's loss of chance was inconsistent and the Hawleys do not dispute that the parties hotly contested her probability of a cure or survival had she immediately begun treatment following Dr. Valencia's diagnosis in November 2000. For example, Dr. Escudier began treating Alice for cancer in November 2001, a year after Dr. Valencia's diagnosis. She estimated Alice had a 60% five-year survival rate in November 2000 and based her estimate on the cancer having been at the Duke's C stage when it was first diagnosed. Dr. Marek, who began treating Alice in December 2001, testified that Alice would have had a 65% chance of being cured had she begun treatment immediately following Dr. Valencia's diagnosis. However, the hospital's witnesses, Drs. Eric Raefsky and Thomas Wheeler, testified that even with immediate treatment in November 2000, Alice's chance of survival was 50% or less. Dr. Raefsky testified that her chances for survival were not greater than 25% to 50% because in his opinion the cancer had already spread from the colon. Dr. Wheeler was of the opinion that the cancer had already progressed to Stage 4, or Duke's D, had spread to her liver, and her survival rate was about 20% at the time of the diagnosis.

The Hawleys contend the trial court did not need to instruct the jury that in order for Columbia's negligence to be a proximate cause of injury to Alice, she must have had a greater than 50% chance of surviving the cancer because the lawyers explained that was the law. But the jurors

took oaths to render their verdict according to "the law as it may be given to you in the Charge of the Court" and evidence submitted under rulings of the court. *See* TEX. R. CIV. P. 236. The judge instructed the jurors that at the conclusion of the evidence, they would receive a written charge from him on the law. The charge itself instructed the jury that "in matters of law, you must be governed by the instructions in this charge" and if the jury "disregarded any of these instructions it will be jury misconduct." *See* TEX. R. CIV. P. 226a. The jury is presumed to have followed the court's instructions. *See Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 771 (Tex. 2003) (noting that unless the record demonstrates otherwise, appellate courts must presume the jury followed instructions given in the jury charge). Statements from lawyers as to the law do not take the place of instructions from the judge as to the law. It is the trial court's prerogative and duty to instruct the jury on the applicable law.

Columbia's requested instruction would not have been redundant, as the Hawleys assert. The instruction would have provided to the jury the standard it was required by law to apply in making its finding on a hotly-contested issue. The opinion in *Kramer* highlights the subtleties among various approaches to valuing a loss of chance, the difficulty in properly framing the loss of chance issue as a legal matter, and the reason juries need to be instructed as to the law on loss of chance. As this Court stated over a century ago when considering alleged charge error, "[w]e must look at the court's charge as practical experience teaches that a jury, untrained in the law, would view it." *Galveston, H. & S.A. Ry. Co. v. Washington*, 63 S.W. 534, 538 (Tex. 1901). It asks too much of lay jurors, untrained in the law, to distill the correct Texas legal standard for loss of chance from the general proximate cause instruction given by the trial court. Columbia's requested loss of chance

instruction would have assisted the jury, was an accurate statement of applicable law, and was supported by the pleadings and evidence. *See Mandlbauer*, 34 S.W.3d at 912. The trial court abused its discretion by refusing to give it.

2. Harm

One way in which a trial court's error in refusing an instruction can be reversible is if the error probably caused the rendition of an improper judgment. TEX. R. APP. P. 61.1(a); *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 170 (Tex. 2002). The instruction Columbia requested related to a contested, critical issue. *See Bel-Ton Elec. Serv.*, 915 S.W.2d at 481; *Sw. Bell Tel. Co.*, 843 S.W.2d at 472. Under the evidence, there was little question that because of the negligence as found by the jury, Alice lost some chance of cure and survival. Unless the jury applied the law as expressed in Columbia's proposed instruction, it could have found that because she lost at least some chance of reduced medical treatment and survival, even if that chance was much less than 50%, the hospital's negligence proximately caused injury to her. Such a result was specifically rejected in *Kramer*. 858 S.W.2d at 407. Considering the pleadings of the parties and the nature of the case, the evidence presented at trial, and the charge in its entirety, the refusal to give the requested instruction on loss of chance was reasonably calculated to and probably did cause the rendition of an improper judgment. *See Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 843 (Tex. 2005); *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986).

D. Independent Contractor

1. Failure to Give the Instruction

A hospital ordinarily is not liable for the negligence of an independent contractor physician. *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 948 (Tex. 1998). Columbia asserts the trial court erred by refusing to instruct the jury, in accordance with the foregoing principle, that the jury should not consider the actions or omissions of Dr. Valencia when determining the hospital's negligence.

The Hawleys urge that the refusal to give such an instruction was not erroneous, even though they do not contend the hospital was liable for the actions or omissions of Dr. Valencia. They note (1) "[n]o one suggested that Valencia was an agent of the Hospital for whose conduct the Hospital could be held liable," (2) it was undisputed and repeatedly emphasized that Dr. Valencia was not a hospital employee, and (3) their lawyers did not dispute Columbia's jury argument that Dr. Valencia did not work for the hospital. The Hawleys also say the jury was instructed to consider only the acts of the hospital's employees. One problem with this assertion is that the jury instructions and liability question did not limit the jury's considerations as the Hawleys claim. The jury charge stated:

> You are hereby instructed that RIO GRANDE REGIONAL HOSPITAL acts or fails to act only through its employees, agents, nurses, and servants.

The one liability question then asked:

> Was the negligence, if any, of RIO GRANDE REGIONAL HOSPITAL, a proximate cause of injuries to Alice H. Hawley?

Columbia does not contend the trial court's instructing the jury that a hospital acts through its employees, agents, nurses, and servants was improper or a misstatement of the law. Rather, Columbia contends the jury should have also been given the following instruction to prevent the hospital from being found liable because the jury improperly considered Dr. Valencia as its agent:

> In considering the negligence of Rio Grande Regional Hospital, do not consider the acts or omissions of the pathologist, Dr. Valencia.

The evidence showed Dr. Valencia was an employee of Useda and Associates, pathologists with offices in the hospital. Dr. Useda, a member of the group, testified he was the medical director of Columbia's pathology laboratory. Drs. Useda and Valencia each testified they had input into the hospital's policy that specified the pathologist was to verbally notify doctors of record when cancer was diagnosed. Dr. Valencia testified he expected the laboratory secretaries to follow the protocol and when he came to work in the laboratory he usually reviewed the certified mail receipts from reports the secretaries had sent the day before. He also testified that only around one-fifth of physicians called about a cancer report would call the laboratory back, so many times he would not personally tell physicians of record about cancer diagnoses. Dr. Valencia could not recall specifically telling either Dr. Arechiga or Dr. Rodriguez that Alice had cancer. Both Drs. Arechiga and Rodriguez denied having been told of the diagnosis.

When considered in light of the evidence and the instruction given, the liability question allowed the jury to consider actions or omissions of any hospital "agent" when determining the hospital's negligence. The court instructed the jury that:

> When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

There was no definition given for "agent." Thus, the jury could have considered Dr. Valencia as the hospital's agent. *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 38 (1996) (defining an agent, in part, as "a person or business authorized to act on another's behalf"). The hospital's

request was designed to prevent that from happening. The instruction was effectively a limiting and proper definition of the term under the evidence. The requested instruction would have assisted the jury, was an accurate statement of applicable law, and was supported by the pleadings and the evidence. *See Mandlbauer*, 34 S.W.3d at 912. The Hawleys do not complain that the instruction would have "tilted" the jury against them in some manner; indeed, one reason they say the failure to give the instruction was not error is because it was undisputed that Dr. Valencia was not an employee of the hospital through whose actions the hospital acted.

In refusing to give the instruction, the trial court failed to follow guiding principles and therefore abused its discretion. We next consider whether the error was harmful.

2. Harm

Columbia asserts that failing to submit the instruction was harmful because the error prevents it from properly presenting the case on appeal. *See* TEX. R. APP. P. 61.1(b) ("No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the Supreme Court concludes that the error complained of . . . (b) probably prevented the petitioner from properly presenting the case to the appellate courts."); *see also* TEX. R. APP. P. 44.1(a)(2). Columbia's position is that under the charge and record there is no way to tell if the jury found it liable because of acts of employees, agents, and servants—for whom it could properly be held liable—or because of acts and omissions of Dr. Valencia—for whom it could not. Columbia relies on the harm analysis of Rule 61.1(b) as we applied it in *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000). There, we held that when a trial court submits a single broad-form liability question commingling valid and invalid theories of liability, the error is presumed harmful if an appellate

court cannot determine whether the jury based its answer on an invalid theory. *See* TEX. R. APP. P. 61.1(b). Columbia claims the charge in this case effectively mixed valid and invalid theories of negligence—negligence committed by hospital agents as opposed to negligence committed by Dr. Valencia, an independent contractor.

In support of their position that *Casteel* is inapplicable here, the Hawleys cite *Columbia Medical Center of Los Colinas v. Bush ex rel. Bush*, 122 S.W.3d 835, 858-59 (Tex. App.—Fort Worth 2003, pet. denied). In *Bush*, the defendant hospital urged that the trial court erred by refusing to instruct the jury not to consider certain specific acts alleged in the pleadings to have been negligence. *Id.* at 857-58. The appeals court determined that because the only theory of liability submitted was negligence, there was not a mixing of valid and invalid theories of liability even if there was no evidence the specific acts in question were negligent. *Id.* at 858-59.

Here, as in *Bush*, negligence was the only theory of liability submitted. But here, Columbia is not complaining of the failure to instruct the jury that it should not consider specific acts as negligence. Columbia is complaining because the charge affirmatively told the jury that the hospital acted through its employees, agents, nurses, and servants and allowed the jury to speculate whether Dr. Valencia was an agent of the hospital.

When considered along with the instruction that the hospital acted through its employees, agents, nurses, and servants, the liability question effectively submitted four negligence questions: (1) were the hospital's employees negligent, (2) were the hospital's agents negligent, (3) were the hospital's nurses negligent, and (4) were the hospital's servants negligent. Among other possible bases for its finding that the hospital was negligent, the jury may have found the employee laboratory

assistants were negligent; it may have found the hospital's employee laboratory operations supervisor was negligent; or it may have found Dr. Valencia was negligent and determined he was an agent of the hospital. But we agree with the Hawleys that the harm question presented in *Casteel* is different from that presented here because here the charge did not submit an invalid theory to the jury. Submission of an invalid theory involves "[a] trial court's error in instructing a jury to consider erroneous matters." *Harris County v. Smith*, 96 S.W.3d 230, 233 (Tex. 2002) (applying *Casteel*'s analysis of an invalid liability theory to an unsupported element of damages). In *Casteel*, for example, the jury charge contained a single broad-form liability question containing instructions on thirteen independent grounds for liability, four of which were invalid because they required consumer status, which the plaintiff did not have. *Casteel*, 22 S.W.3d at 387-88.

Unlike the contentions made in *Casteel*, Columbia does not contend that the jury was allowed to consider an improper theory of liability by the charge that allowed the hospital to be held liable for actions of its agents. Thus, the presumed harm analysis of Rule 61.1(b) was applied in *Casteel* and *Harris County* to a different jury charge problem than is presented here. *See Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 756 (Tex. 2006) ("We specifically limited our holdings in *Casteel* and *Harris County* to submission of a broad-form question incorporating multiple theories of liability or multiple damage elements."). And although in most cases where a trial court errs by refusing to give a proposed instruction the harm analysis will be based on whether the refusal probably caused the rendition of an improper judgment, *see Union Pacific Railroad Co. v. Williams*, 85 S.W.3d 162, 170 (Tex. 2002), the harm analysis of Rule 61.1(b) applies here because the jury could have found Columbia liable based on Dr. Valencia's acts or omissions under the charge as

given, and there is no way for Columbia or an appellate court to tell if it did so. *See Harris County*, 96 S.W.3d at 234-35. Such an error effectively precludes reviewing courts from determining whether the jury found liability on an invalid basis, precludes determination of whether the error probably caused the rendition of an improper judgment, and is harmful because it prevents proper presentation of the case on appeal. TEX. R. APP. P. 61.1(b). We sustain Columbia's issue.

III. Limitation of Damages and Interest

Columbia also asserts that (1) the trial court failed to limit the damages in accordance with Section 11.02 of former Texas Revised Civil Statute Article 4590i[2], and (2) the judgment does not reflect proper pre-judgment and post-judgment interest rates. Because we are remanding for a new trial and these issues may not recur following that trial, we do not address them.

IV. Conclusion

The trial court erred in refusing to submit Columbia's proposed jury instructions as to Dr. Valencia's actions as an independent contractor and as to Alice's loss of chance. The judgment of the court of appeals is reversed and the case is remanded to the trial court for a new trial.

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[2] Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 11.02, 1977 Tex. Gen. Laws 2039, 2052, *repealed by* Act of June 2, 2003, 78th Leg., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

Phil Johnson
Justice

OPINION DELIVERED: June 5, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0416

IN RE COLUMBIA MEDICAL CENTER OF LAS COLINAS, SUBSIDIARY, L.P. D/B/A LAS COLINAS MEDICAL CENTER, ANTONETTE CONNER, AND ANNA MATHEW, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued September 27, 2007

JUSTICE JOHNSON delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE BRISTER, and JUSTICE WILLETT joined.

JUSTICE O'NEILL filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON, JUSTICE MEDINA, and JUSTICE GREEN joined.

The Texas Constitution provides that the right of trial by jury "shall remain inviolate." TEX. CONST. art. 1, § 15. The issue before us is whether, after a jury has rendered its verdict, the trial court may disregard that verdict, grant a new trial, and explain its action only as being "in the interests of justice and fairness." We conclude that just as appellate courts that set aside jury verdicts are required to detail reasons for doing so, trial courts must give more explanation than "in the interest of justice" for setting aside a jury verdict. We conditionally grant mandamus relief directing the trial court to more specifically set out the reasons for which it set aside the jury verdict and granted a new trial.

I. Background

Donald Creech, Jr. entered Columbia Medical Center with kidney stones and died two days later while still in the hospital. As a result of Donald's death, his wife, Wendy Creech, on behalf of herself, their children, and Creech's estate (collectively, "Creech"), sued Columbia and several of its staff members. After a nearly four-week trial, the jury returned a unanimous verdict in favor of defendants.

Creech filed a motion for judgment notwithstanding the verdict, and in the alternative for a new trial. Creech urged that the trial court should grant a new trial because (1) the jury's answer to the negligence question was manifestly unjust and against the great weight and preponderance of the evidence, (2) the evidence conclusively established defendants' negligence, and (3) a new trial was warranted in the interests of justice and fairness.

The trial court granted the motion for new trial as to two nurses and as to Columbia in its capacity as their employer (collectively, "Columbia"). The order stated that a new trial was ordered "in the interests of justice and fairness." A final take-nothing judgment was entered in favor of the other defendants. The court of appeals denied Columbia's petition for a writ of mandamus challenging the trial court's failure to be specific as to the reasons for disregarding the jury's verdict and granting a new trial. ___ S.W.3d ___.

Columbia sought a writ of mandamus from this Court directing the trial court to specify why it granted a new trial and, in the alternative, directing the trial court to enter judgment on the jury verdict. After the case was briefed and argued, the trial judge who granted the new trial was succeeded in office by the Honorable Craig Smith. We abated the proceeding pursuant to Texas

Rule of Appellate Procedure 7.2(b) and remanded so Judge Smith could reconsider the order granting new trial. By order dated March 13, 2009, he reaffirmed the prior order without setting out reasons for granting the new trial:

> IT IS ORDERED, ADJUDGED and DECREED that this Court reaffirms the Order of December 8, 2004 granting Plaintiffs' Motion for New Trial.
>
> IT IS FURTHER ORDERED, ADJUDGED, and DECREED that this Court reaffirms the February 22, 2006 Order Denying Motion to Reconsider Court's Ruling Granting Plaintiffs' Motion for New Trial.

On March 27, 2009, we lifted the abatement and reinstated the petition on the Court's active docket.

Columbia argues that mandamus review of the trial court's order disregarding the jury verdict and granting a new trial is appropriate because these circumstances are extraordinary and it has no adequate remedy by appeal. It asserts that the trial court abused its discretion by (1) granting the partial new trial, (2) not specifying any grounds for granting the partial new trial other than "in the interests of justice and fairness," and (3) not entering judgment on the verdict.

Creech contends that this Court's precedent precludes appellate review of new trial orders and mandamus review should not be expanded to include review of this order. She also asserts that even if mandamus review is available, Columbia cannot show that the trial court's decision was a clear abuse of discretion or that Columbia is without an adequate remedy on appeal.

We agree with Columbia in part and conditionally grant relief as to part of Columbia's request. We direct the trial court to specify its reasons for disregarding the jury's verdict and granting a new trial, to the extent it did so. We deny, without prejudice, Columbia's request for mandamus relief directing the trial court to set aside its new trial order and enter judgment on the verdict.

II. Mandamus

A. General Law

Generally, mandamus will issue only to correct a clear abuse of discretion or the violation of a duty imposed by law, *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992), when an adequate remedy by appeal does not exist. *Perry Homes v. Cull*, 258 S.W.3d 580, 586 (Tex. 2008); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004). Mandamus should not issue to correct grievances that may be addressed by other remedies. *See Walker*, 827 S.W.2d at 840.

Used selectively, mandamus can "correct clear errors in exceptional cases and afford appropriate guidance to the law without the disruption and burden of interlocutory appeal." *In re Prudential*, 148 S.W.3d at 138. For example, in *In re Prudential*, we determined that the issue of enforceability of a pre-suit waiver of jury trial was a circumstance justifying mandamus review:

> The issue before us in the present case—whether a pre-suit waiver of trial by jury is enforceable—fits well within the types of issues for which mandamus review is not only appropriate but necessary. It is an issue of law, one of first impression for us, but likely to recur (it has already arisen in another case in the court of appeals, also on petition for mandamus). It eludes answer by appeal. In no real sense can the trial court's denial of Prudential's contractual right to have the [real party in interest] waive a jury ever be rectified on appeal. If Prudential were to obtain judgment on a favorable jury verdict, it could not appeal, and its contractual right would be lost forever. If Prudential suffered judgment on an unfavorable verdict, Prudential could not obtain reversal for the incorrect denial of its contractual right "unless the court of appeals concludes that the error complained of . . . probably caused the rendition of an improper judgment". Even if Prudential could somehow obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive.

148 S.W.3d at 138 (citations omitted).

And in *In re Barber*, 982 S.W.2d 364 (Tex. 1998), we considered availability of mandamus review for a trial court's order granting a new trial when the trial court refused to enforce its own order. The plaintiff obtained a default judgment, but the parties then submitted an agreed order setting it aside and granting a new trial. *Id.* at 365. The trial court approved the subsequent order, affixed it with a rubber-stamp signature, and left the original order unsigned. *Id.* After the sitting judge suffered a heart attack, another judge presided over the case and determined that the rubber-stamped order was invalid and that the trial court's plenary power had expired, making the default judgment final. *Id.* In granting mandamus relief, this Court held that the rubber-stamped order was signed during the trial court's plenary power within the meaning of Texas Rule of Civil Procedure 329b, and was effective to grant a new trial. *Id.* at 368. While recognizing that mandamus is not an appropriate means to review a final default judgment after the time for appeal has expired, this Court also determined that relator's complaint focused not on the default judgment but on the trial court's refusal to acknowledge the validity of the new trial order. *Id.* Because relator had no other realistic means of obtaining review for the specific set of circumstances, we held that mandamus relief was appropriate. *Id.*

Likewise, in *In re Masonite Corp.*, 997 S.W.2d 194 (Tex. 1999), we considered whether a trial court's improper venue transfer orders could be reviewed by mandamus. The trial court denied defendants' motions to transfer venue even though plaintiffs agreed that venue was improper and that defendants' motion was properly pled and proven. *Id.* at 196. At the time, venue determinations were not subject to mandamus review. *Id.* at 197 & n.9. We concluded the trial court "ignored the pleadings, the facts, and the law," and the record reflected "a clear abuse of discretion." *Id.* at 197.

We further noted that the trial court's actions showed "'such disregard for guiding principles of law that the harm . . . is irreparable.'" *Id.* at 198 (quoting *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 776 (Tex. 1995) (orig. proceeding)). Thus, this Court again recognized that, in certain cases, "exceptional circumstances" can justify mandamus relief. *Id.* at 198-99.

B. Application

1. Exceptional Circumstances

Our decisions have approved the practice of trial courts failing to specify reasons for setting aside jury verdicts. *E.g., Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985). And our decisions preclude, for the most part, appellate review of orders granting new trials. *See Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005) (noting that we have recognized only two instances in which new trial orders are reviewable on appeal: when the trial court's order was void or the trial court erroneously concluded that the jury's answers to special issues were irreconcilably in conflict). Neither party claims that this case involves either a void order or a conflict in jury answers.

Citing authorities such as *Cummins v. Paisan Construction Co.*, 682 S.W.2d 235, 236 (Tex. 1984), Creech argues that this Court's prior decisions prevent a new trial order rendered during the time a trial court has plenary power from being reviewed by a higher court. In *Cummins*, a default judgment was entered against Paisan, and Paisan filed a motion for new trial. *Id.* at 235. Following a hearing on the motion, the trial court set aside the default judgment and granted Paisan's motion. *Id.* Judgment was entered in Paisan's favor based on the jury verdict from the new trial. *Id.* On appeal, Cummins challenged the trial court's granting of Paisan's new trial motion. *Id.* The court

of appeals examined the evidence introduced at the hearing on the motion and held that based on the evidence, the trial court did not abuse its discretion in granting the new trial. *Id.* This Court affirmed the court of appeals decision, but for a different reason. We held that because the motion for new trial was timely filed and the motion was granted during the trial court's plenary power, the order granting a new trial was not reviewable on appeal, either by direct appeal from the order or from a final judgment rendered after further proceedings in the trial court. *Id.* at 235-36; *see also Johnson*, 700 S.W.2d at 918.

We agree with Creech's interpretation of the authorities she cites. But the holdings of those cases support our conclusion that the circumstances here are exceptional ones. According to the authorities she cites, Columbia has no avenue to appeal the trial court's action.

Creech also argues that appellate review of orders granting new trials is inconsistent with legislative intent because the Legislature once passed a law allowing appeals from such orders[1] but repealed it two years later.[2] However, the Legislature's consideration of whether orders granting new trials are or should be appealable does not encompass the issue of whether such orders are subject to the extraordinary remedy of mandamus review. *See Walker*, 827 S.W.2d at 840 (noting that mandamus is an extraordinary remedy, available only when an adequate remedy by appeal is not).

On balance, the significance of the issue—protection of the right to jury trial—convinces us that the circumstances are exceptional and mandamus review is justified. *See In re Prudential*, 148 S.W.3d at 136. Further, we disagree with both Creech and the dissent that granting relief will

[1] Act of Feb. 23, 1925, 39th Leg., R.S., ch. 18, 1925 Tex. Gen. Laws 45.

[2] Act of Feb. 21, 1927, 40th Leg., R.S., ch. 52, § 1, 1927 Tex. Gen. Laws 75.

expand the use of mandamus review. The standards we employ do not expand mandamus principles nor go beyond principles we have previously identified as justifying mandamus review. And, mandamus review remains discretionary, not of right.

2. Adequate Remedy by Appeal

As discussed above, this Court's prior decisions indicate that only in two instances have new trial orders rendered during the time a trial court has plenary power been reviewable by an appellate court: when the trial court's order was void and when the trial court erroneously concluded that the jury's answers to special issues were irreconcilably in conflict. *Wilkins*, 160 S.W.3d at 563; *Johnson*, 700 S.W.2d at 918; *see Cummins*, 682 S.W.2d at 236. The parties do not contend that either of those circumstances exist. Thus, absent mandamus review, Columbia will seemingly have *no* appellate review of the orders granting new trial.

Moreover, if Columbia could obtain appellate review of the new trial orders following a second trial, it would be in much the same situation as the relator in *In re Prudential*. If Columbia suffered an unfavorable verdict, it could not obtain reversal unless it convinced an appellate court that the granting of the new trial was error and that the error either prevented Columbia from properly presenting its case on appeal or probably caused entry of an improper judgment. *See In re Prudential*, 148 S.W.3d at 138. And even if an unfavorable verdict were reversed and rendered in Columbia's favor, Columbia would have lost the benefit of a final judgment based on the first jury verdict without ever knowing why, and would have endured the time, trouble, and expense of the second trial. Under the circumstances, Columbia does not have an adequate appellate remedy. *See Perry Homes*, 258 S.W.3d at 586; *In re Prudential*, 148 S.W.3d at 138.

3. Abuse of Discretion

The Texas Rules of Civil Procedure specifically address new trials. Rule 320 provides, in part, that:

> New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct. New trials may be granted when the damages are manifestly too small or too large.

TEX. R. CIV. P. 320. As the rule specifies, new trials may be granted for good cause on motion of a party or on the trial court's own motion. When a motion for new trial is filed by a party, the motion must be in such form that the bases for the motion can be clearly identified and understood by the trial court:

> Each point relied upon in a motion for new trial or in arrest of judgment shall briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court.

TEX. R. CIV. P. 321. Generality in motions for new trial must be avoided because objections phrased in general terms shall not be considered by the court. TEX. R. CIV. P. 322. Not more than two new trials may be granted for either party in the same cause because of insufficiency or weight of the evidence. TEX. R. CIV. P. 326.

Texas trial courts have historically been afforded broad discretion in granting new trials. *See Johnson*, 700 S.W.2d at 917. But that discretion is not limitless. In *Larson v. Cactus Utility Co.*, 730 S.W.2d 640 (Tex. 1987), we noted that a trial court cannot grant a new trial conditioned on a party's refusal to accept a remittitur if factually sufficient evidence supported the jury's verdict. We held that a trial court may order a remittitur only when the evidence is factually insufficient to

support the verdict, which is the same limitation as is imposed on the court of appeals. *Id.* at 641. We reasoned that both trial courts and courts of appeals should be subject to the standard that no court is free to simply substitute its judgment for that of the jury and that applying different standards for trial courts and courts of appeals could lead to inconsistent results because a trial court's decision as to remittitur could stand when the same conclusion by a court of appeals would not. *Id.* And as previously noted, granting of a new trial is error if the trial court's order is void, or if the trial court specifically based its new trial order on an irreconcilable conflict in answers to jury questions when the answers were not in conflict. *See Wilkins*, 160 S.W.3d at 563; *Johnson*, 700 S.W.2d at 918.

These decisions, coupled with the clear import of the Texas Rules of Civil Procedure, indicate that the amount of discretion Texas trial courts possess to overturn jury verdicts and grant new trials is broad but has limits. For example, and as demonstrated by the Rules of Civil Procedure quoted above, new trials may be granted to a party for sufficiency or weight of the evidence, when damages are "manifestly" too small or too large, and for "good cause." TEX. R. CIV. P. 320, 326.[3]

Jury trials are essential to our constitutionally provided method for resolving disputes when parties themselves are unable to do so. *See* TEX. CONST. art. I, § 15, art. V, § 10; *Wal-Mart Stores, Inc. v. Seale*, 904 S.W.2d 718, 722 (Tex. App.—San Antonio 1995, no writ) (recognizing that a jury's decision is not to be tampered with lightly, regardless of whether it favors the plaintiff or the defendant). Parties to a dispute who choose to have the dispute resolved by a jury and endure the

[3] The good cause for which Rule 320 allows trial courts to grant new trials does not mean just any cause. If it did, the rule would not have specified "good" cause. Our rules of procedure do not define "good cause" in this context, and we do not now undertake to do so. But the fact that the right to jury trial is of such significance as to be provided for in both the Federal and State Constitutions counsels against courts setting aside jury verdicts for less than specific, significant, and proper reasons.

personal and financial inconvenience of such a trial are entitled to know why the verdict was disregarded, regardless of whether the verdict was disregarded by one judge or a panel of judges. So are the jurors whose lives were interrupted so they could serve, and the public that finances the judicial system and depends on its open operations to assure fair processes for dispute resolution. We require appellate courts to explain by written opinion their analyses and conclusions as to the issues necessary for final disposition of an appeal. *See* TEX. R. APP. P. 47.1, 63. If a court of appeals affirms a challenged jury verdict as being supported by factually sufficient evidence, the court need not detail all the evidence in support of the verdict. *Ellis County State Bank v. Keever*, 888 S.W.2d 790, 794 (Tex. 1994). But if the court holds that the verdict is not supported by factually sufficient evidence and effectively sets aside the jury verdict by reversing the trial court's judgment, the court must detail all the relevant evidence and explain how it outweighs evidence supporting the verdict or how the verdict is so against the great weight and preponderance of the evidence that it is manifestly unjust. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986); *see also Citizens Nat'l Bank in Waxahachie v. Scott*, 195 S.W.3d 94, 96 (Tex. 2006) (holding that an appellate court may not reverse a lower court judgment by "merely saying that the court has reviewed all the evidence and reach[ed] a conclusion contrary to that of the trier of fact" but must explain with specificity why it has substituted its judgment for that of the trial court).

The standards by which trial judges and appellate judges may set aside or overturn a jury verdict are different. The Rules of Civil Procedure afford a trial court considerable discretion to set aside a jury verdict, even on its own motion. *See* TEX. R. CIV. P. 320, 326, 327. Appellate judges

have much less discretion because they are limited to the issues urged and record presented by the parties and because appellate courts are specifically limited to reversing judgments only for errors that probably resulted in entry of an improper judgment or precluded a party from properly presenting its case on appeal. TEX. R. APP. P. 44.1, 61.1; *but see Living Ctrs. of Tex., Inc. v. Peñalver*, 256 S.W.3d 678, 681 (Tex. 2008) (noting that no harm analysis is required for certain incurable jury argument); *In re J.F.C.*, 96 S.W.3d 256, 291 (Tex. 2002) (noting that a harm analysis is not conducted for jurisdictional fundamental-error review). And, of course there are differences between the review that can be accomplished by appellate judges who have only the record to consider and trial judges who have seen the parties and witnesses and sensed the affect of certain evidence or occurrences on the trial. Nevertheless, there is no meaningful difference to the parties between an appellate court reversing a judgment based on a jury verdict and a trial court setting the verdict aside or disregarding it. The end result is that the prevailing party loses the jury verdict and the judgment, or potential judgment, based on it.

More than forty other states and the District of Columbia require trial courts, in certain circumstances, to specify the reasons for setting aside jury verdicts.[4] Most have statutes or rules of procedure that embody the requirement, although the requirement in at least one of those states was

[4] *See* ALA. R. CIV. P. 59(d); ALASKA R. CIV. P. 59(e); ARIZ. R. CIV. P. 59(m); ARK. R. CIV. P. 59(e); CAL. CIV. PRO. CODE § 657; COLO. R. CIV. P. 59(c); DEL. SUPER. CT. CIV. P. R. 59(c); D.C. R. CIV. P. 59(d); FLA. R. CIV. P. 1.530(f); GA. CODE ANN. § 5-5-51 (2007); HAW. R. CIV. P. 59(d); IDAHO R. CIV. P. 59(d); ILL. COMP. STAT. ANN. ch. 725 § 5/116-1(c) (2006); IND. R. TRIAL P. 59(J)(7); IOWA R. CIV. P. 1.1008(3); KAN. STAT. ANN. § 60-259(e); KY. R. CIV. P. 59.04; ME. R. CIV. P. 59(d); MD. RULE 4-331(e); MASS. R. CIV. P. 59(d); MI. R. CIV. PRO. 2.611(c); MINN. R. CIV. P. 59.05; MISS. R. CIV. P. 59(d); MO. REV. STAT. § 510.370; MONT. R. CIV. P. 59(f); NEV. R. CIV. P. 59(d); N.J. R. 4:49-1(c); N.M. DIST. CT. CIV. PRO. R. 1-050(c)(1); N.C. CIV. PRO. 59(d); N.D. R. CIV. P. 59(f); OHIO CIV. R. 59(a); OR. REV. STAT. § 19.430 (2007); PA. R. CIV. P. 227.1(e); R.I. R.C.P. 59(d); S.C. R. CIV. P. 59(d); S.D. CODIFIED LAWS § 15-6-59(g); TENN. CIV. PRO. R. 59.05; UTAH R. CIV. P. 59(d); VT. R. CIV. P. 59(d); WASH. SUPER. CT. CIV. R. 59(f); W. VA. R. CIV. P. 59(d); WIS. STAT. § 805.15(2) (2006); WYO. R. CIV. P. 59(d).

first made by judicial decision. *E.g.*, IDAHO R. CIV. P. 59(d); *Quick v. Crane*, 727 P.2d 1187, 1199-1200 (Idaho 1986). The Idaho Supreme Court held that such a requirement is necessary when a trial court exercises any discretion that "has a substantial impact on the litigants." *Quick*, 727 P.2d at 1200. In responding to the argument that requiring trial judges to state their reasons for granting new trials imposes a burden on their ability to handle dockets, the court reasoned that:

> "Where proceedings at trial clearly have gone awry, the reasons for granting a new trial can be readily identified and stated. In cases where the proceedings outwardly seem regular, but the judge nevertheless feels that an injustice has been done, it may be more difficult to identify and to state the reasons. However, these hard cases are precisely the cases where the discipline of stating reasons is most needed."

Id. at 1200-01 (quoting *Sheets v. Agro-West, Inc.*, 664 P.2d 787, 796 (Idaho Ct. App. 1983)).

Federal Rule of Civil Procedure 59(d) requires that a trial court, in granting a new trial on its own initiative, "must specify the reasons in its order." FED. R. CIV. P. 59(d). In *Scott v. Monsanto Co.*, 868 F.2d 786, 791 (5th Cir. 1989), the Fifth Circuit reasoned that a trial court's discretion in granting a new trial is not "impenetrable" and that "careful scrutiny given to orders granting new trials is intended to assure that the court 'does not simply substitute [its] judgment for that of the jury, thus depriving the litigants of their right to trial by jury.'" *Id.* at 791 (quoting *Conway v. Chem. Leaman Tank Lines, Inc.*, 610 F.2d 360, 363 (5th Cir. 1980)).

We are of the opinion that such reasoning is applicable to the issue presented. We do not retreat from the position that trial courts have significant discretion in granting new trials. *Johnson*, 700 S.W.2d at 917. However, such discretion should not, and does not, permit a trial judge to substitute his or her own views for that of the jury without a valid basis. A trial court's actions in refusing to disclose the reasons it set aside or disregarded a jury verdict is no less arbitrary to the

parties and public than if an appellate court did so. *See Scott*, 195 S.W.3d at 96; *Gonzalez v. McAllen Med. Ctr., Inc.*, 195 S.W.3d 680, 682 (Tex. 2006) (noting that plaintiffs were entitled to a written opinion from the court of appeals stating why the jury's verdict can or cannot be set aside). The trial court's action in failing to give its reasons for disregarding the jury verdict as to Columbia was arbitrary and an abuse of discretion.

In *Johnson*, we held that a trial court may, in its discretion, grant a new trial "in the interest of justice." 700 S.W.2d at 918. We have reaffirmed that decision. *See, e.g.*, *Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988). However, for the reasons stated above, we believe that such a vague explanation in setting aside a jury verdict does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public when a lawsuit is tried to a jury. Parties and the public generally expect that a trial followed by a jury verdict will close the trial process. Those expectations may be overly optimistic, practically speaking, but the parties and public are entitled to an understandable, reasonably specific explanation why their expectations are frustrated by a jury verdict being disregarded or set aside, the trial process being nullified, and the case having to be retried. To the extent statements or holdings in our prior cases conflict with our decision today, we disapprove of them.

III. Response to the Dissent

The dissent says the trial court had any number of proposed reasons for granting Creech's motion for new trial. The motion challenged the testimony of Columbia's expert, advanced twenty-eight evidentiary points, challenged the jury's answer to the negligence question as manifestly unjust

and against the great weight and preponderance of the evidence, asserted the evidence conclusively established defendants' negligence, and asserted a new trial was warranted in the interests of justice and fairness. But that only restates Columbia's complaint: the jury verdict as to Columbia has been disregarded and no one other than the trial judges who issued the new trial orders know the specific reasons why. The dissent says the orders were presumably based on one of the grounds in the motion for new trial, but that presumption may not be correct. The judges may have based the orders on other reasons not even urged by Creech and still unknown to both parties. Columbia should be told why the trial court granted the new trial.

As to the procedural history of this case, the appeal was abated because an appellate procedural rule requires successor judges to be afforded an opportunity to reconsider orders such as the one at issue. *See* TEX. R. APP. P. 7.2(b). We recognize that in certain circumstances, including situations such as this, successor judges will be disadvantaged in making rulings on motions such as the one involved here. But successor trial judges are disadvantaged in many, if not most, instances when they are called upon to step into pending cases. For example, in *Deere v. Ingram*, ___ S.W.3d ___, ___ (Tex. 2009), the jury found that a joint venture existed between Deere and Ingram and awarded damages to Deere for Ingram's breach of the agreement and breach of fiduciary duty. *Id.* The trial court entered judgment in Deere's favor based on the verdict but then granted Ingram's motion for judgment notwithstanding the verdict in part. *Id.* Following entry of the new, reduced judgment, the judge who tried the case recused himself. *Id.* The case was assigned to another judge, and Ingram filed a second motion for judgment notwithstanding the verdict or, in the

alternative, for a new trial. *Id.* The second judge stepped in, considered the post-trial motion, granted it, and entered judgment that Deere take nothing. *Id.*

Whether a change of judges is due to recusal, such as in *Deere*, because a new judge is elected, as here, or for any other reason, successor judges almost invariably face at least some decisions similar to those involved here and in *Deere*. Part of being a trial judge is having to make difficult rulings in pending matters.

Pursuant to our decision in *In re Baylor Medical Center at Garland*, 280 S.W.3d 227, 232 (Tex. 2008), the original order by which the jury verdict as to Columbia was disregarded and a new trial granted was interlocutory. In accordance with Texas Rule of Civil Procedure 7.2(b), the successor judge has now considered Creech's motion, held a hearing, and entered his own order reaffirming the grant of the motion. That order is effectively an order refusing to enter judgment on the jury verdict and affects the rights of the parties no less than did the orders of the original judge. We presume the successor judge had specific reasons for entering the order he entered. Columbia is entitled to know those reasons just as much as it would be entitled to know the reasons for the orders entered by the former trial judge.

We agree with the dissent that trial judges are allowed great discretion in matters such as these. But we reject the suggestion that our decision is motivated by an underlying fear that some trial courts might abuse the privilege of their discretion. We have faith in the integrity of our trial bench as well as that of the appellate bench. Both have discrete constitutional and statutory places and duties in the judicial structure. We are not blind to the practicality that a trial judge might "game" the system by stating plausible reasons for setting aside a verdict when the real reasons might

be otherwise. We choose not to attribute such attitudes and motives to trial judges absent some reason for doing so in individual circumstances supported by a record. Nevertheless, we believe it important enough to the transparency of our judicial system and to its apparent fairness to the public that even if a trial judge on occasion gives specious reasons for setting aside a jury verdict, the balance still weighs heavily in favor of requiring trial courts to give their reasons for setting aside or disregarding verdicts.

Finally, we might agree with the dissent's assertion that any change to the existing status should be through the rule-making process if the current status were the product of the rule-making process. It is not. As both we and the dissent have noted, the current status is the product of appellate decisions, not the least of which are decisions from this Court. We do not lightly alter a status established by our prior decisions. But when the status shields decisions affecting rights such as those relating to jury trials from the view of the parties and the public, we should not hesitate to reconsider it.

IV. Entry of Judgment on the Verdict

The trial court has not stated its specific grounds for refusing to enter judgment on the jury verdict and granting a new trial. Thus, we decline to consider whether mandamus relief is available as to the trial court's action in disregarding the jury verdict. We deny, without prejudice, Columbia's request for a writ of mandamus directing the trial court to enter judgment on the verdict.

V. Columbia's Constitutional Arguments

Columbia also urges that the federal and state constitutions require trial courts to specify reasons for disregarding jury verdicts. *See* TEX. CONST. art. I, § 15, art. V, § 10; *Golden Eagle*

Archery, Inc. v. Jackson, 24 S.W.3d 362, 374 (Tex. 2000) (noting that "a state's civil jury system must comport with federal due process"). We need not and do not reach the constitutional issues. *See In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003) ("As a rule, we only decide constitutional questions when we cannot resolve issues on nonconstitutional grounds.").

VI. Conclusion

We conditionally grant relief. We direct the trial court to specify the reasons it refused to enter judgment on the jury verdict and ordered a new trial as to Columbia. The reasons should be clearly identified and reasonably specific. Broad statements such as "in the interest of justice" are not sufficiently specific.

We are confident the trial court will comply. The writ will issue only if it fails to do so.

_____

Phil Johnson
Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0416

IN RE COLUMBIA MEDICAL CENTER OF LAS COLINAS, SUBSIDIARY, L.P. D/B/A LAS COLINAS MEDICAL CENTER, ANTONETTE CONNER, AND ANNA MATHEW, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued September 27, 2007

JUSTICE O'NEILL, joined by CHIEF JUSTICE JEFFERSON, JUSTICE MEDINA, and JUSTICE GREEN, dissenting.

I agree that trial courts should not set aside jury verdicts without valid reasons. And I might agree that a change in the procedural rules to require trial judges to state good cause more particularly than "in the interests of justice and fairness" would be well advised, though the Legislature has only seen fit to impose such a requirement in criminal cases. But declaring such a rule by judicial fiat on interlocutory review, and issuing mandamus relief against the trial court for not following it, turns our mandamus jurisprudence on its head. The Court recites that "exceptional circumstances" justify mandamus relief when the trial court shows "such disregard for guiding principles of law that the harm . . . is irreparable." ___ S.W.3d ___, ___ (internal quotations omitted). Yet this case presents neither exceptional circumstances nor a departure from controlling law, as the trial court followed one of our most well-established legal principles. We have long held,

unequivocally, that a trial court may grant a new trial "in the interests of justice and fairness,"[1] and trial and appellate courts have taken us at our word.[2] The Court simply changes the rule and jettisons the law upon which the trial court relied. After today, I see no principled basis for denying mandamus review of any potentially dispositive but unexplained interlocutory ruling.

The Court's premise is simple enough and, on first glance, compelling: public confidence in the judicial system will be enhanced if trial courts explain the reasons for their rulings. This premise, though, would surely apply with equal force to any number of interlocutory rulings, such as why the court impaneled jurors who were challenged for cause, granted or denied a motion for summary judgment, allowed or disallowed particular discovery, exercised its gatekeeping function as it did with regard to a key expert witness, or admitted or excluded potentially dispositive evidence. A trial court's ruling on matters like these, if wrong, could ultimately lead to reversal on appeal and necessitate the expense and delay of a new trial. Yet we have never justified interlocutory review of such decisions on the trial court's failure to expound its reasoning.

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[1] *See Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985); *Goss v. McClaren*, 17 Tex. 107, 115 (1856); *see also In re Volkswagen of Am., Inc.*, 22 S.W.3d 462 (Tex. 2000); *In re Bayerische Motoren Werke, AG*, 8 S.W.3d 326 (Tex. 2000).

[2] *See In re United Scaffolding, Inc.*, No. 09-09-00098-CV, 2009 Tex. App. LEXIS 2701, at *1–3 (Tex. App.—Beaumont Apr. 16, 2009, orig. proceeding) (trial court did not abuse its discretion by granting new trial "in the interest of justice and fairness" where the moving party's specific complaint was evident from the face of the motion); *In re E.I. DuPont de Nemours & Co.*, No. 09-08-318 CV, 2008 Tex. App. LEXIS 5443, at *1–2 (Tex. App.—Beaumont July 24, 2008, orig. proceeding) (mandamus relief not available where trial court failed to state reason for granting new trial); *In re Baylor Med. Ctr. at Garland*, No. 05-05-01663-CV, 2006 Tex. App. LEXIS 19 (Tex. App.—Dallas Jan. 4, 2006, orig. proceeding); *Eldred v. Eldred*, No. 03-98-00167-CV, 1999 Tex. App. LEXIS 2570, at *19–20 (Tex. App.—Austin Apr. 8, 1999, no pet.); *Mosley v. Employers Cas. Co.*, 873 S.W.2d 715, 717 (Tex. App.—Dallas 1993, writ denied); *Valley Steel Prods. Co. v. Howell*, 775 S.W.2d 34, 36 (Tex. App.—Houston [1st Dist.] 1989, no pet.) (noting that a trial court "need not specify the reason for granting a new trial in its order").

Unlike many other jurisdictions, Texas has no statutory or procedural rule that requires a trial court to further explain its ruling on a new trial motion or that permits interlocutory review of that decision, presumably because the benefits of a relatively prompt retrial if the judge perceives unfairness in the proceedings outweigh the detriments of prolonging final judgment pending interlocutory appellate review. After all, this case has been on review for over four and one half years since the new trial was granted. The Court purports to justify its misadventure on the principle that trial courts may not substitute their judgment for that of the jury. While undoubtedly true, it is equally true that an appellate court may not substitute its discretion for that of the trial court, which is charged with ensuring the fairness of the proceedings and safeguarding the integrity of the judicial process. Because trial courts are in a unique position to observe the proceedings and participants first hand, we have afforded them broad discretion in assessing whether "in the interests of justice and fairness" a new trial is warranted. If abuse of the privilege that such broad discretion affords is a concern, then Rule 320 should be amended to mirror the federal requirement that a court "specify the reasons in its order." FED. R. CIV. P. 59(d). Until then, no jurisprudential imperative compels us to overturn more than a century of clear precedent and erode the broad discretion we have traditionally afforded trial courts in granting new trials when they perceive good cause to do so. Because the Court ventures far beyond the boundaries of our mandamus jurisprudence, I respectfully dissent.

I. Background

Donald Creech, Jr. was admitted to Columbia Medical Center for difficulties with kidney stones. While at the hospital, he received the pain medication Dilaudid, a narcotic, intravenously.

When he increasingly complained of severe pain, the licensed vocational nurse (LVN) attending to Donald increased the amount and frequency of his doses. Several hours after his largest dose, Donald died. Donald's widow, Wendy Creech, brought this suit, alleging that the hospital staff violated the standard of care in administering such a large amount of Dilaudid to Donald when he suffered from sleep apnea. She alleges that the medication, a respiratory depressant, interacted with Donald's sleep apnea to cause his death by asphyxiation.

After a four-week trial, the jury returned a verdict in favor of all defendants. Wendy moved for a new trial, arguing that the evidence conclusively proved the defendants' negligence, the verdict was against the great weight and preponderance of the evidence, the verdict was manifestly unjust and conflicted with evidence that established Columbia's negligence as a matter of law, and a new trial was warranted in the interests of justice and fairness. The motion contained twenty-eight evidentiary points, including a challenge to the reliability of Columbia's expert testimony. The trial court, "in the interests of justice and fairness," granted the motion as to the LVN, her supervising registered nurse, and Columbia in its capacity as their employer (collectively, "Columbia"), presumably on the grounds urged in the new trial motion. The court entered judgment in favor of all other defendants[3] in accordance with the verdict. Relying on our precedent, the court of appeals held that the trial court's explanation for granting the new trial was sufficient. ___ S.W.3d ___. Under our well-established jurisprudence, it clearly was.

[3] The trial court entered judgment in favor of defendants Ali Shirvani, M.D., Rabia Khan, M.D., Kyle Chandler and John Russell Carpenter.

II. Standard of Review

Trial courts have always been afforded broad discretion in the granting of new trials, and may exercise such discretion "in the interests of justice and fairness" without stating any other reason. *See Champion Int'l Corp.*, 762 S.W.2d at 899; *Johnson*, 700 S.W.2d at 918. Over a century ago, this Court emphasized the point:

> In ordinary cases the judge has a discretion to grant a new trial whenever, in his opinion, wrong and injustice have been done by the verdict; and it is upon this ground that courts have refused to interfere to revise the granting of new trials.

Goss, 17 Tex. at 115. In this case, the trial court did precisely what we have long said it could. Yet the Court concludes the trial court abused its discretion in not stating a more specific reason for its ruling, creating new law on mandamus and overturning a long line of precedent in the process.

The Court points to a number of jurisdictions that require a trial court to articulate the reason when granting a new trial *sua sponte*. In this case, though, the trial court did not rule *sua sponte* but *granted the plaintiff's motion* for new trial, presumably for the reasons that the plaintiff explained. Although one of the plaintiff's new trial grounds cited "the interests of justice and fairness," another challenged the verdict based on "the great weight and preponderance of the evidence," a ground we have no jurisdiction to review. We do not know whether the trial court's "in the interests of justice and fairness" ruling was based on perceived unfairness in the proceedings, on factual insufficiency of the evidence to support the jury's verdict, or on both. For this reason alone, we should deny mandamus relief. But even if the trial court had acted *sua sponte*, the rule in nearly all jurisdictions

that require an explanation is codified in a statute or procedural rule.[4] In none of the remaining jurisdictions was the rule promulgated on mandamus or its equivalent, and for good reason.

First, to warrant mandamus relief the trial court must have committed a "clear abuse of discretion," which we have defined to include failure to apply the law correctly. *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992). Because the trial court here did exactly what we have clearly said it could, the trial court can hardly be said to have abused that discretion. Second, our Legislature is well aware that trial courts may grant new trials "in the interests of justice and fairness" and has not seen fit to change the law. The Legislature did decide to allow interlocutory review of new trial orders in criminal proceedings, but declined to extend such review to the civil arena. *See* TEX. CODE. CRIM. PROC. art. 44.01(a)(3). In civil cases, our procedural rules expressly permit a trial court to grant a new trial on its own motion for any good cause. TEX. R. CIV. P. 320. Presuming, as the Court does, that a change in procedure is warranted, it would be far more appropriate to effect that change by amending the rules rather than implementing new law on mandamus.

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[4] This is particularly true in the many jurisdictions that have modeled their rules on the federal rules, which require a trial court to specify the reasons for granting a new trial *sua sponte*. *See* FED. R. CIV. P. 59(d). A majority of jurisdictions have an equivalent statute or rule of procedure. ALA. R. CIV. P. 59(d); ALASKA R. CIV. P. 59(e); ARIZ. R. CIV. P. 59(g); ARK. R. CIV. P. 59(e); CAL. CIV. PROC. CODE § 657 (Deering 2008); COLO. R. CIV. P. 59(c); DEL. SUPER. CT. CIV. R. 59(c); D.C. SUPER. CT. R. CIV. P. 59(d); FLA. R. CIV. P. 1.530(f); GA. CODE ANN. § 5-5-51 (1995); HAW. R. CIV. P. 59(d); IDAHO R. CIV. P. 59(d); IND. R. CIV. P. 59(J)(7); IOWA R. CIV. P. 1.1008(3); KAN. STAT. ANN. § 60-259(e) (2005); KY. R. CIV. P. 59.04; ME. R. CIV. P. 59(d); MASS. R. CIV. P. 59(d); MICH. CT. R. 2.611(C); MINN. R. CIV. P. 59.05; MISS. R. CIV. P. 59(d); MO. REV. STAT. § 510.370 (1952); MONT. R. CIV. P. 59(e)–(f); NEV. R. CIV. P. 59(d); N.J. CT. R. 4:49-1(c); N.M. DIST. CT. R. CIV. P. 1-050(C)(1); N.D. R. CIV. P. 59(i); OHIO R. CIV. P. 59(D); OR. REV. STAT. § 19.430 (2007); R.I. SUPER. CT. R. CIV. P. 59(d); S.C. R. CIV. P. 59(d); S.D. CODIFIED LAWS § 15-6-59(d) (2004); TENN. R. CIV. P. 59.05; UTAH R. CIV. P. 59(d); VT. R. CIV. P. 59(d); WASH. SUPER. CT. CIV. R. 59(d), (f); W. VA. R. CIV. P. 59(d); WYO. R. CIV. P. 59(d).

Even if mandamus were an appropriate vehicle to overturn precedent, there is no cause to do so here. There is a "strong presumption" against overruling our precedent. *Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979). Absent compelling reasons, courts should avoid overturning established law because "the legitimacy of the judiciary rests in large part upon a stable and predictable decisionmaking process;" without adherence to precedent, no question of law would ever be considered resolved. *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995). Compelling reasons to overturn precedent may exist in limited circumstances, such as when the preceding decision itself was incorrect or unconstitutional, there is conflicting precedent, the decision has been undercut by the passage of time, the precedent created inconsistency and confusion, or the decision consistently creates unjust results. *See Hammock v. State*, 46 S.W.3d 889, 892–93 (Tex. Crim. App. 2001); *see also Bowman Biscuit Co. v. Hines*, 251 S.W.2d 153, 155 (Tex. 1952) (Garwood, J., dissenting). None of these circumstances are presented here. The well-established principle that a trial court does not abuse its discretion by ordering a new trial "in the interests of justice and fairness" is clear, we have followed it as recently as 2000, *see In re Bayerische Motoren Werke, AG*, 8 S.W.3d 326; *In re Volkswagen*, 22 S.W.3d 462, and there is no conflicting precedent over the course of the 150 years it has been in place. Our precedent is not unconstitutional, as I will later explain, nor was it incorrect in the first instance. In sum, none of the factors we have considered in those rare instances when we have found it necessary to overrule precedent exist in this case.

Although the Court purports to rely on good policy in support of its new rule, there are also good reasons why a trial court's failure to provide a more specific explanation does not warrant extraordinary relief. For example, it would likely be fundamentally unjust to uphold a verdict when

jurors have been inattentive or their perceptions impaired, but our procedural and evidentiary rules only contemplate the development of an evidentiary record when outside influence has been asserted. *See* TEX. R. CIV. P. 327; TEX. R. EVID. 606(b). In *Tanner v. United States*, the jury was allegedly under the influence of alcohol and drugs, including marijuana and cocaine, for much of the trial. 483 U.S. 107, 115–16 (1987). That evidence was inadmissible under Federal Rule of Civil Procedure 606(b), which is almost identical to Texas Rule of Civil Procedure 606(b). *Id.* at 125. Under the Court's decision today, it is not clear how extended the trial court's explanation for a new trial in similar circumstances would have to be, nor is it clear what a reviewing court should do with that information. For the Court's rule to have meaning, the trial judge would likely need to identify which jurors were impaired, how much so, and when, all without the ability to develop an evidentiary record. The party challenging the new trial order would surely counter that the jury was not impaired, or at least not so impaired as to taint the verdict. It is unclear how an appellate court could effectively review such an order, or whether such a reason, though probably "good cause" to order a new trial under Rule 320, would be sufficient to survive mandamus review.

The procedural history of this case aptly demonstrates another reason why extraordinary relief is not warranted for the trial court's failure to provide a more specific explanation. During the pendency of this Court's review, the trial judge who ordered a new trial, the Honorable Merrill Hartman, left office and a new judge succeeded him. We abated the original proceeding to allow the successor judge to reconsider Judge Hartman's ruling. *See* TEX. R. APP. P. 7.2(b). The new judge did so, and reaffirmed Judge Hartman's order. The Court today sends the case back to the successor judge to specify the reasons why a new trial was granted. To the extent the successor judge

is able to make an independent assessment based on the record, this may be feasible. But if Judge Hartman based his decision in whole or in part on unfairness that he perceived during the proceedings, which until today he was not required to articulate on the record, then the successor judge is faced with an impossible task. In such a circumstance, changing the rules in midstream produces a substantial injustice. And if the successor judge reviews the transcript of the proceedings and reaffirms the new trial order because the jury's verdict was against the great weight and preponderance of the evidence, the Court today opens the door to interlocutory evidentiary review of that decision which heretofore has only been afforded on appeal from a final judgment. *See Champion Int'l Corp.*, 762 S.W.2d at 899; *Johnson v. Court of Civil Appeals for the Seventh Supreme Judicial Dist.*, 350 S.W.2d 330, 331 (Tex. 1961).

The Court purports to preserve the discretion traditionally afforded trial courts in issuing new trial orders, but the practical effect of its decision will be more frequent appellate intervention and delay. *See Johnson*, 700 S.W.2d at 918; *see also Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Moreover, without the vetting that the Court's rule-making process would afford, the parameters for reviewing the trial court's explanation are murky at best. For example, the rules contemplate a trial court's discretion to grant a new trial for "good cause" based on "insufficiency or weight of the evidence." *See* TEX. R. CIV. P. 320, 326. Will a judge's statement that a new trial is ordered "because of insufficiency or weight of the evidence" satisfy the court's requirement? TEX. R. CIV. P. 326. Or must the trial judge, like an appellate court, review the entire record and expend its resources "detail[ing] the evidence relevant to the issue in consideration and clearly stat[ing] why the jury's finding is factually insufficient or is so against the great weight and preponderance as to

be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias?" *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). If upon reflection the judge believes that a particular witness should not have been allowed to testify, or a piece of evidence should not have come in, or a requested instruction should have been included in the charge, are those reasons subject to interlocutory review before a new trial may proceed? If the appellate court considers an articulated reason invalid, will the case go back down for the judge to consider alternative grounds that were urged in support of the new trial motion? And if a new trial is granted based upon the judge's personal observations, to what extent may those observations be tested? Is it sufficient for the judge to explain that the jury was generally inattentive, or must the judge identify the particular jurors and allow the making of a record for purposes of challenging the judge's perception?

Such micromanagement of the trial process diminishes the important role trial courts play in making decisions with the benefit of observing first hand the demeanor of the witnesses, parties, attorneys, and jurors, and any other aspect of the trial that may not be reflected on a cold record. *See Murff v. Pass*, 249 S.W.3d 407, 411 (Tex. 2008) (citing *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 753 (Tex. 2006)). The discretion afforded trial courts is particularly broad in the area of jury management. For example, we have frequently stated that trial courts have "wide latitude" in conducting voir dire proceedings and determining whether a juror is impartial. *Id.* We have noted that an interpretation of juror behavior "turns on the courtroom context, and perhaps the looks on their faces." *Hyundai*, 189 S.W.3d at 755. Given the trial court's observational advantage, it is in a better position than a reviewing court to discern whether the parties received the fair trial that our

laws guarantee, which is why we have long said "[a]n appellate court may not substitute its discretion for that of the trial court." *Johnson*, 700 S.W.2d at 918.

Although acknowledging that orders granting new trials are rare, Columbia warns that without careful interlocutory scrutiny judges will be free to substitute their opinions for those of the jury. Even accepting the premise that some stray trial courts may intentionally abuse their discretion in this regard, I doubt that requiring wayward courts to explain their decisions will bring them back into the fold; a judge intent on granting a new trial without good cause can surely construct a plausible reason capable of withstanding appellate scrutiny. While I agree that trial courts should, when feasible, explain to the parties why a new trial is being granted, imposing such a requirement threatens to impede the conscientious trial judge's ability to correct errors or unfairness that may have occurred in the proceedings, and ultimately result in fruitless expense and delay.

III. Columbia's Constitutional Challenge

Columbia contends our precedents allowing trial courts to grant new trials "in the interests of justice and fairness," without further explanation, violate federal and state constitutional guarantees of due process and the state constitutional guarantee of trial by jury. Specifically, Columbia claims the lack of meaningful appellate review of new trial orders violates substantive and procedural federal constitutional rights to due process and state constitutional rights to due course of law.[5] *See* U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 19. According to Columbia, its

[5] Although the federal due-process and Texas due-course-of-law clauses are worded differently, we have said that difference is "without meaningful distinction" and have "traditionally followed contemporary federal due process interpretations." *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995); *see also Nat'l Collegiate Athletic Ass'n v. Yeo*, 171 S.W.3d 863, 867–68 (Tex. 2005). Columbia does not argue that a distinction should be drawn here.

substantive due-process rights are violated because it is deprived of its property, the jury verdict, in an arbitrary and capricious manner, *see Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 215, 225 (1985), and its procedural due-process rights are violated because it did not have the opportunity to contest the new trial order at a hearing on appeal, *see Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). These alleged constitutional violations, Columbia argues, would be cured by effective appellate review of new trial orders.

Neither type of due-process right that Columbia describes is implicated unless a party is deprived of a protected property or liberty interest. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999); *Mathews*, 424 U.S. at 332. Columbia claims deprivation of a property interest, which is only constitutionally protected if the right is independently guaranteed by state or federal law. *Leis v. Flynt*, 439 U.S. 438, 441–42 (1979). Columbia does not argue that any federal statute or the common law creates a property right in a particular jury verdict, and we have held that "[n]o party to a civil action has a constitutional right of appeal from an order of the trial court granting a new trial." *Plummer v. Van Arsdell*, 299 S.W. 869, 870 (Tex. 1927). Under Texas law, although there is a property interest in a legal claim or contractual right, TEX. PROP. CODE § 111.004(12), there is no property interest in a particular non-final judgment, *Burroughs v. Leslie*, 620 S.W.2d 643, 644 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). Furthermore, the Supreme Court has held that no property rights are implicated when a trial court makes a decision that is discretionary under state law, even if the trial court provides no reasoning for its decision. *Leis*, 439 U.S. at 442–44. Because Columbia was not deprived of any protected property interest when the trial court issued its new trial order, Columbia's due-process and due-course-of-law rights are not implicated.

Columbia further asserts that allowing trial courts to issue new trial orders without appellate review deprives it of its state constitutional right to trial by jury. *See* TEX. CONST. art. I, § 15, art. V, § 10. I agree that the Texas Constitution guarantees Columbia a right to a trial by jury in this health care liability case. But new trial orders, even if shielded from interlocutory review, do not infringe on that right. We upheld the constitutionality of such orders in *Plummer*, and I see no reason to revisit the question here. 299 S.W. at 870. Columbia has had a trial by jury and will have another; it does not have a constitutional right to a particular jury or a particular jury verdict. Indeed, the discretion afforded a trial court in granting new trials does not deprive parties of the right to a fair trial by jury; to the contrary, it helps to guarantee that right when circumstances of the first trial were unjust or unfair to one of the parties. *See* Hon. Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 221 (2005) ("If the first jury was correct, then a second can confirm it."). Given that the merits of Creech's claims and Columbia's defenses will ultimately be decided by a jury, Columbia has not been deprived of its right to a trial by jury.

IV. Conclusion

This case does not present exceptional circumstances to warrant overturning clear and longstanding precedent on mandamus review. Because the Court concludes otherwise, I respectfully dissent.

_____

Harriet O'Neill
Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0418

HCBECK, LTD., PETITIONER,

v.

CHARLES RICE, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued October 18, 2007

JUSTICE GREEN delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE WAINWRIGHT, and JUSTICE BRISTER joined, and in Parts I, II, III, IV, V, and VII of which JUSTICE WILLETT joined.

JUSTICE JOHNSON filed a dissenting opinion, in which JUSTICE MEDINA joined.

JUSTICE O'NEILL did not participate in the decision.

The purpose of the Texas Workers' Compensation Act is to provide employees with certainty that their medical bills and lost wages will be covered if they are injured. An employee benefits from workers' compensation insurance because it saves the time and litigation expense inherent in proving fault in a common law tort claim. But a subscribing employer also receives a benefit because it is then entitled to assert the statutory exclusive remedy defense against the tort claims of its employees

for job related injuries. This exclusive remedy defense provided to subscribing employers is also afforded to a general contractor if, pursuant to a written agreement, it "provides" workers' compensation insurance coverage to the subcontractor and its employees. *See* TEX. LAB. CODE §§ 406.123(a), 408.001(a).

In this case, we consider the extent to which a general contractor must "provide" workers' compensation insurance under the Act to qualify for statutory employer status and the resulting immunity from the work-related claims of a subcontractor's employees. *See* TEX. LAB. CODE §§ 406.123(a), 408.001(a). The court of appeals held that a general contractor does not "provide" coverage in the manner contemplated by section 406.123(a) when its written agreement with the subcontractor requires only that the subcontractor enroll in the site owner's workers' compensation insurance plan. ___ S.W.3d ___. We disagree. A general workplace insurance plan that binds a general contractor to provide workers' compensation insurance for its subcontractors and its subcontractors' employees achieves the Legislature's objective to ensure that the subcontractors' employees receive the benefit of workers' compensation insurance. Accordingly, we reverse the court of appeals' judgment.

I

FMR Texas Ltd. (FMR) contracted with HCBeck, Ltd. to construct an office campus on FMR's property. One of the features of this contract (the Construction Management Agreement, or the Agreement) was a workers' compensation insurance plan provided by FMR that covered the work site. The Agreement required this insurance plan, part of an owner controlled insurance program (OCIP), together with its corresponding OCIP Handbook, to be incorporated into all

construction contracts entered into by HCBeck with any subcontractors. The Agreement described the manner in which FMR would provide insurance on the project:

> Prior to commencement of the Work, the Owner [FMR], at its option and cost, may secure and thereafter, except as otherwise provided herein, maintain at all times during the performance of this Agreement [workers' compensation insurance] . . . with the Owner, the Construction Manager [HCBeck], subcontractors, and such other persons or interests as the owner may name as insured parties . . . .

HCBeck and all subcontractors working on the project were required to enroll in the OCIP. As each contractor enrolled in the OCIP, FMR's insurance representative would designate the contractor "insured" for workers' compensation and other insurance coverage, and an individual policy would be issued in the enrolled contractor's name. The Agreement permitted FMR to terminate or modify the OCIP at any time. But in the event FMR decided to terminate the OCIP, an alternate insurance provision in the Agreement required HCBeck to secure, at FMR's cost, other insurance covering itself and all subcontractors and employees at the same level as the workers' compensation coverage required in the OCIP.

Pursuant to the terms of the OCIP, FMR purchased workers' compensation insurance to cover the construction project and paid the premiums. Meanwhile, HCBeck entered into a subcontract with Haley Greer. The subcontract recognized that the project was covered by FMR's OCIP and further incorporated the insurance provisions contained in FMR's original contract with HCBeck. As mandated by the original contract, the subcontract required that Haley Greer apply for and enroll in FMR's OCIP. Haley Greer then enrolled in the OCIP, and a separate workers' compensation insurance policy was issued in Haley Greer's name.

Charles Rice, Haley Greer's employee, was injured while working on the construction project. Rice made claim upon and received workers' compensation benefits under the policy issued to Haley Greer pursuant to FMR's OCIP. He then filed a negligence suit against HCBeck. HCBeck moved for summary judgment claiming that its original contract with FMR specified that FMR's OCIP "shall" apply to all work at the project performed by HCBeck *and subcontractors* and, but for HCBeck's subcontract with Haley Greer, Rice would not be working on a project that contractually provided workers' compensation insurance covering Haley Greer's employees. HCBeck therefore maintained that it "provided" workers' compensation insurance to Haley Greer as permitted by section 406.123(a) of the Act, and consequently was a statutory employer entitled to immunity from common law liability claims brought by Haley Greer's employees. *See* TEX. LAB. CODE § 406.123(e). HCBeck argued that Rice's exclusive remedy should be the workers' compensation benefits already received. *See id.* § 408.001(a). Rice, on the other hand, contended that the subcontract between HCBeck and Haley Greer obligated Haley Greer—not HCBeck—to provide its own coverage in the event that FMR terminated its OCIP. Since the workers' compensation insurance for Haley Greer's employees came at no cost to HCBeck, Rice argued that HCBeck did not "provide" insurance and was therefore not qualified under the Act as a statutory employer entitled to the exclusive remedy defense.

The trial court granted HCBeck's motion for summary judgment and denied Rice's reciprocal cross-motion for partial summary judgment. The court of appeals, however, held that "HCBeck's contract with Haley Greer—which simply incorporated FMR's OCIP into the subcontract under the direct order of FMR in its contract with HCBeck—is insufficient to constitute 'providing' workers'

compensation insurance to Haley Greer." ___S.W.3d at ___. HCBeck petitioned this Court on the question of whether, through its contractual arrangements with FMR and Haley Greer, it "provided" insurance to Haley Greer so as to qualify for immunity from common law liability claims. *See* TEX. LAB. CODE §§ 406.123(a), 408.001(a). We hold that HCBeck "provides" workers' compensation insurance under the Act because the insurance plan incorporated into both its upstream contract with FMR and its downstream subcontract with Haley Greer included workers' compensation coverage to Haley Greer's employees, and because the contracts specify that HCBeck is ultimately responsible for obtaining alternate workers' compensation insurance in the event FMR terminated the OCIP. Accordingly, we conclude that HCBeck is Rice's statutory employer under section 406.123(e), and Rice's exclusive remedy is the workers' compensation benefits he has already received. *Id*. § 408.001(a).

II

We review a trial court's summary judgment *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When, as here, both parties file a motion for summary judgment with the trial court, and one is granted and one is denied, the reviewing court determines all questions presented and renders the judgment that should have been rendered by the trial court. *Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex. 2004). Statutory construction is a legal question, which is reviewed *de novo* to ascertain and give effect to the Legislature's intent. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007). To discern that intent, we must begin with the "plain and common meaning of the statute's words." *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004). We also consider

the objective the Legislature sought to achieve through the statute, as well as the consequences of a particular construction. *Id.*; *see also* TEX. GOV'T CODE § 311.023(1), (5).

III

Under the Workers' Compensation Act, a "general contractor and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor." TEX. LAB. CODE § 406.123(a). If the general contractor "provides" workers' compensation insurance, it becomes a statutory employer of the subcontractor's employees. *See id.* § 406.123(e) ("An agreement under this section makes the general contractor the employer of the subcontractor and the subcontractor's employees . . . ."). Such an employer is immune from claims brought by a subcontractor's employee because the employee's exclusive remedy is his workers' compensation benefits. *Id*. § 408.001(a). It is undisputed that HCBeck is a general contractor. *See id*. § 406.121(1) (defining a general contractor as "a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors"). Thus, the only question is whether the agreement between this general contractor and this subcontractor "provides" workers' compensation in a manner that makes HCBeck a statutory employer immune from liability under section 408.001(a).

The OCIP administered and paid for by FMR provided workers' compensation insurance coverage to all contractors and their employees working at FMR's job site. Rice claims HCBeck does not qualify as a statutory employer because, by the terms of the subcontract between HCBeck and Haley Greer, HCBeck was never obligated to provide workers' compensation insurance coverage to Haley Greer or its employees in the event FMR opted to terminate the OCIP. Both the original

FMR/HCBeck contract and the HCBeck/Haley Greer subcontract state that FMR may terminate its OCIP at any time, but in that event, the contractors must obtain "alternate insurance." As between the general contract and the subcontract, the alternate insurance provisions are slightly different, but they outline the manner in which employees are to be covered if FMR decided to terminate the OCIP. Rice points to the alternate insurance paragraph in the HCBeck/Haley Greer subcontract to show that HCBeck was never actually required to provide workers' compensation coverage to Haley Greer and its employees. The paragraph states:

> ALTERNATE INSURANCE: The Owner [FMR] is not required to furnish the OCIP. If [FMR] elects to terminate the OCIP at any time, [FMR] will give subcontractor written notice. In the event of OCIP termination, Subcontractor and lower-tier subcontractors will be required to provide Alternate Insurance. Alternate Insurance is the coverage required by the [FMR/HCBeck] Contract Documents if the OCIP is not in force or does not apply.

Rice argues that, if the OCIP is terminated, this provision places the obligation of obtaining workers' compensation insurance for his benefit on his own employer, Haley Greer, and not HCBeck. But although such an interpretation could be gleaned from the paragraph if its third sentence is considered in isolation, the last sentence specifically requires the parties to refer to the FMR/HCBeck contract documents "if the OCIP is not in force or does not apply." That alternate insurance paragraph states:

> If [FMR] elects to exclude this Agreement, or any portion thereof, from the OCIP or for any reason [FMR] is unable or unwilling to furnish [the OCIP] . . . the Construction Manager shall secure such insurance at the Owner's cost . . . .

This paragraph makes it clear that HCBeck is contractually obligated to obtain the insurance to cover the employees on the job site because it specifies that HCBeck, who was identified in the contract

as the Construction Manager, "shall" secure the alternate insurance. Moreover, the OCIP Handbook states that "Contractors will be required to provide on-site [i]nsurance" in the event of OCIP termination.[1] When read together, these provisions outline a contingency plan in the event FMR exercises its contractual right to opt out of its obligation to provide workers' compensation insurance coverage, and that plan charges HCBeck with the responsibility of providing alternate insurance, not Haley Greer.

The dissent contends that HCBeck did not "provide" workers' compensation because "HCBeck did not agree to procure workers' compensation insurance in force for Haley Greer, nor did it agree to pay or somehow obligate itself to pay the premiums, or otherwise assure the workers' compensation coverage Haley Greer had in effect when Rice was injured. " ___S.W.3d ___. But HCBeck complied in all respects with the provision in the Act that expressly allows it to enter into a written agreement to provide workers' compensation insurance to its subcontractors and their employees. TEX. LAB. CODE § 406.123(a). That provision does not require a general contractor to actually obtain the insurance, or even pay for it directly. The Act only requires that there be a written agreement to provide workers' compensation insurance coverage. *Id*. In this case, the coverage that was actually provided to Haley Greer by FMR under the agreement was backed by HCBeck's specific obligation assuring that Haley Greer remained covered in the event FMR decided to discontinue its OCIP.

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[1] The OCIP Handbook, prepared by an outside risk management firm to provide further clarification regarding FMR's OCIP, differentiates between contractors and subcontractors, stating that, "[i]f the [OCIP] is terminated or does not apply, Contractor [HCBeck] will be required to amend (and cause their Subcontractors [Haley Greer] to amend) their insurance policies to provide additional coverage . . . ." This indicates that the higher-tier contractor has the ultimate obligation to ensure that the employees of the lower-tier subcontractors are covered.

HCBeck's obligation is further strengthened by its own interest in maintaining its statutory defenses against claims by Haley Greer's employees. The dissent argues that contracting for coverage does not equate to "providing" because there is no assurance that the general contractor will not abandon its obligation and leave the employee at risk of uncovered injury. But there is no guarantee that any employer will provide workers' compensation for its employees. The law does not require it, although public policy strongly encourages it. Employers that elect to carry workers' compensation coverage more than likely do so because the Act includes incentives for employers who provide it for their employees. The most obvious incentive, of course, is that employers are immunized from negligence liability for workplace injuries to their employees. *See id*. § 408.001(a). But an employer is always free, for whatever reason, to discontinue workers' compensation insurance. *See id*. § 406.005 ("An employer shall notify each employee as provided by this section *whether or not* the employer has workers' compensation insurance coverage.") (emphasis added). When that happens, the employer loses its exclusive remedy defense. The same result applies to the general contractor who has, pursuant to a written agreement, purchased a workers' compensation insurance policy covering its subcontractors and its subcontractors' employees. When it does so, the general contractor becomes the statutory employer of its subcontractor's employees, and is thus entitled to the benefits conferred on employers by the Act. *See id*. § 406.123(e). But a general contractor who makes such an agreement is no more required to continue providing workers' compensation insurance than is FMR, or HCBeck, or Haley Greer in this case. The general contractor workers' compensation insurance plan simply offers certain benefits to parties who seek its advantages, but which benefits the parties may elect to forego. We conclude that HCBeck

provided workers' compensation insurance to Haley Greer and its employees by way of FMR's written OCIP.

IV

In a variation of the dissent's position that HCBeck has not sufficiently involved itself in the actual purchase of Haley Greer's workers' compensation insurance to gain any advantage by it, the court of appeals concluded that HCBeck did not "provide" workers' compensation because, it says, the subcontract called for Haley Greer to obtain its own alternate insurance if FMR terminated the OCIP. ___ S.W.3d at ___. It is true that if the OCIP was terminated, and HCBeck failed to obtain alternate workers' compensation insurance in its place, Haley Greer would have had to obtain workers' compensation insurance on its own in order to cover its employees. But the fear that an employee like Charles Rice might then be left uninsured by the failure of HCBeck to obtain workers' compensation insurance for Haley Greer as it had promised is a concern that would exist whether or not there was an OCIP or other written agreement to provide coverage. Even if Haley Greer had no workers' compensation insurance, Rice would not be without a remedy. He would have the right to sue FMR, Haley Greer and HCBeck in tort. But the scenario the court of appeals lays out never happened. In reality, Haley Greer was covered by workers' compensation insurance and Rice collected workers' compensation benefits from FMR's OCIP. But the court of appeals held that, on the mere possibility that Haley Greer *might* have had to secure alternate insurance on its own if the OCIP was terminated, HCBeck should not be permitted the benefit of statutory employer status under the Act. ___ S.W.3d. at ___. We conclude, however, that HCBeck would still qualify as a statutory employer because it "provided" workers' compensation insurance by virtue of its written

agreement to either buy the insurance itself, or compensate Haley Greer for any "insurance premiums . . . and all things necessary for the complete performance of the Work . . . includ[ing] all other expenses and costs required to completely perform the Work in accordance with the Contract Documents." This defined "Subcontract Amount," found in HCBeck's contract with Haley Greer, ensures that Haley Greer will never bear the financial obligation of the alternate insurance. Whether or not HCBeck can ultimately recover that expense from FMR is irrelevant: what matters is that HCBeck is contractually bound to both parties to provide alternate insurance, and also financially bound to Haley Greer to pay even if it does not make the purchase itself. All of these steps serve as ample evidence that HCBeck goes beyond merely "requiring" enrollment in the OCIP. Moreover, this evidence negates the court of appeals' conclusion that there is no evidence HCBeck would provide Haley Greer with alternate insurance upon OCIP termination.

V

The dissent would hold that a general contractor "provides" insurance if the contractor "puts something in the pot," or "contributes something of value for statutory immunity." ___ S.W.3d at ___. Specifically, the dissent would require that the general contractor "assure (1) the subcontractor is insured, and (2) the insurance will not lapse without the contractor allowing it to do so." *Id.* But HCBeck meets this test. HCBeck has satisfied the first prong because the HCBeck/Haley Greer subcontract covers Haley Greer with its own insurance policy via FMR's OCIP. Without HCBeck acting as a "conduit," as the dissent says, Haley Greer may not have been able to qualify for the project. Indeed, an OCIP helps makes insurance available to subcontractors, as the wider availability of insurance under an OCIP enhances the use of smaller contractors on projects. *See* Jacqueline P.

Sirany & James Duffy O'Connor, *Controlled Construction Insurance Programs: Putting a Ribbon on Wrap-Ups*, 22 WTR CONSTR. LAW 30, 30 n.3 (2002). But HCBeck does not stop at simply requiring Haley Greer to enroll in the OCIP—it also meets the second prong of the dissent's test. HCBeck agrees that it "shall" secure workers' compensation insurance if FMR's OCIP is no longer in place. The dissent claims that HCBeck does not adequately "assure" coverage remains in place by taking such actions as directly paying or guaranteeing payment of the premium, ___S.W.3d at ___, but we think HCBeck does, in effect, act as guaranty to the policy premium by virtue of the "Subcontract Amount" in the contract that it has agreed to pay Haley Greer for the entire project. No matter who secures the workers' compensation upon OCIP termination—whether it be HCBeck *or* Haley Greer—that "Subcontract Amount" provision guarantees that HCBeck will pay the premiums and, thus, "put something in the pot." The onus of ensuring the insurance will not lapse is placed on HCBeck, just as the dissent would require.

VI

The point of disagreement lies between two plausible interpretations of the term "provide." One plausible interpretation is that the Legislature must have intended to exclude from statutory employer status the "conduit" between the owner-subscriber and the subcontractor. Another interpretation is that the Legislature must have contemplated the scenario in which the "conduit," itself, "provides" the workers' compensation by connecting the subcontractor to the monied party most able to pay. If we assume that both of these interpretations are reasonable, we are guided by the following aid to statutory construction:

> In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision.

TEX. GOV'T CODE § 311.023; *see also id.* § 312.005 ("In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy."). Consideration of these factors leads to the conclusion that the "old law, the evil, and the remedy" is best served by adopting the latter, inclusive, interpretation of the statute. *See id.* § 312.005.

First, the "object sought to be attained" has always been simple: to ensure coverage of subcontractors and their employees. *See* Act of May 28, 1983, 68th Leg., R.S., ch. 950, 1983 Tex. Gen. Laws 5210, 5210 (captioning the legislation as "relating to workers' compensation insurance coverage of subcontractors"). In this case, all of the parties agree that Rice was, in fact, insured when he was injured. The dissent agrees that "this matter should be determined by what actually happened, not what might have happened." ___ S.W.3d at ___. If that is true, then the inquiry might properly end with the fact that no contingency plan for alternate insurance needed to be activated because FMR's OCIP was in place with all premiums paid up at the time that Rice was injured. Rice collected benefits from that very policy. Indeed, it is the dissent's view that rests solely on what might happen: *if* FMR's OCIP terminated, and *if* HCBeck then failed to purchase coverage for Haley Greer, and *if* Haley Greer did not purchase alternate coverage on its own, *then* Rice would be left uncovered. The "object sought to be attained" is best achieved through the use of an OCIP which

provides a greater degree of certainty that a subcontractor's employee will be covered by workers' compensation insurance. *See* Sirany, *supra*, at 30 (noting one benefit of an OCIP as "improved insurance coverages").

Second, we consider the legislative history and the circumstances under which the statute was enacted. TEX. GOV'T CODE § 311.023. For almost one hundred years, the Act has contemplated that subcontractors can be covered by workers' compensation insurance purchased by others. In 1917, the Act included a provision that was designed to prevent subscribers from escaping liability by hiring subcontractors to perform the same work:

> If any subscriber to this Act with the purpose and intention of avoiding any liability imposed by the terms of the Act sublets the whole or any part of the work to be performed or done by said subscriber to any sub-contractor, then in the event any employe[e] of such sub-contractor sustains an injury in the course of his employment he shall be deemed to be and taken for all purposes of this Act to be the employe[e] of the subscriber, and in addition thereto such employe[e] shall have an independent right of action against such sub-contractor, which shall in no way be affected by any compensation to be received by him under the terms and provisions of this Act.

Act of Mar. 28, 1917, 35th Leg., R.S., ch. 103, § 1, Part II, sec. 6, 1917 Tex. Gen. Laws 269, 284–85. By using of the term, "subscriber," the Legislature clearly intended that statutory employer status could only be claimed by one who purchased the workers' compensation policy. But when the Legislature enacted the written agreement provision in 1983, it kept the above provision and added three others: (a) the written agreement provision itself; (b) a definition for subcontractor; and (c) a definition for prime contractor. *Id*. The dissent urges a throwback interpretation—that one must essentially be a purchaser; i.e., a subscriber, to claim the statutory employer benefit. But this interpretation ignores the fact that the Legislature added the "prime contractor" provision, yet kept

the term "subscriber" in the very same act. Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6(a), 1983 Tex. Gen. Laws 5210, 5210. With regard to the written agreement section specifically, the Legislature chose to use the term, "prime contractor," as opposed to "subscriber:"

> A subcontractor and prime contractor may make a written contract whereby the prime contractor will provide workers' compensation benefits to the sub-contractor and to employees of the sub-contractor. . . . [T]he contract may provide that the actual premiums (based on payroll) paid or incurred by the prime contractor for workers' compensation insurance coverage for the sub-contractor and employees of the sub-contractor may be deducted from the contract price or any other monies owed to the sub-contractor by the prime contractor. In any such contract, the subcontractor and his employees shall be considered employees of the prime contractor only for purposes of the workers' compensation laws of this state . . . and for no other purpose.

Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6(c), (d), 1983 Tex. Gen. Laws 5210, 5210–11. It is significant that the Legislature did not specify that only "subscribers"could enter into written agreements to provide workers' compensation to subcontractors; instead, it added a new term, "prime contractor."[2] This indicates that the Legislature must have contemplated that the entity that has subscribed to the blanket policy, and the entity that "has undertaken to procure the performance of work or services," could be different. Other than allowing for the possibility that there could be an owner-subscriber and a separate general contractor, the Legislature made no further distinctions between the two, for it would be equally bad for the general contractor to leave the subcontractor's employees without coverage as it would for the owner who purchases the OCIP. *See Entergy Gulf States, Inc. v. Summers*, ___ S.W.3d ___ (Tex. 2009). For if no policy is in place, then

[2] "Prime contractor" became "general contractor" in later revisions of the Act, but the definition remained virtually unchanged. Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6(c), 1983 Tex. Gen. Laws 5210, 5210–11 *amended by* Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05(a)(2), 1989 Tex. Gen. Laws 1, 15 (current version at TEX. LAB. CODE §406.121(1)).

neither the owner nor the general contractor would qualify as a statutory employer entitled to the exclusive remedy defense. *See* TEX. LAB. CODE § 406.123 (a), (e).

Further, the second sentence of the written agreement provision allows the prime contractor to deduct the actual premiums from the subcontractor.[3] In this case, HCBeck contracted to pay for Haley Greer's insurance through its agreement to pay the "Subcontract Amount," as opposed to contractually deducting premiums from Haley Greer's subcontract as contemplated by the statute. But there is no real distinction between the two methods for paying the insurance premium—it is simply accounting. In either case, the reality is that HCBeck was actually paying for the workers' compensation insurance—further evidence that HCBeck has gone beyond merely "requiring" Haley Greer to enroll in FMR's OCIP.

Next, to determine intent, we look to "the common law or other or former statutory provisions, including laws on the same or similar subjects." TEX. GOV'T CODE § 311.023. We have previously expressed our understanding of the purpose behind the exclusive remedy defense:

> The workers' compensation act was adopted to provide prompt remuneration to employees who sustain injuries in the course and scope of their employment. . . . The act relieves employees of the burden of proving their employer's negligence, and instead provides timely compensation for injuries sustained on-the-job. . . . In exchange for this prompt recovery, the act prohibits an employee from seeking common-law remedies from his employer, as well as his employer's agents, servants, and employees, for personal injuries sustained in the course and scope of his employment.

[3] The deduction sentence was recodified, finding its final place in section 406.123(d) of the Labor Code. Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, sec. 6, 1983 Tex. Gen. Laws 5210, 5210–11, *amended by* Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05, 1989 Tex. Gen. Laws 1, 15, *repealed by* Act of May 22, 1993, 73rd Leg., R.S., ch. 269, §5, 1993 Tex. Gen. Laws 987, 1273 (current version at TEX. LAB. CODE § 406.123).

Wingfoot Enters. v. Alvarado, 111 S.W.3d 134, 142 (Tex. 2003) (quoting *Hughes Wood Prods. Inc. v. Wagner*, 18 S.W.3d 202, 206–07 (Tex. 2000)). In the same case, we also recognized a "decided bias" *for* coverage, and we articulated a construction of the written agreement provision that mirrors the facts of this very case:

> [The written agreement] legislation was construed to mean that when a premises owner agree[s] to procure workers' compensation coverage for its general contractor and the general contractor's subcontractor, a negligence suit by the subcontractor's employee against both the general contractor and the subcontractor [is] barred by the exclusive remedy provision . . . .

Wingfoot, 111 S.W.3d at 140, 142 (citing *Williams v. Brown & Root, Inc.*, 947 S.W.2d 673, 675–77 (Tex. App.—Texarkana 1997, no writ). Furthermore, several of the courts of appeals have concluded that a general contractor "provides" workers' compensation insurance even if the premises owner pays for the policy. *See, e.g.*, *Hunt Const. Group, Inc. v. Konecny*, 2008 WL 5102276, *6 (Tex. App.—Houston [1st Dist.] Dec. 4, 2008, no pet.) ("Had the Legislature intended for 'provide' to mean 'purchase,' it could simply have used the word 'purchase' instead."); *Funes v. Eldridge Elec. Co.*, 270 S.W.3d 666, 672 (Tex. App.—San Antonio 2008, no pet.) ("to hold that the general contractor did not 'provide' the insurance would preclude protection of the general contractor, whom the Legislature clearly intended to protect under subsections 406.123(a) and (e)").[4] Although not binding on us, these interpretations are persuasive on the point that multi-tiered contractor

[4] Both of these cases attempt to distinguish the court of appeals' opinion in *Rice v. HCBeck* by pointing to the fact that the Haley Greer was not automatically enrolled in the OCIP, and that FMR was not contractually bound to continue the OCIP. *See Hunt*, 2008 WL 5102276, at *7; *Funes*, 270 S.W.3d at 672. As the dissent has urged, we look at what did happen, not what might happen. ___ S.W.3d at ___. Just like the subcontractors in *Funes* and *Hunt*, Haley Greer did enroll in FMR's OCIP, and Charles Rice did collect workers' compensation benefits for his injury. Thus, because the *reality* of the facts in each case are the same, we think these distinctions do not make a difference.

relationships are prevalent throughout Texas, and that interpreting the statute in a way that favors blanket coverage to all workers on a site aligns more closely with the Legislature's "decided bias" for coverage. *Wingfoot*, 111 S.W.3d at 140 ; *see also Etie v. Walsh & Albert Co., Ltd.*, 135 S.W.3d 764, 768 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). The OCIP, designed by FMR to assure that workers' compensation insurance coverage was provided to all the workers on its construction project—including employees of contractors and subcontractors—is consistent with our articulation of the intent and purpose of the workers' compensation statute.

Finally, we consider the consequences of a particular construction. TEX. GOV'T CODE § 311.023. Holding that HCBeck "provides" workers' compensation, even when it has not purchased the insurance directly, would allow multiple tiers of subcontractors to qualify as statutory employers entitled to the exclusive remedy defense. Such a scheme seems consistent with the benefits offered by controlled insurance programs, which are designed to minimize the risk that the subcontractors' employees will be left uncovered.[5] On the other hand, holding that HCBeck does not "provide" workers' compensation because it has not directly paid for or somehow guaranteed payment of the policy via a line of credit would thwart the usefulness of controlled insurance programs that allow the highest-tiered entity to ensure quality and uninterrupted coverage to the lowest-tiered employees.[6]

---

[5] The purchasing power of a large construction owner, accompanied by centralized coverage and increased economies of scale are all factors that make it *less* likely that an owner-subscriber's workers' compensation coverage would be terminated. *See generally* Sirany, *supra*, at 30–33 (discussing various benefits of OCIPs, including reduced costs, certainty of protection, centralized management, and enhanced coverage).

[6] As a matter of illustration, high courts from other states have highlighted the benefits of the kinds of controlled insurance programs that are prevalent throughout Texas. *See generally Indep. Ins. Agents of Okla., Inc. v. Okla. Tpk. Auth.*, 876 P.2d 675, 676 (Okla. 1994) ("Not only is a typical OCIP designed to reduce the cost of insurance premiums, it allows for a coordinated risk management and safety program for workers and visitors to the construction site. An OCIP also provides for insurance premium rebates to the policy owner for good construction safety records."); *Amer.*

It is not clear, either from the court of appeals' holding or the dissent, what kind of guarantee would be required of a general contractor to adequately "provide" workers' compensation insurance coverage to secure the exclusive remedy defense in the absence of directly obtaining and paying for workers' compensation coverage for its subcontractor's employees. But if actually buying workers' compensation insurance is the only approved method of availing oneself of an immunity defense, then it makes no sense that the Legislature would enact an insuring scheme designed to promote the coverage of the lowest-tiered employees, only to require, in the end, employers who want the immunity defense to purchase workers' compensation insurance policies on the same employees at the same work site. Such a scheme defeats the entire purpose of securing a blanket OCIP and results in duplicative coverage and inefficient use of resources.[7]

VII

We conclude that the Texas workers' compensation insurance scheme, as enacted by the Legislature, was intended to make the exclusive remedy defense available to a general contractor who, by use of a written agreement with the owner and subcontractors, provides workers' compensation insurance coverage to its subcontractors and the subcontractors' employees. The OCIP in this case, established and paid for by FMR pursuant to its contract with HCBeck, qualifies

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Protection Ins. Co. v. Acadia Ins. Co., 814 A.2d 989, 991 n. 1 (Me. 2003) ("The State uses OCIPs to save costs, secure better coverage, and have better safety programs. If a construction project does not have an OCIP, then each contractor and subcontractor has to procure its own insurance and the higher cost of the insurance is passed on to the State.").

[7] To rule as the dissent suggests would likely do away with OCIPs in Texas, along with the benefits they provide to many large-scale developers. For example, the University of Texas System operates a blanket Rolling Owner Controlled Insurance Program, and since its inception, the ROCIP has enrolled over 4,800 contractors and over $3 billion in construction projects. The System has reported that the impact of its ROCIP program has amounted to $8,800,945. THE UNIV. OF TEXAS SYS., OFFICE OF RISK MGMT., RISK MANAGEMENT ANNUAL REPORT 5 (2007), *available at* http://www.utsystem.edu/orm/reports/annualreport_2007.pdf.

under the Act as "providing" workers' compensation insurance to subcontractors in a manner that is consistent with section 406.123(a). HCBeck, having "provided" the coverage to Haley Greer and its employees by virtue of the OCIP, and having otherwise satisfied the Act's requirements to qualify as a statutory employer, should be afforded the Act's employer benefits; *i.e.*, the exclusive remedy defense against Rice's negligence claims.

Accordingly, we reverse the court of appeals's judgment and render judgment in favor of HCBeck.

_____
Paul W. Green
Justice

OPINION DELIVERED: April 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0418

HCBECK, LTD., PETITIONER,

v.

CHARLES RICE, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued October 18, 2007

JUSTICE JOHNSON, joined by JUSTICE MEDINA, dissenting.

The workers' compensation system is bottomed on a voluntary trade. Employers provide workers' compensation insurance coverage in exchange for statutory immunity from suit by employees injured on the job. Employees accept workers' compensation insurance coverage in exchange for releasing their common law rights to sue the employer for injuries on the job. In *Texas Workers' Compensation Commission v. Garcia*, we described the exchange when considering a challenge to the constitutionality of the Texas Workers' Compensation Act (TWCA):

> [T]he Act—carrying forward the general scheme of the former act—provides benefits to injured workers without the necessity of proving negligence and without regard to the employer's potential defenses. In exchange, the benefits are more limited than the actual damages recoverable at common law. We believe this quid pro quo, which produces a more limited but more certain recovery, renders the Act an adequate substitute for purposes of the open courts guarantee.

893 S.W.2d 504, 521 (Tex. 1995).

Today the Court says "[a] general workplace insurance plan that binds a general contractor to provide workers' compensation insurance for its subcontractors and its subcontractors' employees achieves the Legislature's objective to ensure that subcontractors' employees receive the benefit of workers' compensation insurance." ___ S.W.3d ___, ___. It also says HCBeck qualifies as a statutory employer because its subcontract with Haley Greer incorporated the general workplace insurance plan. *Id.* at ___. The Court's decision extends statutory immunity to HCBeck without requiring a corresponding substantive quid pro quo from it as was intended by the Legislature. The decision enlarges the number of entities that can claim that which an employee ostensibly provides by releasing his or her common law right to sue—immunity from suit—by merely *contracting* for someone else such as the subcontractor or the owner of a project to secure and maintain insurance for the subcontractor. All HCBeck did here was facilitate communications between FMR and Haley Greer and agree that HCBeck might in the future provide workers' compensation insurance for Haley Greer. That goes beyond what the Legislature intended.[1] Accordingly, I dissent.

Pursuant to its contract with HCBeck, FMR elected to provide insurance through its OCIP and arranged for an agency to secure individual insurance policies for contractors and subcontractors, including both HCBeck and Haley Greer. The insurance covered only on-site construction activities at FMR's office campus in Westlake. The contractors and subcontractors were contractually

[1] The issue of whether HCBeck has immunity on some basis other than as an employer is not before us. *See* TEX. LAB. CODE § 408.001(a) ("Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.")

required to maintain and furnish proof of separate insurance for their off-site activities. As to the OCIP insurance, FMR paid the premiums. Each contractor and subcontractor adjusted its individual contract price to reflect the premiums FMR paid for the coverage of the individual contractor or subcontractor. Under HCBeck's agreement with FMR, if FMR elected not to provide insurance via an OCIP, then "upon thirty (30) days written notice from the Owner," HCBeck was required to perform the actions FMR actually performed in this case: securing insurers to write coverage for the contractors' on-site Westlake construction activities, paying for the coverage, and then adjusting contract prices of the contractors, if necessary, to reflect the insurance premiums.[2] But because FMR both secured Haley Greer's insurance and paid for it, HCBeck did neither as to the workers' compensation policy in effect when Rice was injured. Nor had HCBeck undertaken any obligation or commitment that assured the coverage was in place. HCBeck's substantive function as to the insurance was (1) contractually requiring the subcontractor to obtain workers' compensation insurance through FMR's plan, and (2) agreeing that it might in the future actually secure and pay for coverage if FMR did not.

Under HCBeck's subcontract with Haley Greer, HCBeck did not agree to procure the workers' compensation insurance in force for Haley Greer, nor did it agree to pay or somehow obligate itself to pay the premiums, or otherwise assure the workers' compensation coverage Haley Greer had in effect when Rice was injured. Haley Greer's subcontract incorporated the contract between FMR and HCBeck. In that contract, HCBeck only agreed to secure and pay for insurance

[2] Rice disputes this point and asserts that the agreements required Haley Greer to provide its own insurance if FMR did not. Because I would reach the same conclusion regardless of whether HCBeck or Haley Greer was required to provide the insurance if FMR did not, I assume the documents required HCBeck to do so.

if FMR notified HCBeck that FMR was unable or unwilling to furnish the coverage under an OCIP. The latter contingency did not occur before Rice was injured.

Citing section 406.123(a) of the TWCA, the Court says that HCBeck "complied in all respects with the provision in the Act that expressly allows it to enter into a written agreement to provide workers' compensation insurance to its subcontractors and their employees." ___ S.W.3d at ___. The Court is wrong. Section 406.123 states that a general contractor and a subcontractor may enter into a written agreement under which the general contractor *provides* workers' compensation insurance for the subcontractor and its employees, not under which it agrees *to provide* the insurance at some point. TEX. LAB. CODE § 406.123(a). The Act must speak of insurance in effect at the time of an employee's injury as opposed to some possible future date; if not, there would be no argument about immunity because there would be no injured employee suing the general contractor. The statute is clear. If the general contractor and subcontractor enter into a contract under which the general contractor provides the insurance, not just promises to provide it at some future time, then the general contractor is classified as the employer of the subcontractor and the subcontractor's employees for purposes of the TWCA:

> § 406.123. Election to Provide Coverage; Administrative Violation
>
> (a) A general contractor and a subcontractor may enter into a written agreement under which the general contractor *provides* workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor.
>
> . . . .
>
> (d) If a general contractor . . . elects to *provide* coverage under Subsection (a) . . . the actual premiums, based on payroll, *that are paid or incurred* by the general

> contractor or motor carrier for the coverage may be deducted from the contract price or other amount owed to the subcontractor . . . .
>
> (e) An agreement under this section makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of this state.
>
> (f) A general contractor shall file a copy of an agreement entered into under this section with the general contractor's workers' compensation insurance carrier not later than the 10th day after the date on which the contract is executed. If the general contractor is a certified self-insurer, the copy must be filed with the [Workers' Compensation] division.
>
> (g) A general contractor who enters into an agreement with a subcontractor under this section commits an administrative violation if the contractor fails to file a copy of the agreement as required by Subsection (f).

TEX. LAB. CODE § 406.123 (emphasis added).

In construing statutes, we ascertain and give effect to the Legislature's intent as expressed by the statutory language. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). We use definitions prescribed by the Legislature and any technical or particular meaning the words have acquired; otherwise, we construe the statute's words according to their plain and common meaning unless a contrary intention is apparent from the context or such a construction leads to absurd results. *Id.* at 625-26; *see* TEX. GOV'T CODE § 311.011.

The Legislature did not define "provides" or "provide" as those words are used in section 406.123. Looking to the common meaning of "provide," we find the definition includes to "supply," "furnish," or "make available." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1556 (1996); *see* TEX. GOV'T CODE § 311.011(a). The "make available" part of the definition is of little applicability when the key to obtaining statutory employer status is a quid pro quo. *See Garcia*, 893

S.W.2d at 521. To "make available" the insurance, all a general contractor would have to do is refer the subcontractor to an insurer or agent who would write the coverage or require the subcontractor to apply for insurance with an owner such as FMR. The general contractor does not trade anything of value in such a situation. Section 406.123 does not express Legislative intent to change the fundamental quid pro quo concept underlying relationships between workers and those who could be subject to common law liability for on-the-job injuries to workers. *See* TEX. LAB. CODE § 406.123. Therefore, the "supply" or "furnish" part of the definition is applicable here. The two words essentially are the same: "supply" means to "furnish or provide with what is lacking or requisite," WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1912 (1996), while "furnish" means to "provide or supply" with something. *Id.* at 777.

The Court views HCBeck as having provided, that is, supplied or furnished, Haley Greer's insurance by contractually requiring Haley Greer to participate in FMR's OCIP. For the same reasons expressed above as to making the insurance "available," even if HCBeck's actions fall within an expansive construction of supplying, furnishing, or providing the insurance, its actions do not warrant statutory employer status because HCBeck still did not contribute anything of value—a quid pro quo—to the trade Haley Greer's employees made for workers' compensation coverage. Moreover, HCBeck's actions simply do not equate to supplying or furnishing the insurance. By contractually requiring Haley Greer to enroll in the OCIP, HCBeck supplied or furnished Haley Greer with the opportunity and obligation to apply for insurance; it did not provide the insurance itself. FMR supplied or furnished the insurance when FMR secured the agency to place the insurance and paid the premiums. Absent payment of, or incurring liability for, premiums by FMR,

the insurance that covered Rice when he was injured would not have gone into effect and been in place.

The parties, the Court, and I agree this matter should be determined by what actually happened, not what might have happened. As to what actually happened, HCBeck substantively functioned only as a conduit through which FMR's insurance requirements were communicated to and imposed on Haley Greer. Otherwise, HCBeck played no part in locating the agent who placed the insurance or in securing and making certain the insurance remained in effect. For a general contractor such as HCBeck to "provide" workers' compensation insurance to a subcontractor under section 406.123 and in exchange receive the significant benefit of statutory employer status, the Legislature surely intended that the general contractor must do more than communicate insurance requirements or contractually require other parties to maintain the insurance in effect, even if the contract requires a subcontractor to enroll in a program in which the project owner contractually agrees to purchase the subcontractor's insurance.

The Court's opinion could be interpreted as allowing a general contractor to claim statutory employer status by agreeing in a subcontract to provide workers' compensation insurance, yet also requiring the subcontractor to provide coverage if the contractor does not. Then, so long as the subcontractor maintains coverage, the general contractor would have contributed nothing to the trade by the subcontractor's employees of their common law rights, yet may claim statutory immunity because it contractually "provided" the insurance. The Court's holding might even be interpreted as giving a general contractor statutory employer status if it contractually required a subcontractor to provide workers' compensation insurance on its own, so long as the subcontractor maintained

coverage. Again, the general contractor would have exchanged nothing for the subcontractor's employees' release of their common law rights against the general contractor. Section 406.123 of the TWCA does not reflect legislative intent that general contractors should have statutory immunity when their involvement in assuring workers' compensation insurance coverage for the subcontractor and its employees is so minimal. *See* TEX. LAB. CODE § 406.123. I would hold that in order for a general contractor to be afforded statutory employer status because it "provides" workers' compensation insurance to a subcontractor, the general contractor must be more substantively involved in securing and maintaining the subcontractor's workers' compensation insurance coverage than was HCBeck, and that contracting for another to place and maintain insurance, whether to be done in the present or the future, is not enough to qualify for the status.

I would hold that under section 406.123, a general contractor "provides" workers' compensation insurance if the general contractor "puts something in the pot," that is, if it contributes something of value for statutory immunity. It could do that by taking actions to assure (1) the subcontractor is insured, and (2) the insurance will not lapse without the contractor allowing it to do so. Such actions would equate to substantive involvement by the general contractor in obtaining and maintaining the subcontractor's insurance. But for the general contractor's actions to reach a level of substantive involvement warranting statutory employer status, coverage would have to actually be assured by the general contractor and not be dependent merely on the fulfillment of a contractual obligation or the payment of premiums by another party, such as a subcontractor that might be under financial pressure to save money by stopping payment of its insurance premiums or an owner that might run short of funds and stop paying insurance premiums. In other words, the general contractor

would have to place itself in a position to have actual control over the workers' compensation insurance becoming effective and remaining in force.

There could be flexibility in how such substantive involvement requirements are met. For example, as to the first requirement referenced above, the statute specifically contemplates a situation in which the subcontractor's insurance is "provided" if a general contractor adds the subcontractor and its employees as insureds under the general contractor's workers' compensation policy. *See id.* § 406.123(f) (requiring a general contractor to file a copy of an agreement under section 406.123 with its workers' compensation carrier or, if self-insured, the Workers' Compensation Division); *id.* § 406.123(g) (making the failure to file a copy of the contract in accordance with subsection (f) an administrative violation). But the requirement might also be fulfilled by the general contractor requiring the subcontractor or its insurer to furnish a certificate of insured status from the insurance company, or a copy of a policy showing coverage for the job activities in question. As to the second referenced requirement, the essential element to keeping insurance in force is payment of premiums. That requirement is most clearly fulfilled when the general contractor is directly liable for the policy premiums so the insurer either receives premiums from the general contractor or the insurer has an unqualified guaranty from the general contractor that the premiums will be paid. *See, e.g.*, *id.* § 406.123(d) (stating that a general contractor that provides coverage to a subcontractor under a written agreement to do so may deduct the actual premiums, based on payroll, that the general contractor pays or incurs for the coverage from amounts owed to the subcontractor). There are methods by which the general contractor could become directly liable for premiums and assure the insurance does not lapse other than by directly paying

premiums—for example, by letter of credit that the insurer could draw against if premiums were not paid otherwise. It is worth noting here that section 406.123 does not specify who must finally absorb the subcontractor's premium cost. The statute authorizes premiums paid or incurred for a subcontractor's insurance to be deducted from amounts owed to the subcontractor. *Id.* But the statute does not preclude the owner from bearing the premium cost, as FMR did in this case. And clearly, the general contractor could absorb the cost without looking to any other party for reimbursement.

The Court says "the reality is that HCBeck was actually paying for the workers' compensation insurance" because HCBeck contracted to pay the "Subcontract Amount" that did not include premiums FMR paid for Haley Greer's insurance as opposed to contractually deducting the premiums from Haley Greer's subcontract. ___ S.W.3d at ___. It concludes there is no real distinction between the two methods of paying the insurance premiums because it is "simply accounting." *Id.* at ___. In this case, though, the distinction matters. Insofar as the workers' compensation insurance that covered Rice, HCBeck was a bystander. It was an interested bystander to be sure; but it was a bystander. FMR bought and paid for Haley Greer's insurance. It received and checked Haley Greer's wage reports on which the compensation insurance premiums were calculated. It determined the amount by which Haley Greer's subcontract was adjusted for the premiums. And the money to pay Haley Greer's subcontract came from FMR. HCBeck did not actually pay Haley Greer's premiums, FMR did. HCBeck had no more involvement in "providing" the workers' compensation insurance covering Rice for his injury on FMR's Westlake job than it had in "providing" Haley Greer's workers' compensation insurance for off-site operations. In both

instances HCBeck contractually required Haley Greer to have the insurance in place, but HCBeck neither secured placement of the insurance nor assured its being in force at the time of Rice's injury.

The question before us is not whether OCIPs are the best or most efficient and economical way to secure insurance—including workers' compensation insurance—for all workers on job sites. Nor is it how OCIPs interface with workers' compensation law. Those matters are significant, but they are more in the nature of policy issues better left to the Legislature to balance and address. The question before us is limited to whether under these particular circumstances the Legislature extended statutory immunity from suit by an injured worker—the major incentive for an employer to carry workers' compensation insurance—to an entity that is not the injured worker's direct employer. Under the Court's decision, that important inducement for carrying workers' compensation insurance is extended to HCBeck even though it did not substantively participate in the transaction that resulted in Rice being covered by workers' compensation insurance.

I would hold that HCBeck was not Rice's statutory employer. I would affirm the judgment of the court of appeals.

_____

Phil Johnson
Justice

OPINION DELIVERED: April 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0422

RELIANCE STEEL & ALUMINUM CO. AND SAMUEL ALVARADO, PETITIONERS

v.

MICHAEL SEVCIK AND CATHY LOTH, RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued December 4, 2007

JUSTICE BRISTER delivered the opinion of the Court.

Neither a plaintiff's poverty nor a defendant's wealth can help a jury decide whose negligence caused an accident.[1] Even though punitive damages were not at issue in this collision case, the plaintiffs tendered evidence that the defendant's annual revenues were $1.9 billion. Because this evidence was inadmissible, and the record reflects that it probably caused an improper verdict, we reverse and remand for a new trial.

[1] *See Texas Co. v. Gibson*, 116 S.W.2d 686, 687 (Tex. 1938) (holding trial court erred in allowing plaintiffs to argue that defendant company had "all the money behind them, and because they are one of the biggest corporations in the country") (internal quotation marks omitted); *Texas & Pac. Ry. Co. v. Harrington*, 62 Tex. 597, 601 (Tex. 1884) (holding trial court erred in allowing plaintiff's widow to testify "that she was very poor, that they had no means of support except the labor of her husband, and that she had no means of supporting or educating her children") (internal quotation marks omitted).

I. Background

Michael Sevcik and Cathy Loth were injured in a highway accident west of Houston when they were hit from behind by a tractor trailer owned by Reliance Steel & Aluminum Co. and driven by Sam Alvarado. Sevcik and Loth filed suit in Waller County, and at trial they offered the following testimony from the deposition of Reliance's corporate representative:

Q: How big a company is Reliance?

A: I believe last year's annual sales approximated $1.9 billion.

Q: About how many employees do they have? Do you know?

A: Just guessing, I think we're close to 3,000 I think, nationwide.

Q: And are the headquarters for Reliance in California? Is that what I –

A: Yes, sir. They're in Los Angeles, California.

Outside the presence of the jury, counsel for the defendants objected to the offer:

Defense counsel:	Judge, on this and the next couple pages, [plaintiffs' counsel] is talking to the witness – this is the corporate rep for Reliance Steel & Aluminum. He is talking to him about how big a company it is, how many people do you employ, you're all over the country. And I think that is irrelevant and it is also inflammatory to the jury because that plants a seed in their mind that this is a huge company with huge dollars and they can afford a huge verdict.
The Court:	[to plaintiff's counsel] You are not seeking punitives?
Plaintiffs' counsel:	No, sir.
The Court:	Therefore it becomes less relevant.

Plaintiffs' counsel:	Right. The thing is, we are definitely entitled to show they are not a mom and pop operation, and we are going to talk – It says they are a California corporation. Then he says they are a division. I'm entitled to bring all of that in.
Defense counsel:	I don't think it is relevant at all. We have the truck driver here, the man who drove the truck who was involved in the accident. Why do we need all this information about the company? That only plants the seed in their mind –
Plaintiffs' counsel:	He is asking Mike Sevcik if he bought a new truck. I think everything
Defense counsel:	This, I think, only tends to make the jurors start thinking about how much money is behind Mr. Alvarado, which isn't something they need to reach their verdict
Plaintiffs' counsel:	Your Honor, some of what we get into in his deposition and then in the testimony of the driver is – part of it is how much – how many hours they have these people riding on the road, 15- and 16-hour days.
The Court:	I'm going to overrule the objection

At the end of the four-day trial, the jury awarded the plaintiffs more than $3 million. The defendants appealed, challenging several of the damage awards and the admission of evidence of its $1.9 billion in revenues. After transfer for docket equalization, the court of appeals reduced one damage item by $6,000, affirmed the rest, and held admission of the gross sales evidence was harmless.[2] The defendants then petitioned this Court for review.

II. Evidence of Wealth

Even when a party's wealth has no logical relevance to a case, the prejudicial effect of such evidence often creates strong temptations to use it. As we have stated before, "highlighting the

[2] ___ S.W.3d ___.

relative wealth of a defendant has a very real potential for prejudicing the jury's determination of other disputed issues in a tort case."[3] To avoid such situations, Texas courts "historically have been extremely cautious in admitting evidence of a party's wealth."[4] Even when wealth can be used on the issue of punitive damages, we take the unusual step of bifurcating a trial so that it cannot be used for any other purpose.[5]

In this case, plaintiffs' counsel argued the evidence of gross revenues was admissible to show Reliance was "not a mom and pop operation." Yet Reliance had never suggested to the jury that it was "a mom and pop operation" or could only pay a limited judgment;[6] the plaintiffs' effort to prove otherwise was simply an unsolicited attempt to show Reliance made a lot of money.

Plaintiffs' counsel argued that gross revenues were relevant to show Reliance was negligent in "running its drivers into the ground" even though it was big enough to "place more drivers on the road or have them work fewer hours." But the plaintiffs never pleaded such a theory; their Third Amended Petition alleged only a vicarious liability claim against Reliance for the negligent acts of

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[3] *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994) (punctuation omitted).

[4] *Sw. Elec. Power Co. v. Burlington No. R.R. Co.*, 966 S.W.2d 467, 471 (Tex. 1998); *see also Eckman v. Centennial Sav. Bank*, 784 S.W.2d 672, 675 (Tex. 1990); *Texas Co.*, 116 S.W.2d at 687; *cf. Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 366 (Tex. 1987) (holding hospital's finances admissible on issue of gross negligence).

[5] TEX. CIV. PRAC. & REM. CODE §§ 41.009, 41.011(b).

[6] *Cf. Hall v. Birchfield*, 718 S.W.2d 313, 326 (Tex. App.—Texarkana 1986), *rev'd on other grounds*, *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361 (Tex. 1987) (holding hospital's finances admissible after administrator injected issue by testifying it could not afford additional equipment or personnel training).

its driver. Nor was such a claim necessary; if an employee drives when he is too tired, his employer is liable regardless of the reason for his condition.[7]

But even if the plaintiffs had alleged or needed to prove that Reliance was independently negligent, for several reasons its gross sales had no tendency to make that claim more or less probable.[8] In the first place, the premise behind this argument is faulty because big companies cannot afford to be less efficient than small companies, at least not for long. Second, the negligence standard is an objective one; it does not generally allow smaller companies to do what bigger companies cannot. Third, a company with large revenues may still not be able to afford more drivers doing less work, because "gross sales are only remotely related to its wealth until the company's expenses are subtracted."[9] Fourth, if a defendant's wealth is admissible to show that it could afford to avoid an accident, then wealth will be admissible in virtually every case, and there would be nothing left of the traditional rule to the contrary.

We also reject the suggestion that evidence of Reliance's wealth was admissible because the defendants' attorneys asked several inappropriate questions about the size and newness of the plaintiffs' cars or home. Each time this occurred and an objection was made, the trial court sustained

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[7] Although Reliance did not stipulate that Alvarado was in the course and scope of his employment until shortly before closing arguments, contemporaneous trip records and other discovery disclosures unquestionably established that fact long before the trial began.

[8] *See* TEX. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

[9] *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 331 (Tex. 1993) (Gonzalez, J., concurring).

the objection and excluded the evidence. One party cannot violate the rules of evidence just because the other party tried to do the same, especially if the other party's evidence was excluded.

The plaintiffs here were entitled to argue (and did) that Alvarado's hours were "too long," but it was not Reliance's gross revenues that made them so. The plaintiffs offered no evidence that Reliance pushed its drivers harder than its competitors, or harder than regulations allowed. Reliance is not complaining about evidence that it had a lot of drivers; it only complains about evidence that it had a lot of money. We hold the trial court abused its discretion in allowing admission of Reliance's gross annual sales.[10]

III. Harmless Error?

Erroneous admission of evidence is harmless unless the error probably (though not necessarily) caused rendition of an improper judgment.[11] We have recognized "the impossibility of prescribing a specific test" for harmless-error review,[12] as the standard "is more a matter of judgment than precise measurement."[13] A reviewing court must evaluate the whole case from voir dire to closing argument, considering the "state of the evidence, the strength and weakness of the case, and the verdict."[14]

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[10] *See In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005) (holding admission or exclusion of evidence is reviewed for abuse of discretion).

[11] TEX. R. APP. P. 44.1; *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004).

[12] *McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992) (quoting *Lorusso v. Members Mut. Ins. Co.*, 603 S.W.2d 818, 821 (Tex. 1980)).

[13] *Nissan Motor Co.*, 145 S.W.3d at 144.

[14] *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 841 (Tex. 1979); *accord*, *Texas Dept. of Human Servs. v. White*, 817 S.W.2d 62, 63 (Tex. 1991).

A. The Effect

The starting point for harmless-error review is the judgment. Obviously, a party that wins a favorable judgment has usually not suffered harm from any errors during trial. In this case, several parts of the verdict on which the judgment was based show that something beyond the relevant evidence was guiding the jury's deliberations.[15]

During trial, plaintiffs' counsel introduced a chart showing that Loth's past medical expenses totaled $33,985.23, and he asked for precisely that amount in closing argument. Nevertheless the jury awarded $40,000. As the court of appeals held, there was no evidence for this amount as "the record is devoid of any testimony or affidavits" supporting it.[16]

The same is true of the jury's verdict that Loth's future medical expenses were $250,000. Reliance concedes there was some evidence that she would incur $37,000 for future medications, and there was also some evidence she could incur as much as $90,000 for a six-month rehabilitation program in Houston.[17] But there was no evidence she would incur anything more. To the contrary, her expert testified that "when we see a patient like Cathy, who is several years past their brain injury, all of the healing and recovery that is going to take place has taken place." While there was evidence that Loth would suffer permanent brain damage (for which the jury awarded $1.75 million in future impairment and mental anguish), there was no evidence that further medical treatment

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[15] *See Coastal Oil & Gas Corp. v. Garza Energy Trust*, ___ S.W.3d ___, ___ (Tex. 2008) (holding damage amounts clearly beyond relevant evidence showed admission of prejudicial memo was harmful).

[16] ___ S.W.3d ___, ___.

[17] The cost of this program was $3,000 per week for 26 weeks, plus up to $2,000 monthly to rent an apartment for six-months in Houston. We assume without deciding that apartment rental is a proper element of "medical care."

could do anything about it. The jury's finding on future medical expenses was simply twice as much as the evidence would support.

The jury's finding of $750,000 for future earning capacity was also surprisingly large given the evidence. Loth's tax returns leading up to the accident showed a total income of $7,562 for all five years combined;[18] at that rate, the future award represented almost 500 years. Similarly, the jury's award for her earning capacity lost in the three years *before* trial was $15,000; at that rate the future award represented 150 years. It is of course true that Loth was entitled to damages for future earning *capacity*, not just future earnings.[19] But the jury's findings still must be based on "such facts as are available" and "on something more than mere conjecture."[20] We need not decide whether this particular award was erroneous; we conclude only that in combination with the other awards it shows that the jury's findings probably were the result of something other than the admissible evidence in the case.[21]

The plaintiffs argue that the verdict was not inflated because the jury awarded them only half of what they requested in closing argument. But whether a jury awarded less than the plaintiffs requested is not the same question as whether they awarded the plaintiffs more than the evidence

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[18] The tax returns reported income of $4,945 in 1995, $1,224 in 1996, $216 in 1997, $718 in 1998, and $459 in 1999.

[19] *McIver v. Gloria*, 169 S.W.2d 710, 713 (Tex. 1943) ("The fact that plaintiff was not engaged in farming at the time he was injured does not bar his recovery for loss of earning capacity, because the measure of his loss is his capacity to earn, not his actual earnings.").

[20] *Id*. at 712.

[21] *See Coastal Oil & Gas Corp. v. Garza Energy Trust*, ___ S.W.3d ___, ___ (Tex. 2008) (holding damage amounts clearly beyond relevant evidence showed admission of prejudicial memo was harmful).

supported. The primary damage requests rejected by the jury related to future pain and mental anguish and future physical impairment, matters as to which the lack of specific proof available makes it very hard to say whether the jury's award was either "too low" or "too high." But in those parts of the verdict where such evidence was available, the jurors' findings generally exceeded it by a substantial amount.

B. The Evidence

In reviewing whether erroneous admission of evidence was harmful, we have also looked to the role the evidence played in the context of the trial. Thus, if erroneously admitted or excluded evidence was crucial to a key issue, the error was likely harmful.[22] By contrast, admission or exclusion is likely harmless if the evidence was cumulative,[23] or if the rest of the evidence was so one-sided that the error likely made no difference.[24]

As already noted, a defendant's wealth has "a very real potential" for prejudice.[25] The Legislature has deemed it so potentially prejudicial that it must be separated from the jury's

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[22] *See Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 917 (Tex. 1992) (holding erroneous admission of another employee's testimony was harmful as it was sole evidence of a pattern of retaliation); *McCraw v. Maris*, 828 S.W.2d 756, 758 (Tex. 1992) (holding exclusion of "crucial circumstantial evidence" regarding whether beneficiary designation form was signed was harmful).

[23] *See State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 452-53 (Tex. 1997) (holding exclusion of newly discovered evidence harmless as it supported verdict jury reached without it); *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994) (holding exclusion of expert testimony was harmful as it was "noncumulative" and "controlling, though not conclusive").

[24] *See, e.g.*, *Texas Dept. of Human Servs. v. White*, 817 S.W.2d 62, 63 (Tex. 1991) (holding admission of photo of child with foster family was harmless in termination trial due to other evidence including mother's substance abuse, emotional illness, and dysfunctional ability as parent).

[25] *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994) (punctuation omitted).

deliberations regarding liability and actual damages.[26] That concern is especially relevant here because the more impressive the wealth, the more likely it is to make an impression. Had Reliance's gross sales been $190,000 or perhaps even $1.9 million, the plaintiffs might be right that it would have been unlikely to turn jurors' heads. But sales of $1.9 *billion* are surely enough to catch any juror's attention. If evidence of gross sales is ever likely to be harmful, the evidence offered here surely must qualify.

Further, that evidence must be considered in the context of this case. Liability here was largely uncontested; as plaintiffs' counsel told the jury in his opening statement, "You're going to hear the driver tell you that it was his fault." Instead, he correctly noted that the key issue was damages: "The biggest issue, the biggest issue, in my opinion, that you're going to have at the end of the week or later in the week when you deliberate is going to involve how much should be paid." In that respect, most of the damages here were difficult to gauge, stemming as they did from soft-tissue injuries and impairments whose effects were hard to measure objectively. Given that the trial focused primarily on setting damage amounts as to which jurors have few clear guideposts, it is probable that proof of Reliance's huge revenues played a crucial role on the key issue at trial.

C. The Emphasis

In harmless-error review, we have also looked to efforts by counsel to emphasize the erroneous evidence.[27] In this case, the court of appeals held that evidence of Reliance's wealth was

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[26] TEX. CIV. PRAC. & REM. CODE §§ 41.009, 41.011(b).

[27] *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004).

harmless because it was mentioned only once.[28] If that were the only rule, there would be little use for the rules of evidence as everyone could ignore them once with impunity.

Moreover, this argument conflicts with the plaintiffs' additional argument that evidence of Reliance's wealth was "buried in the larger context of testimony that concerned the size of the Reliance Steel operation, the number of employees, the number of divisions, and so forth." While plaintiffs' counsel mentioned the gross revenues figures only once, he mentioned Reliance's large size from voir dire to closing argument:

> [opening statement] Also, Mr. Alvarado was introduced. He is one of the defendants in this case. He works for Reliance Steel. It's a corporation that he works with. They are a California corporation and a Texas corporation, but they have businesses also around Texas. They have some up in Garland, and they have others around the country.
>
> [closing argument] They don't even care what happens out on the highway with their 18-wheelers. Have you seen anybody here from Reliance Steel Corporation? Three thousand employees around the country. No. No. They don't care what happens.

Just like gross sales, the size of Reliance and the number of its employees or divisions had no apparent relation to this traffic accident other than to suggest that it could pay a big judgment. Evidence of Reliance's wealth was not rendered harmless merely because it was emphasized in surrogate forms.

D. The Effort

In harmless-error review, we have also considered whether admission of improper evidence was calculated or inadvertent. As this Court has stated before, a party's insistence on introducing

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[28] ___ S.W.3d ___, ___.

inadmissible testimony "indicates how important he thought it was to his case."[29] In the related area of improper evidence of insurance, Texas courts often look to whether the injection of insurance was inadvertent or not.[30] When attorneys insist that prejudicial evidence be admitted, that can be some evidence that at least they thought it would have some likely effect.

Here, of course, admission was no accident. Proof of Reliance's income was not offered in the heat of the moment, but as a deposition excerpt prepared in advance and offered outside the presence of the jury, giving the plaintiffs time to overcome the defendants' objection and the trial court's reservations.

Intentionally leading the trial court into error does not always make the error harmful. But when issues like race, religion, gender, and wealth are injected into a case unnecessarily, there is the potential for damage not just to a litigant but to the civil justice system.[31] Courts must provide equal

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[29] *Alvarado v. Farah Mfg. Co., Inc*., 830 S.W.2d 911, 917 (Tex. 1992).

[30] *See, e.g.*, *St. Louis Sw. Ry. Co. v. Gregory*, 387 S.W.2d 27, 33 (Tex. 1965) (holding counsel's statement that there was "no insurance here" in response to juror's comment about serving on a previous insurance case was harmless); *Putman v. Lazarus*, 293 S.W.2d 493, 495 (Tex. 1956) (holding jurors unsolicited discussion of insurance during deliberations did not require reversal); *Lewis v. UPS, Inc*., 175 S.W.3d 811, 817 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (holding witness's unsolicited mention of workers compensation insurance was harmless); *Isern v. Watson*, 942 S.W.2d 186, 198 (Tex. App.—Beaumont 1997, pet. denied) (holding mention of insurance harmless as it was used in argument merely as an analogy to suggest people should be careful); *Kenneth H. Hughes Interests, Inc. v. Westrup*, 879 S.W.2d 229, 238 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (holding witness's unsolicited mention of insurance was harmless); *Beall v. Ditmore*, 867 S.W.2d 791, 795-96 (Tex. App.—El Paso 1993, writ denied) (same); *Univ. of Texas at Austin v. Hinton*, 822 S.W.2d 197, 201 (Tex. App.—Austin 1991, no writ) (holding counsel's response to juror's question in voir dire about plaintiff's insurance coverage was harmless).

[31] *See* 22 C. Wright & K. Graham, FEDERAL PRACTICE AND PROCEDURE, Ch. 5 Relevancy and Its Limits, § 5179 —Suspect Classifications— Race, Religion, Sex, and Wealth, pp. 163-64 (1st ed. 1978) ("[T]he party who asserts a major premise base on one of the suspect classifications must expect that his premise will be more rigorously scrutinized than is typical in rulings on relevance. Trial judges can expect must less leeway in appellate review of relevance rulings that involve such classifications.").

justice to all, regardless of their circumstances, and efforts to suggest that jurors should do otherwise cannot be lightly disregarded.[32]

* * *

We recognize that evidence of a party's wealth is sometimes admissible, and sometimes unavoidable; a large company may be so well known that jurors need no evidence about its ability to pay a judgment. But we also recognize "the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."[33] We reiterate today that gratuitous evidence about either party's financial circumstances is not what trials should be about.

Accordingly, we reverse the judgment of the court of appeals, and remand the case for a new trial.

Scott Brister, Justice

OPINION DELIVERED: September 26, 2008

[32] *See Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 840 (Tex. 1979) ("[A]n affront to the court and the equality which it must portray will be dealt with harshly.").

[33] *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)) (internal quotation marks omitted).

IN THE SUPREME COURT OF TEXAS

NO. 06-0491

IN RE BAYLOR MEDICAL CENTER AT GARLAND, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued September 27, 2007

JUSTICE JOHNSON delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE BRISTER, and JUSTICE WILLETT joined.

JUSTICE O'NEILL filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON, JUSTICE MEDINA, and JUSTICE GREEN joined.

In this health care liability case, the jury returned a defense verdict following almost four weeks of trial. The trial judge granted a new trial, eventually stated his reasons for doing so, but then resigned. We conclude that the reasons the judge gave for granting the new trial cannot be considered as a basis for mandamus relief against successor trial judges. However, because the case was remanded pursuant to Texas Rule of Appellate Procedure 7.2(b) and the trial court reaffirmed the original new trial order without giving reasons for doing so, we conditionally grant mandamus relief directing the trial court to provide its reasons for refusing to enter judgment on the jury verdict.

Alleging that she suffered an injury as a result of negligent treatment, Tammy Williams and her husband, Steve, (collectively, Williams) brought a health care liability suit against Baylor Medical Center. The jury answered "No" to the first issue that combined the negligence and proximate cause inquiries. The sitting trial judge, the Honorable Joseph P. Cox, entered a take-

nothing judgment. Williams filed a motion for new trial and, in support of the motion, juror affidavits that included information relating to jury deliberations.

Judge Cox granted the motion for new trial but gave no reason for doing so. At a later pretrial hearing, the judge said he granted the new trial solely because of the juror affidavits. After hearing the reason the new trial was granted, Baylor sought a writ of mandamus from the court of appeals directing the trial court to vacate its order granting a new trial. The court of appeals denied relief. ___ S.W.3d ___. We set Baylor's petition for oral argument.

In the meantime, Judge Cox resigned and was succeeded by Judge Nancy Thomas. Pursuant to the Texas Rules of Appellate Procedure, we abated the case for Judge Thomas to consider the new trial order. *See* TEX. R. APP. P. 7.2(b). Judge Thomas set the new trial order aside but later vacated her ruling and reinstated the order.

Following Judge Thomas's ruling, Baylor continued its quest for mandamus relief.[1] After we heard oral argument on Baylor's petition, a new judge was elected and succeeded Judge Thomas. We again abated the case pursuant to Rule 7.2(b). We also held that a trial court may reconsider a new trial order as long as the case is still pending. *In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 232 (Tex. 2008) (overruling *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994)). On March 13, 2009,

[1] Williams urges that Baylor's petition is defective because Baylor failed to submit a copy of the motion to reconsider the original order and a transcript of the hearing before Judge Thomas in violation of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 52.7(a) (requiring relators to file a copy of every document that is material to their claims and a transcript of any relevant testimony from any underlying proceeding). Both parties' briefs contain the transcript of the hearing, and the parties do not differ on the substance of the motion or what occurred during the hearing. We consider the record properly before us. *See* TEX. R. APP. P. 52.7(b) ("After the record is filed, relator or any other party to the proceeding may file additional materials for inclusion in the record.").

the trial court affirmed Judge Cox's order granting a new trial without stating any reasons for doing so.

Baylor continues to assert that the order disregarding the jury verdict and granting a new trial on the basis of juror affidavits was a clear abuse of discretion. However, we do not consider the reasons Judge Cox gave for granting the new trial in determining whether a successor judge abused his or her discretion in refusing to enter judgment on the verdict. *See id.* at 227 ("Mandamus will not issue against a new judge for what a former one did."); *see also* TEX. R. APP. P. 7.2(b). And absent specific reasons for the March 13, 2009 ruling, we cannot determine whether the affirmation of the original new trial order was an abuse of discretion. *In re Columbia Med. Ctr. of Las Colinas*, ___ S.W.3d ___ (Tex. 2009). Accordingly, we deny without prejudice Baylor's request for mandamus directing the trial court to set aside the new trial order. *See id.*

Nevertheless, based on *In re Columbia*, decided after the trial court entered its March 13, 2009 order, the trial court abused its discretion by refusing to enter judgment on the jury verdict and granting a new trial without specifying its reasons for doing so. *Id.* Accordingly, we conditionally grant relief and direct the trial court to specify the reasons that it refused to enter judgment on the jury verdict and affirmed the granting of a new trial. *See id.* The order will issue only if the trial court fails to comply.

Phil Johnson
Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0491

IN RE BAYLOR MEDICAL CENTER AT GARLAND, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued September 27, 2007

JUSTICE O'NEILL, joined by CHIEF JUSTICE JEFFERSON, JUSTICE MEDINA, and JUSTICE GREEN, dissenting.

For the reasons expressed today in my dissenting opinion in *In re Columbia Medical Center of Las Colinas*, Cause No. 06-0416, I respectfully dissent.

Harriet O'Neill
Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0598

PRODIGY COMMUNICATIONS CORP., PETITIONER,

v.

AGRICULTURAL EXCESS & SURPLUS INSURANCE COMPANY, N/K/A GREAT AMERICAN E & S INSURANCE COMPANY AND GREAT AMERICAN INSURANCE COMPANY, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued April 1, 2008

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE MEDINA, and JUSTICE GREEN.

JUSTICE WAINWRIGHT delivered a concurring opinion.

JUSTICE JOHNSON delivered a dissenting opinion, joined by JUSTICE HECHT and JUSTICE WILLETT.

In *PAJ, Inc. v. The Hanover Insurance Co.*, 243 S.W.3d 630, 636-37 (Tex. 2008), we held that "an insured's failure to timely notify its insurer of a claim or suit does not defeat coverage if the insurer was not prejudiced by the delay." *PAJ* involved an occurrence-based commercial general liability ("CGL") policy with a prompt-notice provision that required the insured to notify the insurer of **"**an occurrence or an offense that may result in a claim 'as soon as practicable**.'"** *Id*. at 631-32. Noting that "the timely notice provision was not an essential part of the bargained-for exchange

under PAJ's occurrence-based policy," we held that PAJ's untimely notice did not defeat coverage in the absence of prejudice to the insurer. *Id*. at 636-37.

Today, we decide whether *PAJ*'s notice-prejudice rule applies to a claims-made policy when the notice provision requires that the insured, "as a condition precedent" to its rights under the policy, give notice of a claim to its insurer "as soon as practicable . . ., but in no event later than ninety (90) days after the expiration of the Policy Period or Discovery Period." The parties dispute whether notice of the claim was given "as soon as practicable" but agree that the insured gave notice within the ninety-day cutoff period. The insurer also admits that it was not prejudiced by the delayed notice.

For the reasons explained below, we conclude that "notice as soon as practicable" was not an essential part of the bargained-for exchange under the claims-made policy at issue here. Following *PAJ*, we hold that, in the absence of prejudice to the insurer, the insured's alleged failure to comply with the provision does not defeat coverage. *See id*. Because the court of appeals held otherwise, 195 S.W.3d 764, 768, we reverse its judgment, render judgment that the insurer may not deny coverage based on the fact that notice was not given "as soon as practicable," and remand the remaining issues to the trial court.

I
Factual Background

Prodigy Communications merged with FlashNet Communications in May 2000. At the time of the merger, FlashNet was insured under a claims-made "Directors' and Officers' Liability Insurance Policy Including Company Reimbursement" issued by Agricultural Excess & Surplus

Insurance Company (AESIC).[1] In exchange for a $19,519 premium, the policy covered losses resulting from certain "claims first made" against Flashnet[2] and its directors and officers during the policy period of March 16, 2000 to May 31, 2000. In anticipation of its merger with Prodigy, FlashNet purchased a 3-year "Discovery Period" which, in exchange for a $93,750 premium, extended coverage under the policy to any "claims first made" against the Insureds between May 31, 2000 and May 31, 2003.[3]

The policy contained the following amended[4] "notice of claim" provision:

> The [Insureds] shall, as a condition precedent to their rights under this Policy, give the Insurer notice, in writing, as soon as practicable of any Claim first made against the [Insureds] during the Policy Period, or Discovery Period (if applicable), but in no event later than ninety (90) days after the expiration of the Policy Period, or Discovery Period, and shall give the Insurer such information and cooperation as it may reasonably require.[5]

On November 28, 2001, Flashnet was named as a defendant in a class-action securities lawsuit (commonly referred to as the "IPO litigation"). The underlying FlashNet lawsuit constituted

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[1] Respondent Great American Insurance Company's Executive Liability Division was responsible for underwriting and claims administration of D&O policies issued by AESIC, including the one issued in this case.

[2] With respect to claims against FlashNet itself, coverage was provided solely by operation of Endorsement 16, which added the following insuring agreement: "if, during the Policy Period or the Discovery Period, any Securities Claim is first made against the Company for a Wrongful Act the Insurer will pay on behalf of the Company all Loss which the Company is legally obligated to pay."

[3] As prominently stated on the declarations page, the policy "D[ID] NOT PROVIDE FOR ANY DUTY BY THE INSURER TO DEFEND THOSE INSURED UNDER THE POLICY." This is standard for D&O policies. *See* 3 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 12A.05[1] (2006).

[4] The original "notice of claim" provision, found in section VII of the policy, required that the Insureds "as a condition precedent to their rights . . . give the Insurer notice . . . as soon as practicable . . . but in no event later than ninety (90) days *after such Claim is made . . . .*"

[5] As noted above, the Discovery Period expired on May 31, 2003. Thus, the notice provision required that notice of a claim be given "as soon as practicable . . ., but in no event later than" August 29, 2003.

a "Securities Claim first made against [FlashNet]" "during the . . . Discovery Period" of the policy, as described in the insuring agreement added by Policy Endorsement 16. Prodigy was served with a copy of the complaint on June 20, 2002 and first notified AESIC of the FlashNet lawsuit in a letter dated June 6, 2003. Apparently assuming that AESIC was already aware of the underlying lawsuit, the June 6 letter requested AESIC's consent to a proposed settlement agreement of the claims brought against Flashnet, rather than purporting to provide the initial notice of the claim.

By letter dated June 18, 2003, AESIC denied coverage on the ground that the June 6 letter did not comply with the policy's notice requirements.[6] In response, Prodigy provided AESIC with formal written notice of the claim on June 26, 2003. Along with this notice, Prodigy attached a letter asserting that notice was timely because it had been sent within ninety days of the expiration of the Discovery Period. Despite Prodigy's efforts, AESIC never retreated from its no coverage stance.

II
Procedural Background

Prodigy sued AESIC, seeking a declaration that Prodigy was contractually entitled to coverage. Prodigy also asserted several extra-contractual claims alleging, among other things, that AESIC violated certain Insurance Code provisions as an unauthorized surplus lines insurer and was

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[6] AESIC's letter stated in part:

> As I advised you in telephone conversations on June 9, 2003 and June 11, 2003, AESIC is not participating in the [IPO litigation] and has not signed the relevant agreements. I also advised you that AESIC had not received any written notice of any lawsuit involving Flashnet Communications, Inc. In fact, your June 6, 2003 letter appears to be the first notice of this matter to AESIC. However, such notice was not in compliance with the [Policy's requirements] (including Section VII) ["The Notice of Claim" provision], which are a condition precedent to any rights under the Policy. Furthermore, both the Policy Period and Discovery Period expired prior to your June 6, 2003 letter. Under the circumstances there is no coverage for this matter under the Policy.

thus liable to Prodigy for the full amount of coverage. AESIC moved for summary judgment arguing that Prodigy did not satisfy the policy's condition precedent that notice of a claim be given "as soon as practicable." Prodigy filed a cross-motion for summary judgment. The trial court denied Prodigy's motion and granted AESIC's motion in part, ruling that Prodigy failed to comply with the condition precedent of timely notice and that this failure "avoids coverage, with or without prejudice to AESIC." AESIC and Great American Insurance Company then moved for summary judgment on the remaining Insurance Code issues, and the trial court granted a final summary judgment in their favor.

The court of appeals affirmed, holding that: (1) Prodigy was required to give notice "as soon as practicable," even though the policy allowed notice within ninety days after the expiration of the discovery period; (2) notice given almost one year after the filing of the lawsuit against the insured was not "as soon as practicable" as a matter of law; (3) AESIC was not required to prove that it was prejudiced by Prodigy's late notice; and (4) Insurance Code provisions did not prevent AESIC from enforcing the policy's notice provision. 195 S.W.3d 764, 766-69. Prodigy petitioned this court for review on the issues of late notice and Insurance Code violations. We granted the petition. 51 Tex. Sup. Ct. J. 292 (Jan. 14, 2008).

III
Discussion

We must decide whether, under a claims-made policy, an insurer can deny coverage based on its insured's alleged failure to comply with a policy provision requiring that notice of a claim be

given "as soon as practicable," when (1) notice of the claim was provided before the reporting deadline specified in the policy; and (2) the insurer was not prejudiced by the delay.

As noted earlier, we recently held in *PAJ,* that an "insured's failure to timely notify its insurer of a claim or suit does not defeat coverage if the insurer was not prejudiced by the delay." 243 S.W.3d at 636-37. In reaching that conclusion, we followed our holding in *Hernandez* that "an immaterial breach does not deprive the insurer of the benefit of the bargain and thus cannot relieve the insurer of the contractual coverage obligation." *PAJ*, 243 S.W.3d at 631 (citing *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994)). Prodigy argues that, even assuming it breached the policy's requirement that notice of a claim must be given "as soon as practicable," under our holding in *PAJ*, that breach was immaterial and cannot defeat coverage given AESIC's admitted lack of prejudice. *See id*. AESIC responds that our holding in *PAJ* does not control the outcome of this case for several reasons.

First, unlike the *PAJ* policy, this one states unambiguously that the insured's duty to give "notice, in writing, as soon as practicable" is a "condition precedent" to coverage. Importantly however, our holding in *PAJ* did not rest on the distinction between conditions and covenants. *See id*. at 633 (noting that in *Hernandez* "[w]ithout distinguishing between covenants and conditions or classifying the exclusion as one or the other, we concluded that the insured's breach of the settlement-without-consent provision was immaterial and thus the insurer could not avoid liability") (citing *Hernandez*, 875 S.W.2d at 693); *see also id*. at 633 n.2 (noting that "the courts in many of the cases we cited made no attempt to classify the policy provisions as either covenants or conditions, nor did they even employ those terms"). Instead, we followed our reasoning in

Hernandez, where we applied "'fundamental principle[s] of contract law,'" to hold "that when one party to a contract commits a material breach, the other party's performance is excused." *Id*. at 633 (quoting *Hernandez,* 875 S.W.2d at 692). We noted that one consideration in determining the materiality of a breach is "'the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance.'" *Id*. (quoting *Hernandez,* 875 S.W.2d at 693 (citing RESTATEMENT (SECOND) OF CONTRACTS § 241(a) (1981))). Thus, while the Prodigy policy describes the notice provision as a "condition precedent," we must go further to determine whether prejudice is, or is not, required.

This brings us to AESIC's second reason for distinguishing this case from *PAJ*. Unlike the occurrence-based policy in *PAJ*, the policy at issue here is a "claims-made" policy. According to AESIC, timely notice is always inherent to, and an essential part of, the bargained-for exchange in a claims-made policy. In *PAJ*, we recognized a "critical distinction" between the role of notice in claims-made policies and the role of notice in occurrence policies and concluded that timely notice was not an essential part of the bargained-for exchange in PAJ's occurrence-based policy. 243 S.W.3d at 636. In reaching this conclusion, we were persuaded by the Fifth Circuit's explanation that "'[i]n the case of an "occurrence" policy, any notice requirement is subsidiary to the event that triggers coverage.'" *Id*. (quoting *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653, 658 (5th Cir. 1999)).

To determine whether "notice as soon as practicable" is an essential part of the bargained-for exchange in the claims-made policy at issue here, it is helpful to review the basic distinctions

between occurrence and claims-made policies and the different types of notice requirements associated with each.

As one treatise explains:

> D&O insurance policies today are invariably written on a "claims-made" basis, which means that the policy only covers those claims first asserted against the insured during the policy period. This limitation appears in the insuring clauses. This coverage differs from "occurrence" type coverage, written for most casualty insurance, which covers only claims arising out of occurrences happening within the policy period, regardless of when the claim is made.

3 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 12A.05[3] (2006). Thus, the main difference between these two types of policies is that a "claims-made" policy provides unlimited retroactive coverage and no prospective coverage, while an "occurrence" policy provides unlimited prospective coverage and no retroactive coverage. 20 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE § 130.1(A)(1) (2d ed. 2002) ("HOLMES' APPLEMAN ON INSURANCE 2D"); *see also* 1 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 1.5 (3d ed. 2008) ("COUCH ON INSURANCE 3D").

For the insurance company, the primary advantage of a claims-made policy "is the limitation of liability to claims asserted during the policy period." 20 HOLMES' APPLEMAN ON INSURANCE 2D § 130.1(A)(1). This allows insurers "to calculate risks and premiums with greater precision." *Id*. Furthermore, "the elimination of exposure to claims filed after the policy expiration date enables liability insurance companies to issue the claims made policies at reduced premiums." *Id*.

Both occurrence policies and claims-made policies tend to have a requirement that notice of a claim be given to the insurer promptly, or "as soon as practicable." *See* 13 COUCH ON INSURANCE

3D § 186:13; *see also Chas. T. Main*, *Inc. v. Fireman's Fund Ins. Co.*, 551 N.E.2d 28, 29 (Mass. 1990). Unlike occurrence policies, however, some claims-made policies (often called "claims-made-and-reported policies) have an additional requirement that the claim be reported to the insurer within the policy period or within a specific number of days thereafter.[7] *See, e.g.*, *Burns v. Int'l Ins. Co.*, 929 F.2d 1422, 1423 (9th Cir. 1991) (claims to be reported within sixty days following policy termination); *Zuckerman v. Nat'l Union Fire Ins. Co.*, 495 A.2d 395, 396-97 (N.J. 1985)(claims to be made against insured and reported to insurer during policy period).

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[7] It should be noted that "[m]any courts fail to distinguish between claims-made and claims-made-and-reported policies, and simply speak in broad terms of 'claims-made' policies." *Textron, Inc. v. Liberty Mut. Ins. Co.,* 639 A.2d 1358, 1362 n.2 (R.I. 1994). As one court has explained:

> [T]he only true mark of a "claims made" [policy] is that it provides coverage for any claim first asserted against the insured during the policy period, regardless of when the incident giving rise to the claim occurred. Whether reporting to the insurer [i]s also a condition of coverage depends on the terms of the specific policy.
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> In this regard, there is a distinction between a "claims made" policy and a "claims made and reported" policy: "Whereas the former requires only that a claim be made within the policy period, the latter also requires that the claim be reported to the insurance company within the policy period."

Jones v. Lexington Manor Nursing Ctr., *L.L.C.*, 480 F. Supp. 2d 865, 868 (S.D. Miss. 2006)(quoting *Chicago Ins. Co. v. Western World Ins.* Co., No. Civ.A. 3-96-CV-3179R., 1998 WL 51363, at *3 (N.D. Tex. Jan. 23, 1998) (mem.)); *see also Pension Trust Fund for Operating Eng'rs v. Federal Ins. Co.*, 307 F.3d 944, 955-56 & n.6 (9th Cir. 2002)(holding that claims-made policy that required insured to provide notice of claims "'as soon as practicable'" but "did not require that the claims be reported within the policy period, or even within a specific number of days thereafter" could "[not] be treated as a claims-made-and-reported policy"); *Textron*, 639 A.2d at 1361 n.2 (noting that "[a]bsent a provision requiring notice within a set period after policy expiration, standard claims-made policies 'implicitly allow * * * reporting of the claim to the insurer after the policy period, as long as it is within a reasonable time'") (quoting 2 ROWLAND LONG, THE LAW OF LIABILITY INSURANCE, § 12A.05[3A] at 40 (Supp. 1991)).

Although Prodigy's policy is labeled a "claims-made policy," its requirement that notice of a claim be given "as soon as practicable during the Policy Period,. . . but in no event later than ninety (90) days after the expiration of the Policy Period, or Discovery Period" is characteristic of a "claims-made-and-reported policy". *See* 3 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 12A.05[3A] (2006) ("The distinction between 'claims made' and 'claims made and reported' policies is not necessarily apparent on the face of the policies, since disclosure regulations generally require only that the legend 'claims made' be placed on the policy. The distinction is typically evident in the notice of claims provision of the policy.").

As courts and commentators have recognized, the different kinds of notice requirements when found in a claims-made policy serve very different purposes.[8] *See, e.g.,* 13 COUCH ON INSURANCE 3D § 186:13 ("As a general statement, the prompt notice of claim requirement and the 'claims made' within the policy period requirement serve such different purposes, and are of such different basic character, that the principles applied to one should have little or nothing to do with the principles applied to the other."); *Chas. T. Main,* 551 N.E.2d at 29 (noting that "[t]he purposes of the two types of reporting requirements differ sharply").

In a claims-made policy, the requirement that notice be given to the insurer "as soon as practicable" serves to "maximiz[e] the insurer's opportunity to investigate, set reserves, and control or participate in negotiations with the third party asserting the claim against the insured." 13 COUCH ON INSURANCE 3D § 186:13, *see also Chas. T. Main,* 551 N.E.2d at 29. By contrast, the requirement that the claim be made during the policy period "is directed to the temporal boundaries of the policy's basic coverage terms . . . . [This type of notice] is not simply part of the insured's duty to cooperate, but defines the limits of the insurer's obligation, and if there is no timely notice, there is no coverage." 13 COUCH ON INSURANCE 3D § 186:13. Similarly, a notice provision requiring that a claim be reported to the insurer during the policy period or within a specific number of days

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[8] As one treatise notes:

> Courts too often speak broadly of the [claims-made] policy's "notice requirement," without specifying which requirement is at issue, and make broad pronouncements about the effect of noncompliance with the unspecified "notice requirement." Alternatively, courts may speak in terms of the insured's "untimely notice," and proceed to determine the effect of the untimeliness, without specifying which of the notice requirements is at issue.

13 COUCH ON INSURANCE 3D § 186:13.

thereafter "define[s] the scope of coverage by providing a certain date after which an insurer knows it is no longer liable under the policy." *Resolution Trust Corp. v. Ayo,* 31 F.3d 285, 289 (5th Cir. 1994); *see also Chas. T. Main,* 551 N.E.2d at 29-30 (noting that "fairness in rate setting is the purpose of a requirement that notice of a claim be given within the policy period or shortly thereafter" and therefore this type of notice requirement "is of the essence in determining whether coverage exists" in a claims-made policy).[9]

> The role of notice in claims-made policies has been described as follows:
>
> > Claims made or discovery policies are essentially reporting policies. *If the claim is reported to the insurer during the policy period, then the carrier is legally obligated to pay*; if the claim is not reported during the policy period, no liability attaches. Claims made policies require notification to the insurer to be within a reasonable time. *Critically, however, claims made policies require that that notice be given during the policy period itself.*

20 HOLMES' APPLEMAN ON INSURANCE 2D § 130.1(A)1 (emphasis added). Because the requirement that a claim be reported to the insurer during the policy period or within a specific number of days thereafter is considered essential to coverage under a claims-made-and-reported policy, most courts

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[9] *See also Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Willis,* 296 F.3d 336, 343 (5th Cir. 2002) ("The purpose of claims-made policies, unlike occurrence policies, is to provide *exact notice periods that limit liability to a fixed period of time* 'after which an insurer knows it is no longer liable under the policy, and for this reason such reporting requirements are strictly construed.*'"*)(emphasis added)(quoting *Resolution Trust Corp. v. Ayo,* 31 F.3d 285, 289 (5th Cir.1994)*; F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1330 (5th Cir. 1994) (noting that "[t]he notice requirements in claims made policies allow the insurer to 'close its books' on a policy at its expiration and thus to 'attain a level of predictability unattainable under standard occurrence policies'") (quoting *Burns v. Int'l Ins. Co.*, 709 F. Supp. 187, 191 (N.D. Cal. 1989), *aff'd*, 929 F.2d 1422 (9th Cir.1991)).

have found that an insurer need not demonstrate prejudice to deny coverage when an insured does not give notice of a claim within the policy's specified time frame.[10]

In *Main*, the Supreme Judicial Court of Massachusetts noted the distinction between the "as soon as practicable" and "within the policy year" notice requirements and concluded that, in a claims-made policy, noncompliance with the latter would defeat coverage regardless of prejudice to the insured. 551 N.E.2d at 30. The court explained:

> The purpose of a claims-made policy is to minimize the time between the insured event and the payment. For that reason, the insured event is the claim being made against the insured during the policy period and the claim being reported to the insurer within that same period or a slightly extended, and specified, period. If a claim is made against an insured, but the insurer does not know about it until years later, the primary purpose of insuring claims rather than occurrences is frustrated. Accordingly, the requirement that notice of the claim be given in the policy period or shortly thereafter in the claims-made policy is of the essence in determining whether coverage exists. Prejudice for an untimely report in this instance is not an appropriate inquiry.

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[10] *See*, *e.g.*, *Chas. T. Main,* 551 N.E.2d at 30; *Matador Petroleum Corp.*, 174 F.3d at 656, 658; *Lexington Ins. Co. v. St. Louis Univ.,* 88 F.3d 632, 634-35 (8th Cir. 1996)(where claims-made policy provided that the insured "'shall give' [insurer] notice of each claim 'as soon as practicable,' and in any event, *'during the period of this Policy*,'" insurer "need not prove prejudice to deny coverage if the [insured] failed to report the [claim] *within the policy term*")(emphasis added); *DiLuglio v. New England Ins. Co.*, 959 F.2d 355, 356, 359 (1st Cir. 1992) (where policy provided that insurance company would pay "'any claim or claims ... first made against the Insured and reported to the Company during the policy period'" "prejudice may be presumed *where notice is not provided within the policy period*")(emphasis added); *Nat'l Union Fire Ins. Co. v. Talcott*, 931 F.2d 166, 168 (1st Cir. 1991) (same); *Burns v. Int'l Ins. Co.*, 929 F.2d 1422, 1423-25 (9th Cir. 1991) (notice-prejudice rule did not apply to claims-made policy that covered "claims made against the insureds during the policy period . . . notice of which claim is received by the company within sixty days following the termination of the policy period"); *Esmailzadeh v. Johnson and Speakman*, 869 F.2d 422, 424 (8th Cir. 1989); *Zuckerman v. Nat'l Union Fire Ins. Co.*, 495 A.2d 395, 396-97, 405-06 (N.J. 1985) (where policy covered "claims first made against the insured and reported to the [Insurer] during the policy period" insurer was not required to demonstrate prejudice to deny coverage based on notice given ten months after policy expired).

Id. The court then concluded that a statutory notice-prejudice requirement "applies only to the 'as soon as practicable' type of notice and not to the 'within the policy year' type of reporting requirement which is contained in the policy under review in this case and was not met." *Id*.

Similarly, in *T.H.E. Insurance Company v. P.T.P. Inc.*, 628 A.2d 223, 228 (Md. 1993), the Maryland Court of Appeals held that a statutory notice-prejudice requirement did not apply to the insurer's denial of coverage under a claims-made policy for a claim made and reported after the policy had expired. The court emphasized that the insurer was not attempting to "deny coverage because of an alleged material failure to perform a covenant to give notice, or to satisfy a policy provision that might be phrased as a condition that must be satisfied to prevent the loss of coverage that otherwise would apply." *T.H.E. Ins. Co.*, 628 A.2d at 227. Rather, the court explained, the extended reporting period under the policy had expired before P.T.P. reported the claim, and therefore the notice-prejudice requirement "could no more revive the original policy to cover [the claim] than [it] could reopen an occurrence policy to embrace a claim based on an accident that happened after the end of the policy period." *Id*. The court observed that the insurer would be required to demonstrate prejudice, however, to deny coverage based on the policy's provision requiring the insured to give notice of a claim "'as soon as practicable,'" assuming that the claim had been made and reported within the extended reporting period. *Id.* at 227 n.7.

We agree with this analysis. In a claims-made policy, when an insured gives notice of a claim within the policy period or other specified reporting period, the insurer must show that the insured's noncompliance with the policy's "as soon as practicable" notice provision prejudiced the insurer before it may deny coverage. Here, it is undisputed that Prodigy gave notice of the FlashNet

lawsuit before the ninety-day cutoff. Even assuming that Prodigy did not give notice "as soon as practicable," AESIC was not denied the benefit of the claims-made nature of its policy as it could not "close its books" on the policy until ninety days after the discovery period expired. *See F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1330 (5th Cir. 1994) (noting that "the notice requirements in claims made policies allow the insurer to 'close its books' on a policy at its expiration and thus to 'attain a level of predictability unattainable under standard occurrence policies'")(quoting *Burns v. Int'l Ins. Co.*, 709 F. Supp. 187, 191 (N.D. Cal. 1989), *aff'd*, 929 F.2d 1422 (9th Cir.1991)); *see also* 20 HOLMES' APPLEMAN ON INSURANCE 2D § 130.1(A)1 ("The *essence* . . . of a claims made policy is notice to the insurance carrier *within the insurance policy period*.") (emphasis added).

Accordingly, we conclude that Prodigy's obligation to provide AESIC with notice of a claim "as soon as practicable" was not a material part of the bargained-for exchange under this claims-made policy. *See Hernandez,* 875 S.W.2d at 693 ("In determining the materiality of a breach, courts will consider, among other things, the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance.") (citing RESTATEMENT (SECOND) OF CONTRACTS § 241(a) (1981)). As AESIC has admitted that it was not prejudiced by the delay in receiving notice, it could not deny coverage based on Prodigy's alleged failure to provide notice "as soon as practicable." *See PAJ*, 243 S.W.3d at 636-37.

IV
Conclusion

In a claims-made policy, when an insured notifies its insurer of a claim within the policy term or other reporting period that the policy specifies, the insured's failure to provide notice "as soon as

practicable" will not defeat coverage in the absence of prejudice to the insurer.[11] Accordingly, we reverse the court of appeals' judgment, render judgment that AESIC cannot deny coverage because of Prodigy's alleged failure to give notice "as soon as practicable," and remand the remaining issues to the trial court. TEX. R. APP. P. 60.2(d).

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: March 27, 2009

[11] Because we hold that AESIC cannot deny Prodigy coverage for the Flashnet claim, we do we do not consider Prodigy's contention that AESIC was precluded from enforcing the notice provision because the policy was sold in violation of the surplus lines statute.

IN THE SUPREME COURT OF TEXAS

NO. 06-0598

PRODIGY COMMUNICATIONS CORP., PETITIONER,

v.

AGRICULTURAL EXCESS & SURPLUS INSURANCE COMPANY, N/K/A GREAT AMERICAN E & S INSURANCE COMPANY AND GREAT AMERICAN INSURANCE COMPANY, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

JUSTICE WAINWRIGHT, concurring.

In *PAJ, Inc. v. Hanover Insurance Co.*, we held that "an insured's failure to timely notify its insurer of a claim or suit does not defeat coverage if the insurer was not prejudiced by the delay." 243 S.W.3d 630, 636–37 (Tex. 2008). That holding largely controls the outcome of this case. I joined the dissent in *PAJ*. *See id.* at 637 (Willett, J., dissenting). And I agree with the dissent's assertion today that contracts should be enforced in accordance with the express terms and conditions to which the parties agreed, including notice provisions that are conditions precedent. *See* ___ S.W.3d ___ (Johnson, J., dissenting). It is concerning that the Court's opinion in *PAJ* would likely thwart even the enforcement of a policy's notice requirement that explicitly states, "time is of the essence." Nevertheless, *PAJ* is now the law of the land, and I join in the Court's opinion today for that reason.

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Dale Wainwright
Justice

OPINION DELIVERED: March 27, 2009

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Argued April 1, 2008

JUSTICE JOHNSON, joined by JUSTICE HECHT and JUSTICE WILLETT, dissenting.

Today the Court rewrites an unambiguous insurance contract and changes the agreement of the parties. It holds that AESIC cannot deny coverage to Prodigy even if Prodigy breached explicit contract language making it a condition precedent for it to give notice of the claim "in writing, as soon as practicable." The Court does so by departing from well-established insurance policy construction rules as well as by failing to adhere to the choice made by the Court in *Members Mutual Insurance Co. v. Cutaia*, 476 S.W.2d 278, 280-81 (Tex. 1972), to interpret insurance contracts as written and leave changes to the Legislature or insurance regulatory agency. I dissent.

The rules governing interpretation of contracts in general apply to interpreting insurance policies. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex.

1995). The parties do not contend AESIC's policy is a form promulgated by the State or a regulatory authority, so we seek to ascertain the intent of the parties and interpret the policy accordingly. *See Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746 (Tex. 2006). In ascertaining the parties' intent, we look first and primarily to the written words used. *Id.* ("As with any other contract, the parties' intent is governed by what they said . . . ."); *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998) ("Our primary goal, therefore, is to give effect to the written expression of the parties' intent."); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). Despite regular invitations to add to or ignore language when interpreting insurance policies, this Court has generally adhered to the principle that judges interpret language to which parties have agreed, not alter it. *E.g.*, *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 647, 649 (Tex. 2007) (noting that contract rights arise from the parties' agreement, not principles of equity and declining to "judicially rewrite the parties' contract by engrafting extra-contractual standards"); *Fiess*, 202 S.W.3d at 753 ("For more than a century this Court has held that in construing insurance policies 'where the language is plain and unambiguous, courts must enforce the contract as made by the parties, and cannot make a new contract for them, nor change that which they have made under the guise of construction.'") (quoting *E. Tex. Fire Ins. Co. v. Kempner*, 27 S.W. 122, 122 (1894)); *but see PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 636-37 (Tex. 2008) (holding that as to an occurrence-based policy, an insured's breach of its obligation to timely notify the insurer of a claim or suit does not defeat coverage if the insurer was not prejudiced by the delay).

In *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, we rejected an insurer's claim for equitable reimbursement from its insured, in part, because allowing

reimbursement would have required us to "'rewrite the parties' contract or add to its language.'" 246 S.W.3d 42, 50 (Tex. 2008) (quoting *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003)). In *Excess Underwriters* we also quoted with approval language the Court used in *Fortis Benefits* where we said we are "'loathe to judicially rewrite the parties' contract by engrafting extra-contractual standards.'" *Id.* at 51 (quoting *Fortis Benefits*, 234 S.W.3d at 649).

But today the Court holds AESIC cannot deny coverage to Prodigy even if Prodigy breached the explicit contract language requiring notice of the claim "in writing, as soon as practicable" because (1) that part of the notice provision was not an essential part of the bargained-for exchange; (2) AESIC did not show it was prejudiced by the timing of written notice; and (3) written notice was given within the time period allowed by another part of the policy's notice provision. ___ S.W.3d ___, ___. The Court poses the issue as "whether 'notice as soon as practicable' is an essential part of the bargained-for exchange in the claims-made policy at issue here." I disagree that the record shows the "as soon as practicable" notice provision was not an essential part of the parties' agreement.

In determining whether the notice provisions of AESIC's policy were essential to the agreement, the first place to seek the answer is the policy itself. AESIC's policy consists of a declarations page, a cover page, three pages setting out the terms of the insurance, plus endorsements. The statement "THIS IS A CLAIMS MADE POLICY, READ IT CAREFULLY" appears at the top of the declarations page and the first page of the policy. The first section of the policy is "Section I. Insuring Agreements" made up of two paragraphs—one applicable to Flashnet's directors and officers and the other applicable to Flashnet as a company. Page three of the policy

contains "Section VII. Notice of Claim." The Notice of Claim provision originally contained condition precedent language and a hard-and-fast requirement that written notice of any claim be given within ninety days after the claim was made. It was amended to require written notice to AESIC as soon as practicable "but in no event later than ninety (90) days after the expiration of the Policy Period or Discovery Period." The entire endorsement reads as follows:

> The Directors or Officers shall, *as a condition precedent* to their rights under this Policy, give the Insurer notice, in writing, as soon as practicable of any Claim first made against the Directors and Officers during the Policy Period, or Discovery Period (if applicable), but in no event later than ninety (90) days after the expiration of the Policy Period or Discovery Period, and shall give the Insurer such information and cooperation as it may reasonably require.

(emphasis added). Timely notice was clearly and explicitly a condition precedent to any rights under the policy. Prodigy does not contend the endorsement language is unclear or that Flashnet ever sought any other notice language. Nor does Prodigy contend that Flashnet, a company involved with sophisticated legal matters such as public stock offerings and securities law was misled about or protested the notice provisions when it purchased the policy and the endorsement.

The record and sequence of events indicate that all the notice language, including timing of notice, was an important part of the policy: timely notice was a condition precedent in the original policy and the condition precedent language was carried forward into the endorsement. Certainly the record does not show as a matter of law that the notice language was *not* essential to the parties' agreement. The Court's conclusion otherwise is in derogation of the parties' intent as expressed by policy language.

The Court concludes, relying on decisions from other jurisdictions and legal treatises, that in order for an insurer to deny coverage under claims-made policies for breach of a reporting requirement, the insurer (1) must show prejudice if the insured gives notice of a claim within the policy period or a specified time after policy termination, even though the notice was not "as soon as practicable," but (2) need not show prejudice if the insured gives notice of a claim outside the policy period or the time allowed in the policy for reporting claims after policy termination, if any. ___ S.W.3d at ___. The Court says a requirement of notice "as soon as practicable" is more part of the investigative process and not as much a part of the coverage bargain between the insurer and insured as is an end-of-policy notice requirement. But the insuring agreements and notice provisions of AESIC's policy are completely separate. That separation militates against classifying one notice provision in Section VII as more important because it is a coverage-type provision and the other notice provision as less important because it is an investigation-type provision. Neither of those classifications for the notice provisions is indicated by policy language.

Furthermore, the record demonstrates no logical reason to apply a different rule to AESIC's end-of-policy notice provision. There is no basis in the record for concluding Prodigy's one-year delay in reporting the claim was any more or less important to AESIC's insurance business than if Prodigy had delayed for a year reporting a claim made on the last day of the Discovery Period. In the latter circumstance, the Court says AESIC would not be required to show prejudice and the condition precedent language would preclude the insurer's liability because the insurer needs to close its books as to the policy. We should be bound by the record the parties bring, and the record does not support either the latter statement or treating the delays differently. But first and foremost, the

policy language shows AESIC and Prodigy intended for the two notice provisions to have the same effect: both are conditions precedent to Prodigy's rights under the policy. We should respect the agreement.

In holding a showing of prejudice is required for failure to give notice as soon as practicable, but not for notice failing to comply with the end-of-policy provision, the Court relies on cases from other states. But two cases emphasized by the Court highlight the very point made long ago in *Cutaia* that the Court should defer to legislative and regulatory entities to (1) address the notice-prejudice question, and (2) change policy language if change was deemed necessary. *Cutaia*, 476 S.W.2d at 280-81. In *T.H.E. Insurance Co. v. P.T.P.*, 628 A.2d 223 (Md. 1993) and *Chas. T. Main, Inc. v. Fireman's Fund Insurance Co.*, 551 N.E.2d 28 (Mass. 1990), referenced by the Court, the notice-prejudice issue was addressed by statute and the courts were considering how notice provisions should be treated in light of the statutes. In *Chas. T. Main*, the Supreme Judicial Court of Massachusetts considered a claims-made professional liability policy in light of a statute that provided, in part, as follows:

> An insurance company shall not deny insurance coverage to an insured because of failure of an insured to seasonably notify an insurance company of an occurrence, incident, claim or of a suit founded upon an occurrence, incident or claim, which may give rise to liability insured against unless the insurance company has been prejudiced thereby.

MASS. GEN. LAWS ch. 175, § 112 (1988). The Massachusetts court said, without reference to the record, "the requirement that notice of the claim be given in the policy period or shortly thereafter in the claims-made policy is of the essence in determining whether coverage exists." *Chas. T. Main*, 551 N.E.2d at 30. However, the court, in summary fashion, held the statute applied only to the "as

soon as practicable" notice and not to the "within the policy year" notice. *Id.* It stated that applying the statute to "within the policy year" notice provisions would defeat the fundamental concept on which claims-made policies are premised, and it would be unreasonable to think that the Legislature intended such a result. *Id.*

And in *T.H.E. Insurance Co.*, the Maryland Court of Appeals considered the effect of a statutory notice-prejudice provision on a claims-made policy. 628 A.2d at 223. The statute involved provided:

> Where any insurer seeks to disclaim coverage on any policy of liability insurance issued by it, on the ground that the insured or anyone claiming the benefits of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving requisite notice to the insurer, such disclaimer shall be effective only if the insurer establishes, by a preponderance of affirmative evidence that such lack of co-operation or notice has resulted in actual prejudice to the insurer.

MD. ANN. CODE of 1957 art. 48A, § 482 (1991 Repl. Vol.). The court noted that under one of its previous holdings, if a claim had been reported within the extended reporting period, the insurer would have had to prove actual prejudice. *T.H.E. Ins. Co.*, 628 A.2d at 226 n.7. However, the court held that the statute did not operate to revive the policy as to notice of a claim given after the end of the policy period. *Id.* at 227. Texas does not have a statute, regulation, or agency directive that similarly applies to AESIC's policy.[1]

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[1] Texas does have a State Board of Insurance Order relating to bodily injury or property damage liability claims covered by general liability policies. *See PAJ*, 243 S.W.3d at 632; State Board of Insurance, *Revision of Texas Standard Provision For General Liability Policies--Amendatory Endorsement-Notice*, Order No. 23080 (Mar. 13, 1973) ("As respects bodily injury liability coverage and property damage liability coverage, unless the company is prejudiced by the insured's failure to comply with the requirement, any provision of this policy requiring the insured to give notice of action, occurrence or loss, or requiring the insured to forward demands, notices, summons or other legal process, shall not bar liability under this policy.").

Even disregarding the record, the general discussion of claims-made policies by which the Court eventually differentiates between the two types of notices does not support the step the Court takes. The claims-made policy involved here insures against claims first made against directors and officers during the policy period. As noted above, the notice and insuring agreements of AESIC's policy are separate: the Insuring Agreements are in Section I; the Notice of Claim provisions are in Section VII. For all practical purposes AESIC's policy insures against events—claims first made during the policy period—just as an occurrence policy insures against events—occurrences during the policy period. The difference is that under occurrence policies the insurer may not know of the event it has insured against for a long time after the event, whereas AESIC should know of the event it has insured against (a claim against its insured) during the policy period or within ninety days after expiration of the Discovery Period. Thus, under AESIC's claims-made policy as it is written, the notice requirements terminate the insurer's obligations (1) as the policy period passes without notice of claim being given, or (2) at the latest, ninety days after the Discovery Period ends. But when courts rewrite existing policy provisions as the Court does in this case, insurers' actuarial predictions of losses and expenses, and the process of setting premium rates to cover projected losses and expenses are disrupted. *See* Neil A. Doherty, *The Design of Insurance Contracts When Liability Rules are Unstable*, 58 J. OF RISK AND INS. 227, 227 (1991) ("[T]he recent liability insurance 'crisis' in the United States appears to be a response to a destabilization of the legal system. Insurers argue that they are able to insure the liabilities of clients arising under an unchanging set of liability rules, but they cannot insure against changes in the rules themselves."). Policy language and its effects on the insurer's business are matters better addressed through the legislative and regulatory processes

than through the judicial process. The legislative and regulatory processes allow prospective implementation of changes to policy language and prospective calculation of premiums based on risks assumed by the insurer. Modifications to agreements through the judicial process, however, are primarily retrospective, long after the contracts were entered into and premiums calculated and paid based on agreed-to policy language.

In *Cutaia*, the Court recognized these policy reasons behind leaving changes to the Legislature or regulatory agency. *Cutaia*, 476 S.W.2d at 280-81. But here, the Court does not respect the agreement of the parties or exercise the restraint that it did in *Cutaia*. In *Cutaia* an automobile liability policy required, as one of several conditions precedent to the insured's rights under the policy, that the insured give notice of any accident to the insurer and immediately forward any suit papers. *Id.* at 278. Cutaia, the insured, was sued but failed to forward suit papers to the insurer. *Id.* Following a trial and entry of judgment against Cutaia, the insurer denied coverage because Cutaia did not forward the suit papers. *Id.* at 279. In rendering judgment for the insurer, we noted "[t]here is no provision in the policy that failure to comply with the conditions precedent would be excused if no harm or prejudice were suffered by the insurer; and *such a provision would have to be inserted into the policy by implication*." *Id.* at 278 (emphasis added). The Court declined to override the insurance policy language and by judicial fiat add a prejudice provision to the policy:

> We are, therefore, faced with plain wording of the contract and the holdings of this Court; and we are also faced with facts which show an apparent injustice. The problem then arises as to whether, or what, changes should be made, and by whom. Should this Court overrule its former decisions and say that provisions in the policy are Not conditions precedent to liability? Or should we imply into the policy a provision that failure to comply with the condition precedent will be excused if no harm or prejudice is shown? Or should we enforce the provisions as written and call

> the matter to the attention of those who, for the public, are charged with prescribing policy forms as well as with the approval or disapproval of the provisions of the policy?
>
> . . . .
>
> Our conclusion is, however, that *on balance it is better policy for the contracts of insurance to be changed by the public body charged with their supervision, the State Board of Insurance, or by the Legislature, rather than for this Court to insert a provision that violations of conditions precedent will be excused if no harm results from their violation*.

Id. at 280, 281 (emphasis added).

Similar to the situation in *Cutaia*, Prodigy's written notice did not comply with requirements agreed to as conditions precedent when the policy was purchased. Nevertheless, the court holds Prodigy's untimely notice of claim is now timely and presumably will require payment under a policy with limits of three million dollars. Unlike its choice in *Cutaia*, the Court's choice today is to inject itself into a contractual relationship between two sophisticated parties, insert language into the policy, and change the policy so it in effect provides:

> The Directors or Officers shall, as a condition precedent to their rights under this Policy, give the Insurer notice, in writing, as soon as practicable of any Claim first made against the Directors and Officers during the Policy Period, or Discovery Period, (if applicable), but in no event later than ninety (90) days after the expiration of the Policy Period or Discovery Period, and shall give the Insurer such information and cooperation as it may reasonably require. *Notwithstanding the foregoing provision, the insureds shall not lose any rights under the policy if written notice of a covered claim is given not later than ninety (90) days after the expiration of the Policy Period or Discovery Period, (if applicable), unless the insurer proves it was prejudiced by the failure to give notice as soon as practicable*.

See Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co., 174 F.3d 653, 657 (5th Cir. 1999).

The language effectively added by the Court looks remarkably similar to language in notice-prejudice statutes, regulations, and agency orders. *See* State Board of Insurance, *Revision of Texas Standard Provision For General Liability Policies--Amendatory Endorsement-Notice*, Order No. 23080 (Mar. 13, 1973); MASS. GEN. LAWS ch. 175, § 112 (1988); MD. CODE ANN. of 1957 art. 48A, § 482 (1991 Repl. Vol.). But in matters such as this the Court cannot enact legislation or issue agency orders, and it should limit itself to interpreting or construing agreements—not changing them.

The better choice for courts, as the Court noted in *Cutaia*, is if changes to insurance policy language are to be mandated that affect timing and amount of insurers' actual or incurred loss provisions, other parts of the insurance companies' business, and policy clauses related to rate or premium calculations, the changes should be left to the Legislature and regulatory agencies. *See, e.g.*, J. David Cummins, *Statistical and Financial Models of Insurance Pricing and the Insurance Firm*, 52 J. OF RISK AND INS. 261 (1991). The Legislature and regulatory bodies such as the Texas Department of Insurance have the time, staff, resources and expertise to investigate and bring all relevant information to bear on such issues. I adhere to the opinion expressed by the dissent in *PAJ*:

> I would reaffirm *Cutaia's* recognition that the Legislature and the state agency overseeing the insurance industry are better suited to decide whether an insurer must show prejudice to deny coverage based on late notice. TDI and legislators are free to supplant *Cutaia's* no-prejudice rule with a more liberal notice-prejudice rule if they believe, on public policy grounds, that the latter is preferable.

PAJ, 243 S.W.3d at 641 (Willett, J., dissenting).

I would hold that on this record there is no evidence the condition precedent language requiring written notice of claim to AESIC "as soon as practicable" was not essential to AESIC's policy having been issued. I would affirm the judgment of the court of appeals as to that issue. I

would affirm the remainder of the court of appeals' judgment for the reasons stated in the court of appeals' opinion.

_____

Phil Johnson
Justice

OPINION DELIVERED: March 27, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0611

MAURICIO MARTINEZ-PARTIDO, PETITIONER,

v.

METHODIST SPECIALTY AND TRANSPLANT HOSPITAL; METHODIST HEALTHCARE SYSTEM OF SAN ANTONIO, LTD., L.L.P. D/B/A METHODIST SPECIALTY AND TRANSPLANT HOSPITAL; JANE OR JOHN DOE(S), HOSPITAL EMPLOYEE(S); AND JANE OR JOHN DOE(S), HOSPITAL NURSE(S), RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

PER CURIAM

In this health care liability case, plaintiff Mauricio Martinez-Partido served expert reports within 120 days of filing suit as section 74.351(a) of the Texas Civil Practice and Remedies Code requires, and the defendants objected to the sufficiency of those reports. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a). Prior to a hearing on the reports' sufficiency, Martinez-Partido requested a thirty-day extension under section 74.351(c) to cure any deficiencies in the reports that the trial court might find. The trial court found the reports adequate, and the defendants appealed. The court of appeals found the reports deficient and, without considering Martinez-Partido's extension request, reversed and rendered judgment in the defendants' favor. ___ S.W.3d ___, ___. Although

Martinez-Partido did not expressly request remand in the court of appeals, he did argue that the trial court's finding was correct and should be affirmed. A party seeking affirmance need not request the lesser included relief of remand. *See* TEX. R. APP. P. 25.1(c). While we agree with Martinez-Partido that he is entitled to have the trial court decide whether he should receive an extension under section 74.351(c), we see no merit in his contention that the court of appeals lacked jurisdiction or that the defendants did not properly raise and preserve their objections. Because we conclude that Martinez-Partido is entitled to a remand, we vacate the court of appeals' judgment and remand the case to the trial court to consider whether to grant a thirty-day extension under section 74.351(c) in light of our decision in *Leland v. Brandal*, 257 S.W.3d 204 (Tex. 2008).

The petition is granted and, without hearing oral argument, the court of appeals' judgment is vacated, and the case is remanded to the trial court for further consideration. *See* TEX. R. APP. P. 59.1, 60.2(f).

OPINION DELIVERED: September 26, 2008

IN THE SUPREME COURT OF TEXAS

NO. 06-0653

IN RE MARY LOUISE WATKINS, M.D., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE BRISTER delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE MEDINA, and JUSTICE GREEN joined.

CHIEF JUSTICE JEFFERSON filed a concurring opinion, in which JUSTICE O'NEILL joined.

JUSTICE JOHNSON filed a concurring opinion.

JUSTICE WILLETT filed a concurring opinion.

Gary Jones filed this suit against Dr. Mary Louise Watkins, alleging she injured his eye in the course of treating a lesion on his face. Within 120 days of filing, he served what he purported to be an expert report.[1] Dr. Watkins objected that the report was merely a narrative of treatment, and

[1] *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a).

failed to address the standard of care, breach, or causation.[2] Nevertheless, the trial court granted a 30-day extension.[3] Jones filed a new report, which Dr. Watkins has not challenged.

Dr. Watkins then filed an interlocutory appeal and an original proceeding in the court of appeals asserting the trial court abused its discretion in granting an extension, and seeking an order of dismissal. The court of appeals dismissed the interlocutory appeal for want of jurisdiction and denied mandamus relief.[4] Dr. Watkins seeks review of only the latter ruling, asking that we order the case dismissed.

We hold we cannot. The separate writings join issue again today on the question whether the item served was a deficient report or no report at all. But here it does not matter. If no report was served, interlocutory appeal was available,[5] so mandamus is unnecessary. If the report was merely deficient, then an interlocutory appeal was prohibited,[6] and granting mandamus to review it would subvert the Legislature's limit on such review. Legislative findings balancing the costs and benefits of interlocutory review must work both ways: having treated them with respect when they

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[2] *See id.* § 74.351(r)(6); *Am. Transitional Care Ctrs. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001) (holding report must disclose the treatment challenged and the reasons claims are meritorious to constitute a good-faith effort).

[3] *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c); *see also id.* § 74.351(l) (providing motion to dismiss should be granted if "the report does not represent an objective good faith effort to comply with the definition of an expert report").

[4] 192 S.W.3d 672.

[5] *Badiga v. Lopez*, ___ S.W.3d ___, ___ (Tex. 2009).

[6] TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9); *see Ogletree v. Matthews*, 262 S.W.3d 316, 321 (Tex. 2007).

encourage interlocutory review,[7] we must treat them with the same respect when they discourage it.

Accordingly, the petition for mandamus is denied.[8]

_____

Scott Brister
Justice

OPINION DELIVERED: January 23, 2009

[7] *See In re McAllen Med. Ctr., Inc.*, ___ S.W.3d ___, ___ (Tex. 2008).

[8] TEX. R. APP. P. 52.8(d).

IN THE SUPREME COURT OF TEXAS

NO. 06-0653

IN RE MARY LOUISE WATKINS, M.D., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

CHIEF JUSTICE JEFFERSON, joined by JUSTICE O'NEILL, concurring.

I join the Court's opinion but write separately to elaborate upon the report that was served in this case. The report was written by a physician specializing in treatment of the eyes. He states that he treated Jones for injuries sustained after acetic acid was splashed into Jones's right eye during a procedure at Dr. Watkins's office for a facial lesion. The report notes that Jones suffered an epithelial defect and corneal stromal scar, and it discusses the "high likelihood of permanent scarring" Jones faced. It describes a course of treatment with the eye specialist (including a separate visit to a cornea specialist), and concludes that while Jones's situation was stable, he suffered a corneal scar in the right eye.

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: January 23, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0653

IN RE MARY LOUISE WATKINS, M.D., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE JOHNSON, concurring.

I withdraw my concurring opinion delivered January 23, 2009, and substitute the following in its place.

In regard to a health care liability claim,

> "Expert report" means a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6). The definition requires that for a document to qualify as a statutory expert report, it must demonstrate three things: (1) someone with relevant expertise ("'[e]xpert report' means a written report by an *expert*"), (2) has an opinion ("that provides a fair summary of the *expert's opinions*"), and (3) that the defendant was at fault for failing to meet applicable standards of care and thereby harmed the plaintiff ("regarding *applicable standards of care*, the manner in which the care rendered by the physician or health care provider *failed to meet the standards*, and the *causal relationship* between that failure and the injury, harm, or damages."). *Id.* (emphasis added); *see Rivenes v. Holden*, 257 S.W.3d 332, 334, 337 n.4, 339 (Tex.

App.—Houston [14th Dist.] 2008, pet. denied) (holding that a report not mentioning the appellant, appellant's failure to meet the applicable standard of care, or how this failure caused the plaintiff's injuries was not an expert report as to the appellant making it unnecessary to address the question of whether the report was a good faith effort to comply with section 74.351).

In *Ogletree v. Matthews*, 262 S.W.3d 316, 321 (Tex. 2007), the Court held that if a *deficient* report was served, an extension order—even when combined with a motion to dismiss—was not subject to interlocutory appeal. In *Ogletree*, the trial court determined that the report was deficient, denied defendant's motion to dismiss, and granted an extension to cure the report. *Id.* at 318. The report was not accompanied by a curriculum vitae and was allegedly deficient because its author was a radiologist and not qualified to render legally valid opinions about the standard of care applicable to the urologist defendant. *Id.* But there, the report demonstrated a physician, albeit one with different medical specialization from the defendant, held and expressed opinions that the defendant violated standards of care and caused damage to the plaintiff. The Court referred to the report as deficient. *Id.* at 321.

The document referred to in this case as an expert report is not a *deficient* statutory expert report; it is not a statutory expert report *at all*. While the document is authored by a physician, it does not show that as of the date of the report the author held any opinion as to (1) applicable standards of care for the treatment in question, (2) the manner in which care rendered by the defendant physician failed to meet the standards, or (3) the causal relationship between that failure and the harm claimed.

The report before us does not purport to have any relationship to a health care liability or malpractice case. As the trial judge noted, the document is no more than a status report. In it, the author gives the history taken from the plaintiff that acetic acid "intended for a facial lesion splashed into his right eye," sets out physical findings from examinations, reports the plaintiff's condition as stable, and gives recommendations for future treatment and a prognosis.

The Court said in *Ogletree* that "[i]f *no* report is served within the 120 day deadline provided by 74.351(a), the Legislature denied trial courts the discretion to deny motions to dismiss or grant extensions, and a trial court's refusal to dismiss may be immediately appealed." 262 S.W.3d at 319-20 (emphasis added); *see* TEX. CIV. PRAC. & REM. CODE § 74.351(b) (stating that a trial court "shall" dismiss a claim when expert reports are not served within 120 days); *id.* § 51.014(a)(9) (authorizing interlocutory appeal of the denial of a motion to dismiss filed under section 74.351(b)). The Court has followed through on our statement in *Ogletree* by holding that when no report is served, but a trial court denies a motion to dismiss and grants an extension to cure, an interlocutory appeal is available to challenge the denial of the motion to dismiss. *Badiga v. Lopez*, ___ S.W.3d ___, ___ (Tex. 2009).

The Court is not faced with a *deficient* report as was the case in *Ogletree*; the Court is faced with *no* statutory-compliant expert report as we were in *Badiga*. When no statutory-compliant expert report is filed, there is an adequate remedy by appeal. *Id.* at ___; *Ogletree*, 262 S.W.3d at 321. Because there was an adequate remedy by appeal, I join the Court's judgment in denying mandamus relief.

Phil Johnson
Justice

OPINION DELIVERED: May 1, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0653

IN RE MARY LOUISE WATKINS, M.D., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE WILLETT, concurring.

A few days ago we held in *Badiga v. Lopez* that interlocutory appeal is available if no expert report was served,[1] a holding we echo today: "If no report was served, interlocutory appeal was available, so mandamus is unnecessary."[2] I agree with JUSTICE JOHNSON that since the "report" in this case was "not a statutory expert report *at all*,"[3] Dr. Watkins was entitled to immediately appeal the trial court's refusal to dismiss the lawsuit against her.[4] She did precisely that in the court of appeals, which disclaimed jurisdiction over the interlocutory appeal,[5] but in this Court she seeks only mandamus relief. Given the startling frequency of "no report vs. deficient report" cases, I regret that Dr. Watkins' failure to appeal the court of appeals' erroneous dismissal prevents us from squarely

[1] __ S.W.3d __, __ (Tex. 2009).

[2] __ S.W.3d at __ (footnote omitted).

[3] How else do you describe something that omits all three required statutory elements? Three strikes usually sends you to the dugout, not to first base.

[4] __ S.W.3d at __ (Johnson, J., concurring).

[5] 192 S.W.3d 672, 674 ("We conclude that a petition for writ of mandamus is the appropriate means to address this complaint; therefore, we dismiss the interlocutory appeal . . . for want of jurisdiction.").

(and finally) deciding whether this is a deficient-report case (where an extension is discretionary) or a no-report case (where dismissal is mandatory). I believe it is the latter.

The issue is at once recurring and elusive. For the third time in barely a year we encounter an issue that we cannot reach: whether any health-related document, no matter how irrelevant its content, suffices to warrant an unreviewable thirty-day extension. The issue arose originally, but only indirectly, in *Ogletree v. Matthews*, when the Court noted in passing that medical-expert reports are either absent or deficient,[6] prompting me to stress in a separate concurrence that "the Court's classification of all purported expert reports as either absent or deficient may prove inapposite in rare cases—where the claimed 'report' is actually no such thing—and inadvertently expand the availability of the thirty-day extension provided by section 74.351(c) beyond what the Legislature intended."[7] Which is to say, "there exists a third, albeit rare, category: a document so utterly lacking that, no matter how charitably viewed, it simply cannot be deemed an 'expert report' at all, even a deficient one."[8] So in *Ogletree*, I expressed hope (naively) that "[a] grossly substandard filing pitched as a bona fide report" under section 74.351 would "be a rare bird in Texas legal practice."[9]

A few months later in *Lewis v. Funderburk*, the Court confronted "an actual sighting of this rare bird, a species that in my view merits extinction, not conservation."[10] In that case, the purported

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[6] 262 S.W.3d 316, 320 (Tex. 2007).

[7] *Id.* at 322 (Willett, J., concurring).

[8] *Id.* at 323.

[9] *Id.* at 324.

[10] 253 S.W.3d 204, 209 (Tex. 2008) (Willett, J., concurring).

report was merely (and irrefutably) a "thank-you-for-your-referral letter" from one doctor to another—a letter that never accused anyone of doing anything wrong.[11] However, the defendant waived the "no report" issue by failing to timely appeal, thus foreclosing a merits-based challenge.[12] Such rare-bird sightings, it turns out, are becoming commonplace.[13]

Unfortunately, as noted above, today's case has a procedural hurdle that prevents us from reaching the marquee "no report vs. deficient report" issue. In the court of appeals, Dr. Watkins filed a "joint petition for writ of mandamus and interlocutory appeal alleging that the trial court abused its discretion when it denied her motion to dismiss."[14] The court of appeals dismissed the interlocutory appeal for want of jurisdiction and considered only the mandamus action, calling it "the appropriate means to address this complaint."[15] As the Court points out, Dr. Watkins seeks review only of the denial of mandamus relief, not the dismissal of her interlocutory appeal.

Accordingly, the only question here is whether we should review the order by mandamus, which, as the Court notes, is unnecessary if no report was served because the statute explicitly authorizes interlocutory appeal in such cases. The most interesting issue, procedurally unreachable,

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[11] *Id.* at 206 (majority opinion).

[12] *Id.* at 208.

[13] Absent appellate enforcement of chapter 74's mandatory-dismissal provision in no-report cases, such sightings will doubtless proliferate. If trial courts grant extensions even in no-report cases when dismissal is statutorily required, thus lowering the "threshold over which a claimant must proceed to continue a lawsuit," *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005) (per curiam), chapter 74 defendants may soon identify with the seaside residents of Bodega Bay, besieged by avian attacks. THE BIRDS (Universal Pictures 1963).

[14] 192 S.W.3d 672, 673.

[15] *Id.* at 674.

is whether Jones served a deficient report or, as I believe, no report at all. The trial court's assessment of Jones's proffered "report" is to the point:

> I don't think it complies with the statute . . . . I don't feel that it does meet the standard. . . . It needs to be in compliance with the statute . . . . [A]ll that [the document] is saying is reciting when [he] went to the doctor, what the doctor did, then [he] got laser treatment, and then [his] vision improved, but, you know, it wasn't back to where it was. It's just a narrative. It's not an expert's report as to the standard of care as required by the statute at all, not even close.

We have held that something cannot constitute "an objective good faith effort"[16] to comply with the statutory definition "if it omits any of the statutory requirements."[17] Here, the "report" omits *all three* (four if you count the missing curriculum vitae;[18] five if you count the absence of any expert *opinion*) and, as JUSTICE JOHNSON puts it, "does not purport to have any relationship to a malpractice case."[19] Surely, a medical-expert report must at some point actually accuse someone of committing malpractice. This is no more an expert report than my son's tricycle is a Harley.

On this point, Jones's briefing is notable, casting his case as so cut-and-dry that the common-law *res ipsa loquitor* doctrine applies, thus relieving him of the duty to serve an expert report under section 74.351. This argument likely explains the skimpiness of Jones's proffered "report," which his own submission to the trial court declared is "provided although not required" because the alleged malpractice "is plainly within the common knowledge of laypersons" and, he continued,

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[16] TEX. CIV. PRAC. & REM. CODE § 74.351(*l*).

[17] *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001).

[18] *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a).

[19] __ S.W.3d at __ (Johnson, J., concurring).

"perhaps as simple as a medical negligence case could be." Jones notes that when he submitted the one-page narrative, the law was "rapidly changing, and is in fact still very unsettled on the question of whether a *res ipsa loquitor* medical negligence case requires an expert report." Although we held in *Murphy v. Russell* that the Legislature's expert-report requirement applies to all health care liability claims, however cast,[20] Jones points out that *Murphy* postdated the filing of his "report" by three months. In addition, Jones stresses that a case decided shortly before he submitted his "report" held that *res ipsa loquitor* medical-negligence claims "fall outside the spectrum of cases requiring expert reports."[21] Maybe this is why Jones did not replace or strengthen the submission after Dr. Watkins filed objections, even though thirty-nine days remained of the 120-day window, after which Dr. Watkins filed her motion to dismiss. Jones argues that despite our *Murphy* decision (which was not itself a *res ipsa loquitor* case) there persists a "yet remaining uncertainty of the expert witness requirement in *res ipsa loquitor* medical negligence cases."[22]

Nonetheless, despite the trial court's own "not even close" determination, despite its express finding that the "report" was "just a narrative" and not an expert report, and despite a statute that mandates dismissal when no report has been served, the trial court granted a thirty-day extension. That is, something lacking every statutory element was nonetheless deemed to satisfy the statutory

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[20] 167 S.W.3d 835, 839 (Tex. 2005) (per curiam).

[21] *Wade v. Methodist Hosp.*, No. 01-02-01272-CV, 2004 WL 2749565, at *8 (Tex. App.—Houston [1st Dist.] Dec. 2, 2004, no pet.) (mem. op.).

[22] Given its disposition, the Court does not address this argument, though as a general rule, *res ipsa loquitor* is inapplicable in medical-malpractice cases. *Palacios*, 46 S.W.3d at 880 (citing the predecessor to section 74.201, which strictly limits the doctrine "to the limited classes of cases to which it applied as of August 29, 1977").

criteria. As we held in *Badiga*, section 51.014(a)(9) authorizes an interlocutory appeal from a dismissal-denial when no report has been filed.[23] The dispositive question is whether a narrative that fails to include any expert opinion on the standard of care, breach, or causation is merely deficient and thus eligible for an unreviewable extension or tantamount to no report at all and thus ineligible for *any* extension. For the reasons stated above, I believe this is a no-report case like *Badiga*, meaning the court of appeals erred in dismissing Dr. Watkins' interlocutory appeal.

Had Dr. Watkins challenged the court of appeals' dismissal of her interlocutory appeal, this case, like *Badiga*, would have presented the issue we expressly reserved in *Ogletree*: whether there can be interlocutory review of a denied dismissal motion when there is no report as opposed to (and note this locution) "a report *that implicated a provider's conduct* but was somehow deficient."[24] Jones's report implicated *nobody's* conduct and, in my view, "is no more a report than a doctor-signed prescription or Christmas card would be."[25] Filing nothing would have been qualitatively no worse. Calling this a report, even a deficient one, is like calling something a Wright Brothers biography that leaves out Wilbur and Orville. I see little meaningful difference between filing nothing and filing something that amounts to nothing; both undermine what the statute underscores: claims lacking timely support must be dismissed.

The statute by its terms denies Jones a post-deadline opportunity to supply the elements mandated by section 74.351(c). Jones had such an opportunity; he had exactly 120 days from the

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[23] *Badiga v. Lopez*, __ S.W.3d __, __ (Tex. 2009).

[24] *Ogletree v. Matthews*, 262 S.W.3d 316, 320 n.2 (Tex. 2007) (emphasis added).

[25] *Lewis v. Funderburk*, 253 S.W.3d 204, 211 (Tex. 2008) (Willett, J., concurring).

time he filed his lawsuit,[26] a clock he alone controlled. In fact, Jones's opportunity was especially golden, one that few claimants enjoy. Dr. Watkins filed *pre-deadline* objections to the proffered report, giving Jones thirty-nine days to supplement or replace it before the 120-day period expired. He did neither.

If Texas courts adopt a relaxed approach to the mandatory-dismissal statute, rushed claimants' lawyers facing an imminent 120-day expert-report deadline can rifle through the casefile and submit the first provider-generated document they find—or just copy the entire medical file and stamp "report" atop it—confident that if they can coax an extension from the trial court, it will be bulletproof, and they can procure an actual report later. In fact, the court of appeals' decision is already being cited as precedent for the notion that bare-bones material like this, however devoid of the statutory elements, can avert dismissal.[27] In my view, courts (both trial and appellate) should not absolve the omission of the Legislature's prescribed elements, giving a pass to something that by its own content never purports to be a report, thus letting claimants argue "heads I win" (no interlocutory appeal) and "tails you lose" (no mandamus relief).

I concede that courts, this one included, cannot decree with micrometer-like precision when something falls from deficient to so-deficient-it's-absent. Each case has its own distinct facts, but judges are not incapable of applying indistinct lines, or at minimum prescribing the outer ones. One bright-line marker seems beyond reasonable objection: when a "report" contains none of the statutorily prescribed contents. There must exist an agreed outer fringe, and the superficial document

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[26] *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a).

[27] *In re Padilla,* 242 S.W.3d 549, 552 (Tex. App.—El Paso 2007, orig. proceeding).

in this case lies beyond it. The Legislature, aiming to weed out unsupported and inadequately investigated claims, enacted a rigid statute: missed deadlines mean dismissed claims. If a document bears zero resemblance to the statute—containing nothing that makes a report a report—it cannot receive an extension.

I regret we are unable (again) to resolve this issue once and for all. It is no small matter to short-circuit the Legislature's deadlines for bringing medical-negligence claims by declaring unreviewable a trial court's decision to judicially amend the statute and excuse any medical-related piece of paper, no matter how untethered to chapter 74's criteria. Courts should not adopt a "no harm, no foul" approach to statutory violations. Denying interlocutory relief in such cases invites additional flouting of the Legislature's rules. I remain where I have been: If a report is missing, not just amiss, courts are remiss if they do not dismiss.[28]

All that said, because I believe Dr. Watkins was entitled to bring an interlocutory appeal, I agree with the Court that she cannot seek mandamus relief.

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Don R. Willett
Justice

OPINION DELIVERED: January 23, 2009

[28] *Funderburk*, 253 S.W.3d at 210 (Willett, J., concurring).

IN THE SUPREME COURT OF TEXAS

NO. 06-0778

THE CITY OF EL PASO, ET AL., PETITIONERS,

v.

LILLI M. HEINRICH, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

Argued November 13, 2007

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

"Sovereign immunity protects the State from lawsuits for money damages." *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). But "an action to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars." *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). Today we examine the intersection of these two rules. We conclude that while governmental immunity generally bars suits for retrospective monetary relief, it does not preclude prospective injunctive remedies in official-capacity suits against government actors who violate statutory or constitutional provisions. We affirm in part and reverse in part the court of appeals' judgment and remand this case to the trial court for further proceedings.

I
Background

Lilli M. Heinrich is the widow of Charles D. Heinrich, a member of the El Paso Police Department who died in August 1985 from wounds received in the line of duty. Shortly after Charles died, the El Paso Firemen & Policemen's Pension Fund began paying Heinrich monthly survivor benefits equal to 100% of the monthly pension her husband had earned.[1] The parties contest how those payments were apportioned. The City of El Paso, the El Paso Firemen & Policemen's Pension Fund ("the Fund"), the Fund's Board of Trustees ("the Board"), and the individual board members contend that the Fund's bylaws assigned only two-thirds of this payment to Heinrich, the other third being paid to her on behalf of her then-minor child. Heinrich, on the other hand, contends that, notwithstanding the bylaws, the Board voted to award her 100% of Charles' pension benefits in her own right, as more fully explained below.

Accordingly, when in 2002 the Board reduced the monthly payments to Heinrich by one-third after Heinrich's son turned 23, Heinrich filed this lawsuit, alleging that petitioners violated the statute governing the Fund by reducing her benefits retroactively. Heinrich sought both declaratory relief and an injunction restoring Heinrich to the "status quo from [the] date of the illegal act." Petitioners filed pleas to the jurisdiction asserting that governmental immunity shielded the governmental entities from suit and that the individual board members enjoyed official immunity. The trial court denied the pleas, and petitioners filed an interlocutory appeal.

[1] The City withheld a percentage of Charles's compensation (and that of other officers) to fund the plan.

The court of appeals affirmed, holding that "a party may bring a suit seeking declaratory relief against state officials who allegedly act without legal or statutory authority and such suit is not a 'suit against the state.'" 198 S.W.3d 400, 406. The court acknowledged that, if successful, Heinrich would be entitled to past and future benefits, but held that Heinrich's suit made a valid claim for her vested right to pension benefits rather than money damages. *Id.* at 407. We granted the petition for review in order to clarify the types of relief that may be sought without legislative consent.[2] 50 Tex. Sup. Ct. J. 910 (June 22, 2007).

II
Discussion

A
Ultra Vires Claims

Petitioners contend that although Heinrich requests declaratory and equitable relief, her claim is essentially for past and future money damages, and that governmental immunity therefore bars her suit. As we said in *Reata Construction Corp. v. City of Dallas*, "'[s]overeign immunity protects the State from lawsuits for money damages.' Political subdivisions of the state . . . are entitled to such immunity—referred to as governmental immunity—unless it has been waived." *Reata*, 197 S.W.3d 371, 374 (Tex. 2006) (citations omitted); *see also Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). We have said repeatedly that the Legislature is in the best position to waive or abrogate immunity, "because this allows the Legislature to protect its policymaking function." *IT-Davy*, 74 S.W.3d at 854 (citations omitted) (collecting cases).

[2] The State of Texas and the Texas State Association of Fire Fighters submitted amicus curiae briefs.

Heinrich concedes that the City, Fund, and Board enjoy governmental immunity from suit, but argues that because her claim alleges a reduction in her benefits that was unauthorized by law, it is not barred. This is so, she says, because "[p]rivate parties may seek declaratory relief against state officials who allegedly act without legal or statutory authority." *Id.* at 855 (citing *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432 (Tex. 1994) (suit challenging state officials' construction of compulsory school-attendance law)); *see also Fed. Sign.*, 951 S.W.2d at 404 ("A private litigant does not need legislative permission to sue the State for a state official's violations of state law.") (citations omitted)). We explained the rationale behind this exception to governmental immunity in *Federal Sign*:

> A state official's illegal or unauthorized actions are not acts of the State. Accordingly, an action to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars. In other words, we distinguish suits to determine a party's rights against the State from suits seeking damages. A party can maintain a suit to determine its rights without legislative permission.

Fed. Sign, 951 S.W.2d at 404 (citations omitted).

On this basis, Heinrich argues that rather than money damages, she seeks only equitable and injunctive relief under the Uniform Declaratory Judgment Act. That Act is a remedial statute designed "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." TEX. CIV. PRAC. & REM. CODE § 37.002(b). It provides: "A person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the . . . statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal

relations thereunder." *Id.* § 37.004(a). The Act, however, does not enlarge a trial court's jurisdiction, and a litigant's request for declaratory relief does not alter a suit's underlying nature.[3] *IT-Davy*, 74 S.W.3d at 855; *State v. Morales*, 869 S.W.2d 941, 947 (Tex. 1994). It is well settled that "private parties cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages . . . as a declaratory-judgment claim." *IT-Davy*, 74 S.W.3d at 856 (citing *W. D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 842 (Tex. 1958)).

Heinrich relies on *State v. Epperson*, 42 S.W.2d 228, 231 (Tex. 1931), in which we held that a suit against a tax collector for the recovery of money (alleged to be due under a contract and withheld unlawfully) was not barred by immunity. There, we noted that the tax collector had no discretion under the governing law to deny payment on Epperson's contract:

> By legislative act the state has constituted the tax collector of the county its agent to receive delinquent taxes collected under such contract, and it is the duty of such officer to pay all fees and commissions lawfully incurred in the collection thereof to the various parties who may be entitled thereto. Under such circumstances, the tax collector's duty with reference to money belonging to persons who are entitled under valid contracts to receive the same from him is purely ministerial. If he withholds the payment of such

[3] We recently dismissed a claim for declaratory and injunctive relief against the Houston Municipal Employees Pension System in which the "plaintiffs . . . requested that the trial court issue an injunction directing the pension board to comply with the trial court's interpretation of Article 6243h," the governing statute. *Houston Mun. Employees Pension Sys. v. Ferrell*, 248 S.W.3d 151, 158-59 (Tex. 2007). Under Article 6243h, the Houston board's "interpretation of [the] Act [is] final and binding on any interested party," TEX. REV. CIV. STAT. art. 6243h § 2(y), and we held that this language precluded judicial review. *Ferrell*, 248 S.W.3d at 158 ("There is no right to judicial review of an administrative order unless a statute explicitly provides that right or the order violates a constitutional right.") (citations omitted). Here, however, Article 6243b contains no language similar to that in 6243h granting the Board exclusive authority to interpret the act, *see* TEX. REV. CIV. STAT. art. 6243b, and, in any case, Heinrich does not challenge petitioners' interpretation of 6243b, but rather alleges that they have violated that statute under an undisputed reading thereof. *See Ferrell*, 248 S.W.3d at 160 (Brister, J., concurring) ("A different case might be presented if the plaintiffs alleged the board was clearly violating some provision of the statute. Article 6243h gives the pension board complete discretion to interpret the statute, but not to violate it.").

> funds when a person is lawfully entitled to receive same, he has failed to discharge a duty imposed upon him by law and his act is a wrongful one.

Epperson, 42 S.W.2d at 231. We therefore concluded that although the trial court would "not possess jurisdiction to enforce the specific performance of the contract relied upon by Epperson or to award damages for any breach of said contract," Epperson's suit was "simply an action to compel an officer, as agent of the state, to pay over funds to a party who claims to be lawfully entitled thereto." *Id.*

Thus, the rule arising out of *Epperson* is that while suits for contract damages against the state are generally barred by immunity, where a statute or the constitution requires that government contracts be made or performed in a certain way, leaving no room for discretion, a suit alleging a government official's violation of that law is not barred, even though it necessarily involves a contract. We explained this distinction in *W. D. Haden Co. v. Dodgen*:

> [A]lthough [*Epperson*] ar[ose] out of [a] contract transaction . . .[it] appears to fall into the class of cases projected by *United States v. Lee*, [106 U.S. 196 (1882)].[4] In that class of cases it is held that suits for property alleged to be unlawfully or wrongfully withheld from the rightful owner by officers of the state are not suits against the sovereign itself and may be maintained without permission of the sovereign.

308 S.W.2d 838, 841 (Tex. 1958). In other words, where statutory or constitutional provisions create an entitlement to payment, suits seeking to require state officers to comply with the law are not barred by immunity merely because they compel the state to make those payments. This rule is generally consistent with the letter and spirit of our later caselaw. In *IT-Davy*, we distinguished

[4] The *Dodgen* Court expressly declined to limit *Epperson* based on changes in federal immunity jurisprudence. *Dodgen*, 308 S.W.2d at 843.

permissible declaratory-judgment suits against state officials "allegedly act[ing] without legal or statutory authority" from those barred by immunity: "In contrast [to suits not implicating sovereign immunity], declaratory-judgment suits against state officials seeking to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities are suits against the State. *That is because such suits attempt to control state action by imposing liability on the State*." 74 S.W.3d at 855–56 (citations omitted) (emphasis added).

From this rationale, it is clear that suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money. To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act. *Compare Epperson,* 42 S.W.2d at 231 ("the tax collector's duty . . . is purely ministerial") *with Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 706 (Tex. 2003) (newly elected commissioners court immune from suit where it "acted within its discretion to protect the perceived interests of the public" in rejecting contract approved by predecessor), *and Dodgen,* 308 S.W.2d at 842 (suit seeking "enforcement of contract rights" barred by immunity in the absence of any "statutory provision governing or limiting the manner of sale"). Thus, *ultra vires* suits do not attempt to exert control over the state—they attempt to reassert the control *of* the state.[5] Stated another way, these suits do not seek to alter government policy but rather to enforce existing policy.

[5] Because the policy embodied in the law extends only as far the amount wrongfully withheld, claims for amounts beyond those alleged to be due under the relevant law, such as consequential damages, remain barred by immunity.

Further, while "[a] lack of immunity may hamper governmental functions by requiring tax resources to be used for defending lawsuits . . . rather than using those resources for their intended purposes," *Reata Constr. Corp.*, 197 S.W.3d at 375, this reasoning has not been extended to *ultra vires* suits, *see Fed. Sign*, 951 S.W.2d at 404 (citing *Dir. of the Dep't of Agric. & Env't v. Printing Indus. Ass'n of Tex.*, 600 S.W.2d 264, 265-66 (Tex. 1980) (legislative consent not required for suit for injunctive relief against state agency to halt unauthorized printing equipment and printing activities), *Tex. Highway Comm'n v. Tex. Ass'n of Steel Imps., Inc.*, 372 S.W.2d 525, 530 (Tex. 1963) (legislative consent not required for declaratory judgment suit against Highway Commission to determine the parties' rights), and *Cobb v. Harrington*, 190 S.W.2d 709, 712 (Tex. 1945) (legislative consent not required for declaratory judgment suit against State Comptroller to determine parties' rights under tax statute)). Further, extending immunity to officials using state resources in violation of the law would not be an efficient way of ensuring those resources are spent as intended. This is particularly true since, as discussed below, suits that lack merit may be speedily disposed of by a plea to the jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

B
Proper Parties

Nonetheless, as a technical matter, the governmental entities themselves—as opposed to their officers in their official capacity—remain immune from suit. We have been less than clear regarding

the permissible use of a declaratory remedy in this type of *ultra vires* suit.[6] Must it be brought directly against the state or its subdivisions? Or must it be brought against the relevant government actors in their official capacity? *Compare Fed. Sign*, 951 S.W.2d at 404 ("A private litigant does not need legislative permission to sue the State for a state official's violations of state law.") (citations omitted), *with IT-Davy*, 74 S.W.3d at 855 ("Private parties may seek declaratory relief against state officials who allegedly act without legal or statutory authority.") (citations omitted). It seems to us, however, that because the rule that *ultra vires* suits are not "suit[s] against the State within the rule of immunity of the State from suit" derives from the premise that the "acts of officials which are not lawfully authorized are not acts of the State," *Cobb*, 190 S.W.2d at 712, it follows that these suits cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity.[7] This is true even though the suit is, for all practical purposes, against the state. *See Brandon v. Holt*, 469 U.S. 464, 471-72 (1985) ("[A] judgment

[6] For claims challenging the validity of ordinances or statutes, however, the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity. TEX. CIV. PRAC. & REM. CODE § 37.006(b) ("In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard."); *see Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697-698 (Tex. 2003) ("[I]f the Legislature requires that the State be joined in a lawsuit for which immunity would otherwise attach, the Legislature has intentionally waived the State's sovereign immunity."); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) ("The DJA expressly provides that persons may challenge ordinances or statutes, and that governmental entities must be joined or notified. Governmental entities joined as parties may be bound by a court's declaration on their ordinances or statutes. The Act thus contemplates that governmental entities may be—indeed, must be—joined in suits to construe their legislative pronouncements."). Here, Heinrich is not challenging the validity of the bylaws or the governing statute, but rather petitioners' actions under them.

[7] State officials may, of course, be sued in both their official and individual capacities. Judgments against state officials in their individual capacities will not bind the state. *See Alden v. Maine*, 527 U.S. 706, 757 (1999) ("Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.").

against a public servant 'in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond."); *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007) ("It is fundamental that a suit against a state official is merely 'another way of pleading an action against the entity of which [the official] is an agent.'") (quoting *Kentucky v. Graham,* 473 U.S. 159, 165 (1985)).

C
Permissible Relief

But the *ultra vires* rule is subject to important qualifications. Even if such a claim may be brought, the remedy may implicate immunity. *Cf.* 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3524.3 (under federal immunity law, an *ultra vires* suit may be brought but "if the defendant is a state officer, sovereign immunity bars the recovery of damages from the state treasury in a private suit"). This is a curious situation: the basis for the *ultra vires* rule is that a government official is not following the law, so that immunity is not implicated, but because the suit is, for all practical purposes, against the state, its remedies must be limited. *Cf. Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982) ("There is a well-recognized irony in *Ex parte Young*; unconstitutional conduct by a state officer may be 'state action' for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh."). We recently held that retired firefighters could not pursue a declaratory judgment action against the City to recover amounts allegedly previously withheld from lump-sum termination payments in violation of the Local Government Code. *City of Houston v. Williams*, 216 S.W.3d 827, 828 (Tex 2007). Without discussing *Epperson*, we applied the rule from *IT-Davy* and *Dodgen* that

the declaratory judgment act cannot be used to circumvent immunity, noting that "[t]he only injury the retired firefighters allege has already occurred, leaving them with only one plausible remedy—an award of money damages." *Id.* at 829. *Williams* stands for the proposition, then, that retrospective monetary claims are generally barred by immunity.

We also stated that "in every suit against a governmental entity for money damages, a court must first determine the parties' contract or statutory rights; if the sole purpose of such a declaration is to obtain a money judgment, immunity is not waived." *Id.* This does not mean, however, that a judgment that involves the payment of money necessarily implicates immunity. Drawing the line at monetary relief is itself problematic, as "[i]t does not take much lawyerly inventiveness to convert a claim for payment of a past due sum (damages) into a prayer for an injunction against refusing to pay the sum, or for a declaration that the sum must be paid, or for an order reversing the agency's decision not to pay." *Bowen v. Massachusetts*, 487 U.S. 879, 915-16 (1988) (Scalia, J., dissenting) (discussing section 702 of the Administrative Procedure Act, which waives sovereign immunity in actions against federal agencies as long as the plaintiff seeks "relief other than money damages") (quoting 5 U.S.C. 702 (2000)).

Parsing categories of permissible relief in cases implicating immunity inevitably involves compromise. *See, e.g.,* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 482 (3d ed. 2002) ("The law of remedies against governments and government officials is a vast and complex body of doctrine, full of technical distinctions, fictional explanations, and contested compromises."). The United States Supreme Court has held that, under federal immunity law, claims for prospective injunctive relief are permissible, while claims for retroactive relief are not, as such an award is "in

practical effect indistinguishable in many aspects from an award of damages against the State." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). This rule originated in *Ex parte Young*, 209 U.S. 123 (1908), in which the Court held that an action to restrain a government official from unconstitutional conduct was not barred by immunity. Later, in *Edelman*, the Court recognized that the distinction between prospective and retrospective relief "will not in many instances be that between day and night" and cautioned that a fiscal impact on the State did not necessarily implicate immunity:

> The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham v. Richardson*, 403 U.S. 365 (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing. But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra*.

Id. at 667-68 (footnote omitted). The retroactive portion of the *Edelman* district court's decree was different, however, as "[i]t require[d] payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard." *Id*. at 668.

While "[t]he line between prospective and retrospective remedies is neither self-evident nor self-executing," LAYCOCK, MODERN AMERICAN REMEDIES at 483, the Supreme Court shed further light on the issue in *Milliken v. Bradley*, 433 U.S. 267, 269 (1977), a case involving desegregation of the Detroit school system. The Supreme Court upheld a trial court's order requiring state officials to spend $6 million on education to remedy effects of segregation. *Milliken*, 433 U.S. at 290. The Court held that this relief was permissible under *Edelman*: "That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system." *Id.*; *see also* 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3524.3 (noting that, under *Edelman*, "[i]njunctions requiring expenditure of state funds are acceptable, so long as the order is prospective" but "[r]etroactive relief, including compensatory damages from state funds are barred").

This compromise between prospective and retroactive relief, while imperfect, best balances the government's immunity with the public's right to redress in cases involving *ultra vires* actions, and this distinction "appear[s] in the immunity of the United States, and in the law of most states' immunity from state-law claims." LAYCOCK, MODERN AMERICAN REMEDIES at 482. It also comports with the modern justification for immunity: protecting the public fisc. *Tooke v. City of Mexia*, 197 S.W.3d 325, 331-32 (Tex. 2006) (observing that immunity "shield[s] the public from the costs and consequences of improvident actions of their governments"); *Federal Sign*, 951 S.W.2d at 417 (Enoch, J., dissenting) (noting that suits against the state would deplete treasury resources and tax funds necessary to operate the government). Moreover, it is generally consistent with the way

our courts of appeals have interpreted *Williams*. *See, e.g., City of Round Rock v. Whiteaker*, 241 S.W.3d 609, 633-34 (Tex. App.—Austin 2007, pet. denied) (approving, under *Williams*, dichotomy between declaratory and injunctive claims regarding past statutory violations and those seeking only to compel the city to follow the law in the future; the government was immune from the former but not the latter); *Bell v. City of Grand Prairie*, 221 S.W.3d 317, 325 (Tex. App.—Dallas 2007, no pet.) (holding that, under *Williams*, firefighters' requested declaration regarding past statutory violation was barred, but to the extent the requested declaration concerned future violations, the claim was not barred, providing the firefighters did not seek an award of money damages). And finally, it ensures that statutes specifically directing payment, like any other statute, can be judicially enforced going forward.

This approach is inconsistent with *Epperson*, however, in which we held that, if successful, Epperson would be entitled to "the sum of $93,000 which belonged to him as his commission for services rendered." *Epperson*, 42 S.W.2d at 229. In that respect, *Epperson* conflicts with *Williams*, in which we implied that prospective remedies might not be barred even though retrospective monetary ones were. *Williams*, 216 S.W.3d at 829 (noting that "[t]he only injury the retired firefighters allege has already occurred, leaving them with only one plausible remedy—an award of money damages" and that "they assert no right to payments from the City in the future"). The best way to resolve this conflict is to follow the rule, outlined above, that a claimant who successfully proves an *ultra vires* claim is entitled to prospective injunctive relief, as measured from the date of injunction. *Cf. Edelman*, 415 U.S. at 669 (using entry of injunction to distinguish retrospective from

prospective relief). Thus, while the *ultra vires* rule remains the law, *see Federal Sign*, 951 S.W.2d at 404, *Epperson*'s retrospective remedy does not.

But this rule is not absolute. For example, a claimant who successfully proves a takings claim would be entitled to compensation, and the claim would not be barred by immunity even though the judgment would require the government to pay money for property previously taken. *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001) (noting that governmental immunity "does not shield the State from an action for compensation under the takings clause"); *cf.* WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3524.3 ("If the state cannot invoke its immunity, retroactive relief against it is allowed.").

Heinrich has not alleged a takings claim. In the trial court, Heinrich alleged only that "a suit for equitable relief against a governmental entity for violation of a provision of the Texas Bill of Rights is excepted from . . . sovereign immunity under Texas Constitution article [I], section 29" without specifying which provision of the Bill of Rights had been violated. In the court of appeals, however, she clarified that her constitutional complaint was a "violation of Article 1, section 16." TEX. CONST. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."). Petitioners contend that she waived this argument by failing to raise it in the trial court. *See Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001) ("'[A]s a rule, a claim, including a constitutional claim, must have been asserted in the trial court in order to be raised on appeal.'") (citations omitted). Even if Heinrich's constitutional argument was properly presented, however, it has no merit. Heinrich does not challenge the governing statute or bylaws, but rather the Board's actions under those

provisions. Indeed, Heinrich argues that "[t]he Pension Board and its individual members acted outside their authority and in violation of the Texas Constitution when they reduced [Heinrich's] benefits." Because Heinrich does not allege that any law sanctioned the retroactive reduction in her benefits, her constitutional argument fails.[8]

As we have repeatedly noted, the Legislature is best positioned to waive immunity, and it can authorize retrospective relief if appropriate. *See, e.g.,* TEX. LOCAL GOV'T CODE § 180.006 (enacted after *Williams* and waiving immunity for firefighter and police officer claims for back pay and civil penalties). There are cases in which prospective relief is inadequate to make the plaintiff whole, but the contours of the appropriate remedy must be determined by the Legislature.

Thus, Heinrich's claims for prospective relief may be brought only against the appropriate officials in their official capacity, and her statutory claims for future benefits against the City, Fund, and Board must be dismissed.[9] Heinrich's pleadings are unclear as to the capacity or capacities in which she has sued the individual Board members. The United States Supreme Court has observed that, "[i]n many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *see also United States ex rel. Adrian v. Regents of Univ. of Cal.,* 363 F.3d 398, 403 (5th Cir. 2004). In these cases, "'[t]he course of proceedings' in such cases typically will indicate the nature of the liability

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[8] Further, although the parties do not address it, we note that the reduction in Heinrich's survivor payments occurred before the effective date of article XVI, section 66 of the Texas Constitution ("Protected Benefits Under Certain Public Retirement Systems"), and we do not consider whether it would otherwise apply in this case.

[9] While this case was pending on interlocutory appeal, the Legislature enacted 271.151-.160 of the Local Government Code, waiving immunity from suit for certain claims against cities and other governmental entities. Heinrich does not argue that her claims fall within these provisions, and we express no opinion on that subject.

sought to be imposed." *Graham*, 473 U.S. at 167 n.14 (citations omitted). Here, the injunctive relief Heinrich seeks would necessarily come from the Board, rather than the individual members. Considering "the nature of the liability sought to be imposed," *id.*, and construing Heinrich's pleadings liberally, *Miranda*, 133 S.W.3d at 226, we conclude that she has sued the Board members in their official capacities, and her claims are therefore not automatically barred by immunity.[10] To the extent that the court of appeals held that the suit is against the Board members in their individual capacities, we reverse that portion of its judgment.

D
Evidence That Petitioners Acted *Ultra Vires*

In their second issue, petitioners argue that governmental immunity prohibits Heinrich's suit because Heinrich has offered no evidence that the reduction in her benefits was illegal or unauthorized. We conclude, however, that Heinrich has presented evidence raising a fact question on this issue.

"When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent." *Miranda*, 133 S.W.3d at 226 (citations omitted). Here, Heinrich alleges that petitioners violated article 6243b, section 10A(b) of the Texas Revised Civil Statutes when they reduced her benefits. Thus, if

[10] Because the mayor of El Paso, who is also a Board member, was named as a defendant in his official capacity, Heinrich may seek liability from the City through that officer, although her claims against the City itself must be dismissed.

Heinrich's allegations are true, her suit would fall within the *ultra vires* exception to governmental immunity as described above.

This is not the end of our analysis, however: "if a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do." *Id.* at 227. If there is no question of fact as to the jurisdictional issue, the trial court must rule on the plea to the jurisdiction as a matter of law. *Id.* at 228. If, however, the jurisdictional evidence creates a fact question, then the trial court cannot grant the plea to the jurisdiction, and the issue must be resolved by the fact finder. *Id.* at 227–28. This standard mirrors our review of summary judgments, and we therefore take as true all evidence favorable to Heinrich, indulging every reasonable inference and resolving any doubts in her favor. *Id.* at 228.

Petitioners argue that, in accordance with the governing bylaws, the payments to Heinrich were reduced when her son ceased to be eligible to receive them, and asserts that the statutory provisions Heinrich relies upon are "inapplicable." Conversely, Heinrich alleges that she was awarded 100% of her husband's pension in accordance with these provisions, and that petitioners' subsequent retroactive reduction of her benefits violated, among others, article 6243b, section 10A(a)(1) of the Texas Revised Civil Statutes. The relevant portions of article 6243b, section 10A provide:

> (a) Notwithstanding anything to the contrary in other parts of this Act and subject to Subsections (b) and (c) of this section, the Board of Trustees may, by majority vote of the whole board, make from time to time one or more of the following changes, or modifications:

> (1) modify or change prospectively or retroactively in any manner whatsoever any of the benefits provided by this Act, except that *any retroactive change or modification shall only increase pensions or benefits*;
>
> ***
>
> (b) None of the changes made under Subsection (a) of this section may be made unless all of the following conditions are sequentially complied with:
>
> (1) the change must be approved by a qualified actuary selected by a four-fifths vote of the Board; the actuary's approval must be based on an actuarial finding that the change is supported by the existing funding status of the fund; the actuary, if an individual, must be a Fellow of the Society of Actuaries or a Fellow of the Conference of Actuaries in Public Practice or a Member of the American Academy of Actuaries; the actuary, if an actuarial consulting firm, must be established in the business of providing actuarial consulting services to pension plans and have experienced personnel able to provide the requested services; the findings upon which the properly selected and qualified actuary's approval are based are not subject to judicial review;
>
> (2) the change must be approved by a majority of all persons then making contributions to the fund as employees of a department to which the change would directly apply, voting by secret ballot at an election held after ten (10) days' notice given by posting at a prominent place in every station or substation of a department to which the change would directly apply and in the city hall;

TEX. REV. CIV. STAT. art. 6243b, § 10A (emphasis added). Under this statute, while benefits may be increased if certain procedures are followed, the Board has no discretion to retroactively lower pensions. Petitioners, however, cite the provisions of the 1980 bylaws, under which the reduction would be proper due to Heinrich's son's age. They therefore suggest that Heinrich erroneously relies

on 1985 changes to the bylaws that increased the surviving spouse's share but were prospective only in nature and do not apply to Heinrich.

Heinrich submitted an affidavit from John Batoon, former Assistant City Attorney for El Paso.[11] Batoon's affidavit provided:

> I was serving as an Assistant City Attorney for the City of El Paso in 1985. I reviewed and approved the award to Ms. Lilli M. Heinrich of 100% of her deceased husband's, Charles D. Heinrich, benefits from The El Paso Firemen & Policemen's Pension Fund. All procedures were followed according to the Plan and according to law. The membership voted and approved of the benefits awarded Ms. Heinrich as was required by the Plan. Because Mr. Heinrich had been an outstanding police officer for the City of El Paso and because he was killed in the line of duty, the Board of Trustees and the membership voted to award Ms. Heinrich 100% of Mr. Heinrich's benefits.
>
> Consideration of the amount of benefits awarded Ms. Heinrich was not based, in any way, on the fact that she had a minor child at that time. Ms. Heinrich was awarded 100% of the benefits because Mr. Heinrich had been a well-loved officer and his death was a terrible loss for the police department. It was the Board of Trustees and the membership's way of paying tribute to a fallen officer.

Along with this sworn testimony, the evidence included a pair of October 16, 1985 letters from the chief of police, one signed by the then-Board members, stating that "Mrs. Heinrich will receive 100% of her husband's final pension amount," and one unsigned, stating that 100% would go to "Mrs. Heinrich and her dependent children." The minutes of the November 20, 1985 Board meeting also indicate that the membership had previously voted to change benefits so that surviving spouses' benefits would increase from 66 2/3 to 100% of the pension amount. The Board contends that these bylaw changes do not apply to Heinrich, but even if they do not, Batoon's affidavit and

[11] The Fund, the Board, and the Board members objected to this evidence. The trial court did not explicitly rule on the objections, and the petitioners do not raise any evidentiary issues on appeal.

the letters raise a fact question as to whether Heinrich's individual benefits were increased to 100% of her husband's pension payments under the provisions of article 6243b and subsequently reduced in violation thereof. We conclude that the trial court correctly denied that portion of the plea to the jurisdiction challenging Heinrich's claims against the individuals in their official capacities. *Miranda*, 133 S.W.3d at 227–28.

E
The Individuals' Immunity

In their final issue, petitioners assert that the trial court erred in denying the individual board members' plea to the jurisdiction based on governmental and official immunity. With the limited *ultra vires* exception discussed above, governmental immunity protects government officers sued in their official capacities to the extent that it protects their employers. *See Univ. of Tex. Med. Branch v. Hohman*, 6 S.W.3d 767, 776 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.). Because of this exception, however, governmental immunity does not bar Heinrich's claims against the individuals in their official capacities. Official immunity, by contrast, is an affirmative defense protecting public officials from individual liability. *See Telthorster v. Tennell*, 92 S.W.3d 457, 459-60 (Tex. 2002). Because we hold that Heinrich has not sued the Board members in their individual capacities, official immunity is inapplicable here.[12]

[12] The court of appeals failed to draw this distinction, instead discussing the protections available to officials from governmental immunity. 198 S.W.3d at 407. This conflict gives us jurisdiction over this interlocutory appeal. TEX. GOV'T CODE § 22.225(c), (e).

III
Conclusion

In sum, because there is a question of fact as to whether Heinrich's pension payments have been reduced in violation of state law, her claims for prospective declaratory and injunctive relief against the Board members and the mayor in their official capacities may go forward, but we dismiss her retrospective claims against them. All of her claims against the City, Fund, and Board, however, are barred by governmental immunity, and we dismiss them. Finally, we hold that the Board members have not been sued in their individual capacities, and to the extent the court of appeals held otherwise, we reverse its judgment. We affirm in part and reverse in part the court of appeals' judgment and remand this case to the trial court for further proceedings. TEX. R. APP. P. 60.2(a),(d).

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: May 1, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0815

JESSE C. INGRAM, PH.D. AND BEHAVIORAL PSYCHOLOGY CLINIC, P.C., PETITIONERS,

v.

LOUIS DEERE, D.O. AND HILLVALE MEDICAL GROUP ASSOCIATION D/B/A/ HILLVALE MEDICAL ASSOCIATION, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued February 16, 2008

JUSTICE WAINWRIGHT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE WILLETT joined, in which JUSTICE O'NEILL and JUSTICE BRISTER joined except as to part II.D.5.a, and in which JUSTICE JOHNSON joined except as to part II.D.2.

JUSTICE JOHNSON filed a concurring opinion.

In this case, we review a court of appeals judgment reinstating a jury verdict finding that Louis Deere, D.O. and Jesse C. Ingram, Ph.D. formed a partnership pursuant to the Texas Revised Partnership Act (TRPA).

TRPA lists five factors to be considered in determining whether a partnership has been formed. This determination should be made by examining the totality of the circumstances in each

case, with no single factor being either necessary or sufficient to prove the existence of a partnership. Here, the evidence is legally insufficient to establish that a partnership existed between Ingram and Deere. Because the evidence of the formation of a partnership is legally insufficient, we do not address the issue raised in Ingram's cross-petition challenging the court of appeals' decision that Ingram owed Deere a fiduciary duty. Accordingly, we reinstate the trial court's take-nothing judgment in favor of Ingram and reverse the court of appeals' judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Ingram, a licensed psychologist, and Deere, a board certified psychiatrist, entered into an oral agreement in 1997, which provided that Deere would serve as the medical director for a multidisciplinary pain clinic. Deere contends that they agreed he would receive one-third of the clinic's revenues, Ingram would receive one-third, and the remaining one-third would be used to pay the clinic's expenses. Deere also claims that when he and Ingram began working together, Ingram told him their work "was a joint venture, or [they] were partners, or [they] were doing this together." Ingram contends that they only agreed Deere would receive one-third of the clinic's revenues and that there was no agreement as to the other two-thirds. Deere acknowledges that, during his time at the clinic, he never contributed money to the clinic, he did not participate in the hiring of any employees, he did not know any of the clinic staff's names, he never purchased any of the clinic's equipment, his name was not on the clinic's bank account, and his name was not on the lease agreement for the clinic space.

Fourteen months after Deere began working at the clinic, Ingram prepared a written

agreement to memorialize their arrangement. The document was entitled "Physician Contractual Employment Agreement" and stated that Ingram was the "sole owner" of the clinic. Deere refused to sign the document, claiming that it contradicted their initial arrangement. Immediately after Deere received the document, he ceased working at the clinic.

Deere later sued Ingram, asserting claims of common law fraud, statutory fraud, fraudulent inducement, breach of contract, breach of fiduciary duty, and declaratory judgment and seeking specific performance, damages, and attorneys' fees. The jury found that Deere and Ingram entered into a partnership agreement and that Ingram breached the agreement and his fiduciary duty to Deere. The trial court entered judgment on the jury verdict awarding damages of (1) $34,249.68 for compensation owed Deere through March 1999, (2) $2,525,437.00 for Deere's share of the partnership's revenue from April 1999 through the time of trial, (3) $2,500,000.00 for Deere's share of revenue to accrue after trial, and (4) $27,500.00 in attorneys' fees for the trial stage with additional fees in the event of a motion for new trial and various appeals.

Ingram filed a motion for judgment non obstante veredicto (judgment n.o.v.). After a hearing, Judge David Evans signed a new judgment, eliminating a portion of the damages awarded by the jury and reducing the award of attorneys' fees. Following his decision, Judge Evans recused himself without explanation, and the case was assigned to Judge Merrill Hartman. Ingram then filed a second motion for judgment n.o.v. or, in the alternative, a motion for new trial. Judge Hartman signed a judgment n.o.v. and rendered a take-nothing judgment in Ingram's favor.

The court of appeals reversed the trial court's take-nothing judgment on the second motion for judgment n.o.v. and reinstated the trial court's judgment on the first motion for judgment n.o.v. The court held that Ingram waived his right to challenge the existence of a partnership because he failed to raise the issue in his second motion for judgment n.o.v. 198 S.W.3d 96, 100. Without discussing whether Deere and Ingram created a partnership, the court held that there was legally sufficient evidence to support the jury's finding that the partnership continued to exist through the time of trial. *Id.* at 101–02. However, the court affirmed the trial court's ruling that Ingram did not owe Deere a fiduciary duty, as there was no evidence of a confidential relationship between Deere and Ingram that would give rise to an informal fiduciary duty. *Id.* at 102–03. On appeal to this Court, Ingram argues that the court of appeals erred in reinstating the trial court's judgment on the first motion for judgment n.o.v. because there is no evidence that Deere and Ingram created a partnership. Deere principally contends that Ingram waived all of the alleged errors in one way or another at the trial court. Deere also filed a cross-petition appealing the court of appeals' adverse ruling on his breach of fiduciary duty claim.[1] Because we conclude there is no evidence of a

[1] The only argument Deere makes to this Court in support of his claim that Ingram breached a fiduciary duty he owed to Deere is that such a duty arose by virtue of their partnership. *See* TEX. REV. CIV. STAT. art. 6132b-4.04 (recognizing the unwaivable duties of care and loyalty and the obligation of good faith required of partners under the Texas Revised Partnership Act); *see also Bohatch v. Butler & Binion*, 977 S.W.2d 543, 545 (Tex. 1998) (recognizing "as a matter of common law that '[t]he relationship between . . . partners . . . is fiduciary in character'"). The court of appeals held there was no evidence of a fiduciary relationship between Ingram and Deere. However, we need not address the issue of whether there is independent evidence of a fiduciary duty because we hold there is no legally sufficient evidence that Ingram and Deere were partners.

partnership, we do not reach the other issues raised by Deere or Ingram.

II. LAW AND ANALYSIS

A. Preservation of Error

As an initial matter, we must address Deere's contention that Ingram failed to preserve his no evidence argument regarding the existence of a partnership. First, Deere argues Ingram failed to preserve his no evidence argument because he did not file a verified denial in response to Deere's claim that they were partners, which Texas Rule of Civil Procedure 93(5) requires. It is undisputed that Ingram did not file the requisite verified denial. However, this issue was tried by consent of the parties. When both parties present evidence on an issue and the issue is developed during trial without objection, any defects in the pleadings are cured at trial, and the defects are waived. TEX. R. CIV. P. 67; *Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445–46 (Tex. 1993).

We addressed a similar issue in *Sage Street*. In that case, we discussed whether the trial court should have submitted a contract's ambiguity to the jury, although neither party pleaded it. *Sage St.*, 863 S.W.2d at 444–46. We reiterated the long-standing rule that an issue is "not tried merely by the hearing of testimony thereon." *Id.* at 446 (citing *Harkey v. Tex. Employers' Ins. Ass'n*, 208 S.W.2d 919, 922 (Tex. 1948)). However, because *both* parties presented conflicting testimony on the subject and allowed the issue to be raised in the jury charge, the contract's ambiguity was tried by consent. *Id.* Here, not only did both parties present evidence at trial to affirm or controvert the existence of a partnership, but Deere, the party arguing that a partnership existed, also submitted the issue in the

jury charge. The issue was developed at trial, and both parties understood that it was contested. Accordingly, the failure to file a verified denial did not preclude Ingram from raising the issue on appeal.

Second, Deere argues that error was not preserved because Ingram's motion for a judgment n.o.v. did not assign a no evidence point of error regarding the jury's answer to the partnership question. However, Ingram prevailed on his motion for judgment n.o.v. Thus, as the prevailing party, he need only raise the issue of whether a partnership existed as a cross-point. TEX. R. APP. P. 38.2(b). When a trial court renders judgment n.o.v. and the losing party appeals, the prevailing party may also appeal and present points or issues on any ground that would either vitiate the verdict or preclude affirming the judgment and reinstating the verdict, including grounds not raised in the judgment n.o.v. *See id.* (providing that when a trial court renders a judgment n.o.v., "the appellee must bring forward by cross-point *any* issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict" (emphasis added)). This is an exception to the general rule that as a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court and that the trial court ruled or refused to rule on the request. *See* TEX. R. APP. P. 33.1(a). Because Ingram properly raised the issue to the court of appeals, he did not waive the issue for review by either this Court or the court of appeals.

B. Standard of Review

When reviewing a court of appeals judgment reversing the trial court's judgment n.o.v., we conduct a legal sufficiency analysis of the evidence. *Guevara v. Ferrer*, 247 S.W.3d 662, 665 (Tex. 2007). We review the evidence presented at trial in the light most favorable to the jury's verdict, crediting evidence favorable to that party if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Id.*

C. Partnership Law

1. Texas Common Law

Under the common law, the Court recognized that a partnership or joint enterprise "presupposes an agreement to that end," which could be either express or implied. *Donald v. Phillip*s, 13 S.W.2d 74, 76 (Tex. 1929). We explained that the "intention of the parties to a contract is a prime element in determining whether or not a partnership or joint venture exists."[2] *Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex. 1978) (citing *Luling Oil & Gas Co. v. Humble Oil & Ref. Co.*, 191 S.W.2d 716, 722 (Tex. 1946) ("[A] court would not declare that a partnership existed unless that intention clearly appeared . . . .")). The common law also considered that profit sharing was the most important factor shedding light on the intention to establish a

[2] Prior case law discusses differences between joint ventures and partnerships. We see no legal or logical reason for distinguishing a joint venture from a partnership on the question of formation of the entity. *See Gray v. West*, 608 S.W.2d 771, 776 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.). In fact, a joint venture that satisfies the definition of "partnership" is a partnership subject to TRPA. TEX. REV. CIV. STAT. art. 6132b-2.02 Comment of Bar Committee. In this case, counsel for both Deere and Ingram used the terms interchangeably during trial.

partnership. *See Friedlander v. Hillcoat*, 14 S.W. 786, 787 (Tex. 1890) ("A common interest in the profits is an essential element to constitute a partnership."). These two elements were incorporated into a five-factor test that developed under the common law for partnership formation: (1) intent to form a partnership, (2) a community of interest in the venture, (3) an agreement to share profits, (4) an agreement to share losses, and (5) a mutual right of control or management of the enterprise. *Coastal Plains*, 572 S.W.2d at 287 (citing *Brown v. Cole*, 291 S.W.2d 704, 709 (Tex. 1956), and *Luling Oil & Gas*, 191 S.W.2d at 722). These factors continued to guide the question of partnership formation when Texas promulgated and later amended statutory regimes governing partnerships.

2. Texas Statutory Law

The Texas Uniform Partnership Act (TUPA) was passed in 1961 and substantially adopted the major provisions of the Uniform Partnership Act (UPA), which itself was adopted in every state except Louisiana after it was approved by the National Conference of Commissioners on Uniform State Laws in 1914. *See* Harry J. Haynsworth, IV et al., *Should the Uniform Partnership Act Be Revised?*, 43 BUS. LAW. 121, 121 (1987); REVISED UNIF. P'SHIP ACT, 6 U.L.A. 45 (1997). TUPA was replaced by TRPA, effective January 1, 1994,[3] the result of a project of the Partnership Law Committee of the State Bar of Texas Section on Business Law and the Texas Business Law Foundation. Act of May 31, 1993, 73rd Leg., R.S., ch. 917, § 1, 1993 Tex. Gen. Laws 3887, 3893.

[3] UPA was revised in 1997 and renamed the Revised Uniform Partnership Act (RUPA). UNIF. P'SHIP ACT, intro., 6 U.L.A. 5 (2001). Although Texas has adopted portions of RUPA, it has not adopted the uniform act in its entirety. *Id.* at 45.

TRPA carried forward some of the common law modifications in ways relevant to this case that were promulgated in TUPA. The partnership in this case was allegedly formed in 1997. It is uncontested that TRPA governs this dispute; rather, the parties contest whether Deere has proven the existence of a partnership under TRPA.[4]

TRPA provides that "an association of two or more persons to carry on a business for profit as owners creates a partnership." TEX. REV. CIV. STAT. art. 6132b-2.02(a). Unlike TUPA,[5] TRPA

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[4] Three statutory regimes have governed partnerships formed in Texas—TUPA, TRPA, and the Texas Business Organizations Code (TBOC). TRPA, enacted in 1993, replaced TUPA. Act of May 31, 1993, 73rd Leg., R.S., ch. 917, § 1, 1993 Tex. Gen. Laws 3887, 3893. TRPA governs partnerships formed on or after January 1, 1994, and other, existing partnerships that elected to be governed by it. TEX. REV. CIV. STAT. art. 6132b-11.03(a). In 2003, the TBOC replaced TRPA. Act of May 29, 2003, 78th Leg., R.S., ch. 182, § 1, 2003 Tex. Gen. Laws 267, 592–93. The TBOC governs partnerships formed on or after January 1, 2006, and other partnerships that elect to be governed by the TBOC. TEX. BUS. ORGS. CODE § 402.001. In addition, TRPA and the TBOC contain transition rules, providing that the preceding law will apply to existing partnerships for a period of years after each act's effective date, unless the partnership elects to be governed by the new act immediately. TEX. REV. CIV. STAT. art. 6132b-11.03; TEX. BUS. ORGS. CODE § 402.001. On January 1, 2010, TRPA will expire, and the TBOC will apply to all partnerships, regardless of their formation date. TEX. REV. CIV. STAT. art. 6132b-11.03. TRPA and the TBOC's rules for determining partnership formation are substantially the same. *Compare* TEX. BUS. ORGS. CODE § 152.052, *with* TEX. REV. CIV. STAT. art. 6132b-2.03.

[5] TUPA did not provide a list of considerations or factors that were important or necessary to the establishment of a partnership. With one exception, TUPA only provides rules indicating circumstances that did not give rise to a partnership. TUPA reads as follows:

> (1) Except as [otherwise provided] persons who are not partners as to each other are not partners as to third persons.
>
> (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.
>
> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
>
> (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
>
> (a) As a debt by installments or otherwise,
>
> (b) As wages of an employee or rent to a landlord,

articulates five factors, similar to the common law factors, that indicate the creation of a partnership. They are:

> (1) receipt or right to receive a share of profits of the business;
> (2) expression of an intent to be partners in the business;
> (3) participation or right to participate in control of the business;
> (4) sharing or agreeing to share:
> (A) losses of the business; or
> (B) liability for claims by third parties against the business; and
> (5) contributing or agreeing to contribute money or property to the business.[6]

Id. art. 6132b-2.03(a). The common law required proof of all five factors to establish the existence of a partnership. *See Coastal Plains*, 572 S.W.2d at 287. However, TRPA contemplates a less formalistic and more practical approach to recognizing the formation of a partnership.

First, TRPA does not require direct proof of the parties' intent to form a partnership. TEX. REV. CIV. STAT. art. 6132b-2.02 (stating that two or more persons may form a partnership regardless of "whether the persons intend to create a partnership"). Formerly, the intent to be partners was a "prime," although not controlling, element in the creation of a partnership. *Coastal Plains*, 572

> (c) As an annuity to a widow or representative of a deceased partner,
> (d) As interest on a loan, though the amount of payment vary with the profits of the business,
> (e) As the consideration for the sale of a good-will of a business or other property by installments or otherwise.
> (5) Operation of a mineral property under a joint operating agreement does not of itself establish a partnership.

TEX. REV. CIV. STAT. art. 6132b, § 7

[6] Four years after TRPA was enacted, Oregon adopted factors almost verbatim to the factors listed in TRPA for determining whether a partnership exists. OR. REV. STAT. § 67.055 (2008). Oregon and Texas are the only states to enact a statute that deviates from the UPA's rules for determining the existence of a partnership.

S.W.2d at 287. Instead, TRPA lists the "expression of intent" to form a partnership as a factor to consider. TEX. REV. CIV. STAT. art. 6132b-2.03(a)(2). Second, unlike the common law, TRPA does not require proof of *all* of the listed factors in order for a partnership to exist. Third, sharing of profits—deemed essential for establishing a partnership under the common law—is treated differently under TRPA because sharing of profits is not required. *Cf. Friedlander*, 14 S.W. at 787 ("A common interest in the profits is an essential element to constitute a partnership."). Still, TRPA comments note that the traditional import of sharing profits as well as control over the business will probably continue to be the most important factors. TEX. REV. CIV. STAT. art. 6132b-2.03 Comment of Bar Committee. Additionally, TRPA recognizes that sharing of losses may be indicative of a partnership arrangement but states that such an arrangement is "not necessary to create a partnership." *Id.* art. 6132b-2.03(c). TRPA also restates and extends the list of circumstances in TUPA that do not by themselves indicate that a person is a partner.[7] *Id.* art. 6132b-2.03(b).

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[7] According to TRPA, "[one] of the following circumstances, by itself, does not indicate that a person is a partner in the business":

> (1) the receipt or right to receive a share of profits:
>
> (A) as repayment of a debt, by installments or otherwise;
>
> (B) as payment of wages or other compensation to an employee or independent contractor;
>
> (C) as payment of rent;
>
> (D) as payment to a former partner, surviving spouse or representative of a deceased or disabled partner, or transferee of a partnership interest;
>
> (E) as payment of interest or other charge on a loan, regardless of whether the amount of payment varies with the profits of the business, and including a direct or indirect present or future ownership interest in collateral or rights to income, proceeds, or increase in value derived from collateral; or
>
> (F) as payment of consideration for the sale of a business or other property by installments or otherwise;

The question of how many of the TRPA factors are required to form a partnership is a matter of first impression for this Court. The TRPA factors seem to serve as a proxy for the common law requirement of intent to form a partnership by identifying conduct that logically suggests a collaboration of a business's purpose and resources to make a profit as partners. After examining the statutory language and considering that TRPA abrogated the common law's requirement of proof of all five factors, we determine that the issue of whether a partnership exists should be decided considering all of the evidence bearing on the TRPA partnership factors. While proof of all five common law factors was a prerequisite to partnership formation under the common law, the totality-of-the-circumstances test was, in some respect, foreshadowed in Texas case law. As Justice Jack Pope wrote for the San Antonio Court of Appeals,

> No single fact may be stated as a complete and final test of partnership. Each case must rest on its own particular facts and the presence or absence of the usual attributes of a partnership relation. The earlier Texas rule indicated that profit sharing was the controlling test. We think it is now generally held that such a test is not all-inclusive and controlling . . . . The absence of an express provision obligating the parties to share in the losses is also important and indicates that no partnership existed. But this feature too is not controlling.

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(2) co-ownership of property, whether in the form of joint tenancy, tenancy in common, tenancy by the entireties, joint property, community property, or part ownership, whether combined with sharing of profits from the property;

(3) sharing or having a right to share gross returns or revenues, regardless of whether the persons sharing the gross returns or revenues have a common or joint interest in the property from which the returns or revenues are derived; or

(4) ownership of mineral property under a joint operating agreement.

TEX. REV. CIV. STAT. art. 6132b-2.03(b).

Davis v. Gilmore, 244 S.W.2d 671, 673–74 (Tex. Civ. App—San Antonio 1951, writ ref'd) (citations omitted). Many states apply this totality-of-the-circumstances test.[8]

[8] *McCrary v. Butler*, 540 So. 2d 736, 739 (Ala. 1989) (stating that "[t]here is no arbitrary test as to whether a partnership exists, but such a determination will be made upon all of the attendant circumstances"); *Tripp v. Chubb*, 208 P.2d 312, 314 (Ariz. 1949) (stating that "the question of the existence of a partnership depends upon the intention of the parties," which "must be ascertained from all of the facts and circumstances and the action and conduct of the parties"); *Moon v. Ervin*, 133 P.2d 933, 937 (Idaho 1943) (stating that to show a partnership exists, there "must be other facts, showing that relationship to have been the intention of the parties"); *Parish v. Bainum,* 138 N.E. 147, 149 (Ill. 1923) (stating that "'[t]he requisites of a partnership are that the parties must have joined together to carry on a trade or venture for their common benefit, each contributing property or services and having a community of interests in the profits'" (quoting *Meehan v. Valentine*, 145 U.S. 611, 618 (1892))); *Potts v. Lux*, 166 P.2d 694, 697 (Kan. 1946) (stating that the question of whether a partnership exists "depends in each instance upon the intention of the parties to the arrangement, the terms of the agreement creating their relationship and the facts and circumstances evidencing the manner in which their business affairs are carried on once that relationship has been established"); *Lupien v. Malsbenden*, 477 A.2d 746, 748 (Me. 1984) (stating that "[a] finding that the relationship between two persons constitutes a partnership may be based upon evidence of an agreement, either express or implied" . . . and "'[n]o one factor is alone determinative of the existence of a partnership'" (quoting *Dalton v. Austin*, 432 A.2d, 774, 777 (Me. 1981))); *Cyrus v. Cyrus*, 64 N.W.2d 538, 541 (Minn. 1954) (stating that a partnership exists "if the evidence as a whole reasonably shows that the parties have entered into a contractual relation whereby they have combined their property, labor, and skill in an enterprise or business as co-owners for the purpose of joint profit"); *Smith v. Redd*, 593 So. 2d 989, 994 (Miss. 1992) (stating that "[a]n expressed agreement is not required; intent may be implied, or established from the surrounding circumstances"); *Temm v. Temm*, 191 S.W.2d 629, 632 (Mo. 1945) (stating that "[s]ince partnership rests on the intention of the parties each case must be determined upon its own particular facts"); *In re Keytronics*, 744 N.W.2d 425, 441 (Neb. 2008) (stating that "[t]he five indicia of co-ownership are only that; they are not all necessary to establish a partnership relationship, and no single indicium of co-ownership is either necessary or sufficient to prove co-ownership"); *Eggleston v. Eggleston*, 47 S.E.2d 243, 247 (N.C. 1948) (stating that a "[p]artnership is a legal concept, but the determination of the existence or not of a partnership . . . involves inferences drawn from an analysis of 'all the circumstances attendant on its creation and operation'" (quoting *Helvering v. Clifford*, 309 U.S. 331, 335 (1940))); *Ins. Agents, Inc. v. Zimmerman*, 381 N.W.2d 218, 220 (S.D. 1986) (stating that "since there is no arbitrary test for determining the existence of a partnership, each case must be governed by its own peculiar facts" (quoting *Munce v. Munce*, 96 N.W.2d 661, 663 (S.D. 1959))); *Harman v. Rogers*, 510 A.2d 161, 163 (Vt. 1986) (stating that "[i]n deciding whether a partnership has been created by tacit agreement, courts must examine the facts to determine whether the parties carried on as co-owners of a business for profit"); *Cooper v. Knox*, 90 S.E.2d 844, 847 (Va. 1956) (stating that "'[n]o one factor or circumstance can be taken as a conclusive criterion, but each case must be determined upon its own particular facts and surrounding circumstances'" (quoting 68 C.J.S., *Partnership*, § 30)); *Pruitt v. Fetty*, 134 S.E.2d 713, 716 (W. Va. 1964) (stating that "[t]here is no general rule applicable in determining or ascertaining the question of partnership . . . but each case must be governed by its own facts and surrounding circumstances"); *P&M Cattle Co. v. Holler*, 559 P.2d 1019, 1022 (Wyo. 1977) (stating that "the question of whether . . . a [partnership] exists must be gathered from the conduct, surrounding circumstances and the transactions between the parties").

We note the difficulty of uniformly applying a totality-of-the-circumstances test, *see Perry Homes v. Cull*, 258 S.W.3d 580, 592 (Tex. 2008) (explaining the difficulty of applying a totality-of-the-circumstances test in determining whether a party waived an arbitration clause in a contract), but we cannot ignore the Legislature's decision to codify the essential common law partnership factors in TRPA without specifying that proof of all or some of the factors is required to establish a partnership. *See* TEX. REV. CIV. STAT. art. 6132b-2.03; *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008) (explaining that courts presume that the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted). Yet, we can provide additional guidelines for this analysis. Of course, an absence of any evidence of the factors will preclude the recognition of a partnership under Texas law. *Cf. Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997) (applying TUPA). Even conclusive evidence of only one factor normally will be insufficient to establish the existence of a partnership.[9] To hold otherwise would create a probability that some business owners would be legally required to share profits with individuals or be held liable for the actions of individuals who were neither treated as nor intended to be partners. *See* TEX. REV. CIV. STAT. art. 6132b-3.03(a) (explaining that a partnership is liable for the acts of a partner done with authority or in the ordinary course of the partnership's business); *see also Kao Holdings, L.P. v. Young*, 261 S.W.3d 60, 63 (Tex. 2008). The Legislature does not indicate that it intended to

[9] In closing argument, Deere's counsel told the jury that a partnership could be established by finding proof of only one factor. He argued, "A joint venture is a partnership too, you know. [The judge] put 'ors' after all these elements. You don't have to have all of them ladies and gentlemen, you can have any one of them, or you can have two of them, or you can have three of them . . . ." There was no objection to the charge on this point.

spring surprise or accidental partnerships on independent business persons, if, for example, an employee is paid out of business profits with no other indicia of a de facto partnership under TRPA. On the other end of the spectrum, conclusive evidence of all of the TRPA factors will establish the existence of a partnership as a matter of law. The challenge of the totality-of-the-circumstances test will be its application between these two points on the continuum.

D. Existence of a Partnership

In this case, we consider whether more than a scintilla of evidence of any of the factors indicative of a partnership was introduced at trial.

1. Profit Sharing

Deere argues that he received or had the right to receive a share of the clinic's profits because he and Ingram had an agreement in which each of them would receive one-third of the clinic's "gross revenue" and the remainder would be used for expenses. It is true that the "receipt or right to receive a share of profits of the business" may be indicative of the existence of a partnership under TRPA, but a share of profits paid as "wages or other compensation to an employee or independent contractor" is not indicative of a partnership interest in the business. TEX. REV. CIV. STAT. art. 6132b-2.03(b)(1)(B); *see Friedlander*, 14 S.W. at 788; *Strawn Nat'l Bank v. Marchbanks*, 74 S.W.2d 447, 449 (Tex. Civ. App.—Eastland 1934, writ ref'd) (saying that the "oft-repeated quotation 'profits as profits'" . . . "is to utter jargon" because they are not profits when paid as compensation for services).

The evidence does not establish that Deere received a share of profits as contemplated under TRPA for two reasons. First, the agreement between Ingram and Deere cannot constitute Deere's receipt of "profits," but rather of gross revenue. Because TRPA does not define the term "profits," we define it using its ordinary meaning. TEX. GOV'T CODE § 312.002; *Heritage Res., Inc. v. Nations Bank*, 939 S.W.2d 118, 121–22 (Tex. 1996); *Ramsay v. Md. Am. Gen. Ins. Co.*, 533 S.W.2d 344, 346 (Tex. 1976). The ordinary meaning of "profits" is "[t]he excess of revenues over expenditures in a business transaction." BLACK'S LAW DICTIONARY 1246 (8th ed. 2004). Furthermore, this Court, interpreting similar language in TUPA, established that the receipt of gross revenue is not profit sharing. *See Schlumberger Tech. Corp.*, 959 S.W.2d at 176 (interpreting TUPA, TEX. REV. CIV. STAT. art. 6132b, § 7(3), and explaining that "[e]ntitlement to a royalty based on gross receipts is not profit sharing."). There is no evidence that the allocation for expenses was sufficient to satisfy all the clinic's expenses, leaving only profits to be split. Even if some funds may have been reserved for expenses, as Deere claims, there is no evidence that Deere's share would have decreased if expenses grew or increased if expenses shrank. Simply put, Deere's share depended on the clinic's receipts, not its excess of revenues over expenditures. Therefore, the evidence in this case leads to one conclusion: Deere did not share the clinic's profits but agreed to and received a percentage of the clinic's gross revenues.

Second, Ingram wrote twenty checks to Deere as compensation from January 1997 until March 1999. These checks referred to Deere as a "medical consultant" and the payments as

"contract labor." Therefore, they contradict his argument that he received profits as a partner in the clinic. Under TRPA, receipt of profits as compensation for an employee's services or an independent contractor's work is not evidence that parties were partners. TEX. REV. CIV. STAT. art. 6132b-2.03(b)(1)(B); *Strawn Nat'l Bank*, 74 S.W.2d at 449. Because Deere cashed the checks without challenging the characterizations, this fact also does not support his argument.

2. Expression of Intent to Be Partners

"[E]xpression of an intent to be partners in the business" is one of five factors courts use in determining whether a partnership exists. TEX. REV. CIV. STAT. art. 6132b-2.03(a)(2). This is different from the common law definition of a partnership that required proof that the parties intended to form a partnership at the outset of their agreement. *Coastal Plains*, 572 S.W.2d at 287 (citing *Luling Oil & Gas*, 191 S.W.2d at 722); *cf.* TEX. REV. CIV. STAT. art. 6132b-2.02 ("An association of two or more persons to carry on a business for profit as owners creates a partnership, *whether the persons intend* to create a partnership . . . ." (emphasis added)). Conversely, TRPA evaluates the parties' *expression* of intent to be partners as one factor, TEX. REV. CIV. STAT. art. 6132b-2.03(a)(2), and it does not by its terms give the parties' intent or expression of intent any greater weight than the other factors, *see* TEX. REV. CIV. STAT. art. 6132b-2.03(a).

When analyzing expression of intent under TRPA, courts should review the putative partners' speech, writings, and conduct. While under the common law, evidence probative on other factors is considered evidence of "intent," under TRPA, the "expression of intent" factor is an inquiry

separate and apart from the other factors. Courts should only consider evidence not specifically probative of the other factors. In other words, evidence of profit or loss sharing, control, or contribution of money or property should not be considered evidence of an expression of intent to be partners. Otherwise, all evidence could be an "expression" of the parties' intent, making the intent factor a catch-all for evidence of any of the factors, and the separate "expression of intent" inquiry would be eviscerated. Such an interpretation would undermine the language of TRPA, which establishes five separate factors to be considered when determining the existence of a partnership. *See* TEX. REV. CIV. STAT. art. 6132b-2.03.

Evidence of expressions of intent could include, for example, the parties' statements that they are partners, one party holding the other party out as a partner on the business's letterhead or name plate, or in a signed partnership agreement. *See Reagan v. Lyberger*, 156 S.W.3d 925, 928 (Tex. App. Dallas 2005, no pet.) (interpreting TRPA and holding that evidence was sufficient to support a jury finding of the existence of a partnership where, among other evidence, the plaintiff testified that he referred to the defendant as his business partner and other witnesses stated that the defendant identified himself as the plaintiff's partner); *Brewer v. Big Lake State Bank*, 378 S.W.2d 948, 951 (Tex. Civ. App. El Paso 1964, no writ) (explaining that a party introducing a person to the bank as the party's partner is evidence of the existence of a partnership).

The terms used by the parties in referring to the arrangement do not control, *Coastal Plains*, 572 S.W.2d at 288, and merely referring to another person as "partner" in a situation where the

recipient of the message would not expect the declarant to make a statement of legal significance is not enough. *See* TEX. REV. CIV. STAT. art. 6132b-2.02(a) ("An association of two or more persons to carry on a business for profit as owners creates a partnership, whether the . . . association is called a 'partnership,' 'joint venture' or other name."). The term "partner" is regularly used in common vernacular and may be used in a variety of ways. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1626 (1st ed. 1996) (defining "partner" as one who shares in the possession or enjoyment of something with another, one of two or more persons who play together in a game against an opposing side, a husband and wife, or either of a couple who dances together). Referring to a friend, employee, spouse, teammate, or fishing companion as a "partner" in a colloquial sense is not legally sufficient evidence of expression of intent to form a business partnership. *See Murphy v. McDermott Inc.*, 807 S.W.2d 606, 613 (Tex. App. Houston [14th Dist.] 1991, pet. denied) (explaining that although one party referred to the other party as his partner, this alone did not create a partnership). However, the same terms could constitute legally significant evidence of expression of intent when made in a circumstance that indicates significance to the business endeavor. Thus, courts should look to the terminology used by the putative partners, the context in which the statements were made, and the identity of the speaker and listener.

Deere argues that he expressed his intent to be a partner with Ingram by sharing the clinic's profits and losses and having access to the clinic's records. His evidence of other factors, sharing of profits and losses and control of the business, is insufficient to establish expression of intent.

Deere's evidence is also insufficient because there must be evidence that both parties expressed their intent to be partners. TEX. REV. CIV. STAT. art. 6132b-2.03(a) (explaining that "[f]actors indicating that persons have created a partnership include *their* . . . expression of an intent to be partners in the business" (emphasis added)). Because Ingram is the party denying the existence of a partnership, an expression of intent to be partners by Ingram would be of particular interest.

The evidence of Ingram's expression of intent to be business partners is the following exchange during Deere's trial testimony:

> Q. What representations did [Ingram] make to you when you were forming this idea that later turned out to be not true?
>
> A. [Deere] Well, that number one, that this was a joint venture, or that we were partners, or we were doing this together.

Deere's testimony is unclear and gives the alleged arrangement with Ingram three different characterizations—that they were joint venturers, partners, or "were doing this together." It is unclear from this testimony what Ingram believed to be the nature of their relationship. Any significance of Deere's testimony is further obviated because he testified that partner "means some people working together." Accordingly, Deere called the employees he supervised at his clinic "partners." After Deere's counsel explained to him the legal definition of a partnership during his testimony, Deere referred to his trial attorney as his "partner" because he was "depending on [him]."

Deere also testified that the clinic kept its established name after he joined as the medical director, and he and Ingram never discussed a name change. He never signed a lease agreement for

the building owned by Ingram where the clinic was housed, was not named on the clinic's bank account, never signed a signature card for the clinic's bank account, and never filed taxes representing that he was co-owner of the clinic. Additionally, Deere paid his own medical malpractice insurance, which he acknowledged was his common practice when he did contract work. Deere cannot provide the content, context, or circumstances to give any of the alleged expressions of intent legal significance as evidence of a partnership.

3. Control

Deere argues he had an equal right to control and manage the clinic's business because, although he was never allowed to see the books and records, he repeatedly requested to see them. He also points to Ingram's testimony that "maybe" Deere viewed the clinic's books on one occasion.[10] Furthermore, Deere argues that he had control because Ingram discussed with him how much the clinic made, the amounts paid to the staff, and the need to hire Ingram's wife as personnel director. No other evidence supports support these statements and proves he participated in or had the right to control the clinic's business.

The right to control a business is the right to make executive decisions. *See Brown v. Cole*, 291 S.W.2d 704, 710 (Tex. 1956) (noting that evidence of control of the business could be exercising authority over the business's operations); *Guerrero v. Salinas*, No. 13-05-323-CV, 2006 WL 2294578, at *11 (Tex. App. Corpus Christi Aug. 10, 2006, no pet.) (concluding that evidence of

[10] This argument contradicts Deere's trial testimony that he was never allowed to look at the books.

management or control of the business was the right to write checks on the business's checking account); *Tierra Sol Joint Venture v. City of El Paso*, 155 S.W.3d 503, 508 (Tex. App.—El Paso 2004, pet. denied) (noting that a party does not have control of the business if the party does not have control over and access to the business's books); *Price v. Wrather*, 443 S.W.2d 348, 351–52 (Tex. Civ. App. Dallas 1969, writ ref'd n.r.e.) (noting that control of the business could be receiving and managing all of the business's assets and monies). However, being sporadically provided information regarding the business does not indicate that Deere had control of or the right to control the business. At most, Deere's evidence demonstrates that Ingram talked with Deere about the business. But owners talk with consultants, employees, accountants, attorneys, spouses, and many others about their businesses, and these conversations do not establish that these people have control of the businesses. Likewise, those same classes of people may have the opportunity to look at the businesses' books, but once again, a review of the books itself is not evidence of control. Deere submitted no evidence that he made executive decisions or had the right to make executive decisions and has shown no evidence of this factor.

4. Sharing of Losses and Liability for Third Party Claims

Contrary to the common law, under TRPA an agreement to share losses is not necessary to create a partnership. TEX. REV. CIV. STAT. art. 6132b-2.03(c); *see Coastal Plains*, 572 S.W.2d at 287. Therefore, while under TRPA the absence of an agreement to share losses is not dispositive of the existence of a partnership, the existence of such an agreement could support Deere's argument

that a partnership existed between him and Ingram. TEX. REV. CIV. STAT. art. 6132b-2.03(a)(4)(A).

According to Deere, he and Ingram agreed that Deere would receive one-third of the clinic's gross revenue, Ingram would receive one-third of the clinic's gross revenue, and the remainder would be used to pay clinic expenses. Deere argues that this agreement determined how losses would be shared, but he testified that there was never a discussion of how expenses in excess of one-third of the clinic's gross revenue would be divided between him and Ingram. The meaning of "net operating losses" is "the excess of operating expenses over revenues, the amount of which can be deducted from gross income if other deductions do not exceed gross income." BLACK'S LAW DICTIONARY 963 (8th ed. 2004). Here, Ingram and Deere never discussed what would happen to the allocation if expenses exceeded one-third of the revenue or gross income. They never discussed losses, only expenses. There is no legally cognizable evidence to support the contention that Ingram and Deere agreed to share losses.

5. Contribution of Money or Property

Finally, there is no evidence that Deere "contribut[ed] or agree[d] to contribute money or property" to the clinic as a partner. TEX. REV. CIV. STAT. art. 6132b-2.03(a)(5). Deere does not argue that there was any *agreement* that he contribute either money or property to the enterprise. *See Id.* Furthermore, Deere does not contend that he actually contributed money to the clinic. In fact, Deere acknowledged at trial that he did not contribute to clinic renovations or the purchase of medical equipment and supplies and that he did not agree to use his personal resources to pay for any

expenses in the operation of the clinic. Rather, Deere's only argument regarding this factor is that he contributed his reputation as property to the alleged partnership.

TRPA defines "property" as "all property, real, personal, or mixed, tangible or intangible, or an interest in that property." *Id.* art. 6132b-1.01(15). Reputation is a type of goodwill and may be valuable intangible property. *Tex. & Pac. Ry. Co. v. Mercer*, 90 S.W.2d 557, 560 (Tex. 1936). Therefore, an individual's reputation can be property that is contributed to the partnership. However, even if a person lends her good name to a business, she does not automatically become a de facto partner. At a minimum, the putative partner would have to prove that any such value can be distinguished from services rendered or property given as an employee.

a. Contribution of Valuable Property

Although Deere claims his reputation was a valuable contribution to the alleged partnership, the evidence does not support this assertion. Deere argues that the testimony of Ingram's expert, Ron McClellan, who stated that Deere's reputation was a "benefit to the clinic" and "added value" to the clinic, supports his claim. However, McClellan only testified generally that Deere's reputation could add value to the clinic, and he acknowledged that his statements were unsupported and mere assumptions, stating: "Not knowing Dr. Deere and his reputation, I can only assume." His opinion, therefore, was merely speculation. *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232–33 (Tex. 2004) (quoting TEX. R. EVID. 401). In order to show that Deere's reputation improved the goodwill of the clinic, McClellan, at a minimum, had to know Deere's

reputation in the psychiatric or pain management fields. McClellan admitted he had no such knowledge. *See Taormina v. Culicchia*, 355 S.W.2d 569, 574 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.) (explaining that the measure of goodwill is "the fixed and favorable consideration of customers arising from an established and well-known and well-conducted business").

The only other evidence supporting Deere's claim is his unsubstantiated statements given during his testimony that his reputation added value to the clinic. Assuming he is qualified to give an opinion on this matter, his testimony is devoid of support for that conclusion. Deere testified that he did not know how many clients came to the clinic specifically because of his presence and that the clinic's name never changed to highlight his addition to the alleged venture. Moreover, the pain clinic was not marketed using his name. Neither Deere nor McClellan ever explained how Deere's reputation contributed to the clinic's success. *See Mercer*, 90 S.W.2d at 560 (to recover damages for goodwill, issues must be submitted to the jury to obtain findings on the change in value of the business); *Taormina*, 335 S.W.2d at 574 (noting that the witness arrived at a sum for goodwill after an investigation of the business, observation of its operations, and examination of its books).

b. Contribution as a Partner

Furthermore, there is no evidence that Deere added value to the clinic as a partner and not an employee. Even if we were to assume that Deere contributed quantifiable value and enjoyed a good reputation in the psychiatric or pain management fields, he cannot establish this factor without evidence that the contribution is distinguishable from the contributions of an employee. Employees

may contribute to business endeavors by lending their time and reputation, but that is not a contribution to the venture indicative of a partnership interest. Even assuming Deere's reputation was impeccable, nothing indicates that Deere contributed or agreed to contribute to the clinic as a partner and not as an employee. In sum, there is no legally sufficient evidence that Deere contributed property to the multidisciplinary pain clinic that would establish a partnership interest.

III. CONCLUSION

Whether a partnership exists must be determined by an examination of the totality of the circumstances. Evidence of none of the factors under the Texas Revised Partnership Act will preclude the recognition of a partnership, and even conclusive evidence of only one factor will also normally be insufficient to establish the existence of a partnership under TRPA. However, conclusive evidence of all five factors establishes a partnership as a matter of law. In this case, Deere has not provided legally sufficient evidence of any of the five TRPA factors to prove the existence of a partnership. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's take-nothing judgment.

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Dale Wainwright
Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0815

JESSE C. INGRAM, PH.D. AND BEHAVIORAL PSYCHOLOGY CLINIC, P.C., PETITIONERS,

v.

LOUIS DEERE, D.O. AND HILLVALE MEDICAL GROUP ASSOCIATION D/B/A/ HILLVALE MEDICAL ASSOCIATION, RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued February 16, 2008

JUSTICE JOHNSON, concurring.

Deere sued Ingram, claiming they formed a partnership for the purpose of creating an interdisciplinary pain clinic. The jury found they did. The trial court, however, eventually granted Ingram's motion for judgment notwithstanding the verdict and entered a take-nothing judgment. The court of appeals reversed in part, reinstating the jury verdict. 198 S.W.3d 96, 104-05.

In this Court, Ingram claims Deere offered no evidence that a partnership was formed. *See* TEX. REV. CIV. STAT. art. 6132b-2.03(a).

The jury charge contained seven questions. Question One asked

> Did [Deere] and [Ingram] form a joint venture[1] without giving it a name for the purpose of a interdisciplinary pain clinic that included the following terms:
> . . .
> That [Deere] and [Ingram] would each own 50% of the unnamed joint venture;
> . . . .

The jury was also instructed to consider the factors enumerated in the Texas Revised Partnership Act to determine whether a joint venture was created. *See id.* It found that a joint venture was created. Ingram challenges the legal sufficiency of the evidence to support the jury's answer.

I agree that evidence of one factor normally, but not necessarily always, will be legally insufficient to support a partnership finding. The Court says even considering Deere's testimony that Ingram said "this was a joint venture, or that we were partners, or we were doing this together," the evidence is legally insufficient as to any factor, including the factor of intent to form a partnership. I disagree the evidence was legally insufficient to support a finding of intent. After all, the jury *did* determine Deere's testimony was credible. Otherwise, it could not have found a joint venture existed.

However, we need not labor over whether Deere's testimony was legally sufficient evidence as to intent to form a partnership. Regardless of such testimony, there was no evidence to support the specific term of ownership percentage included in Question One.

According to the charge, one of the terms Deere had the burden of proving was that he and Ingram "would each own 50% of the unnamed joint venture." Deere did not object to Question One, so sufficiency of the evidence is measured against the charge as it was given. *Osterberg v. Peca*,

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[1] The jury question inquired about a "joint venture." As the Court notes, the parties reference the relationship both as a joint venture and a partnership. ___ S.W.3d ___, ___ n.2.

12 S.W.3d 31, 55 (Tex. 2000) ("[I]t is the court's charge, not some other unidentified law, that measures the sufficiency of the evidence when the opposing party fails to object to the charge.").

Deere offered no evidence that equal ownership of the business was ever discussed. Certainly there is no evidence that an agreement was reached for the business to be owned equally. Because there is no evidence that Deere and Ingram agreed to each own fifty percent of the allegedly formed joint venture, Deere did not carry his burden of proof under the jury charge. *See Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 618-19 (Tex. 2004) (citing *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001)).

For the foregoing reasons, I join the Court's opinion except for Part II-D 2. I also join the Court's holding that the evidence is legally insufficient to support a judgment for Deere and join the Court's judgment.

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Phil Johnson
Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0845

WAGNER & BROWN, LTD. ET AL, PETITIONERS

v.

JANE TURNER SHEPPARD, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF SYBIL TURNER, DECEASED, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

Argued December 5, 2007

JUSTICE BRISTER delivered the opinion of the Court.

JUSTICE WILLETT did not participate in the decision.

One observer has estimated that 85 percent of the 27,000 wells drilled in the East Texas oil field in the first half of the 20th century were unnecessary — resulting in a huge waste of money and

natural resources.[1] As one means of reducing excessive drilling, the Texas Legislature provided for voluntary pooling in 1949,[2] and compulsory pooling in 1965.[3]

Since then, this Court has never addressed how a pool of producing properties is affected if a lease in the pool expires. In this case, the courts below held that expiration of a lease removes those minerals from the pool and bars recovery of any costs incurred before termination. But the pooling agreement here did not depend on the continuation of underlying leases, nor was the equitable right of reimbursement for improvements necessarily extinguished by termination of the lease. Accordingly, we reverse and remand for further proceedings.

I. Background

Jane Sheppard, a CPA and retired family lawyer, owns 1/8th of the minerals underlying a 62.72-acre tract in Upshur County, Texas.[4] C.W. Resources, Inc. leased her 1/8th interest, and along with Wagner & Brown, Ltd. leased the other 7/8ths of the minerals from other owners. Sheppard's

[1] Howard R. Williams, *Conservation of Oil and Gas*, 65 HARV. L. REV. 1155, 1166 (1952) ("It has been estimated that all but 3,000 or 4,000 of the 27,000 wells in the East Texas field are unnecessary. The waste of materials and labor in this field alone may well exceed one billion dollars, and the unnecessary drilling costs in Texas may well exceed fifty million dollars per year.").

[2] Act approved May 24, 1949, 51st Leg., R.S., ch. 259, § 1, 1949 Tex. Gen. Laws 477–83 (current version at TEX. NAT. RES. CODE § 101.011).

[3] Act approved March 4, 1965, 59th Leg., R.S., ch. 11, § 2, 1965 Tex. Gen. Laws 24–6 (current version at TEX. NAT. RES. CODE § 102.011); *see R.R. Comm'n v. Miller*, 434 S.W.2d 670, 671 (Tex. 1968).

[4] Sheppard appears individually and as independent executrix of the estate of Sybil Turner, deceased.

lease had a special addendum providing that if royalties were not paid within 120 days after first gas sales, her lease would terminate the following month.[5]

Sheppard's lease also authorized pooling with adjacent tracts. On September 1, 1996, C.W. Resources, Wagner & Brown, and mineral lessees on adjacent tracts signed a unit agreement pooling the Sheppard tract and eight others to form the W.M. Landers Gas Unit.[6] One month later, a gas well was successfully completed and began producing, and a second well was completed in September 1997. Both wells were physically located on the Sheppard tract, but pursuant to the unit agreement proceeds and costs were split among all the tracts in proportion to acreage.

The original unit agreement designated C.W. Resources as operator of the unit. In September 2000, Wagner & Brown took over that position, and discovered that Sheppard had not been paid royalties within 120 days of the first gas sales. Wagner & Brown offered Sheppard a new lease, but with two producing wells already on her property, she declined. The parties agree that Sheppard's lease terminated on March 1, 1997, and since then she has been an unleased co-tenant, entitled to her share of proceeds from minerals sold less her share of the costs of production and marketing.

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[5] The provision stated:

> Within 120 days following the first sale of oil or gas produced from the lease premises, or lands pooled therewith, settlement shall be made by Lessee, or by Lessee's agent, for royalties due hereunder with respect to such oil or gas, and such royalties shall be paid monthly thereafter without the necessity of Lessor executing a division or transfer order. If said initial royalty payment is not so made under the terms hereof, this lease shall terminate as of 7:00 A.M. the first day of the month following the expiration of said 120 day period.

[6] The other parties joining in the unit agreement were defendants Thompson Interests, Inc., Carl A. Westerman, Westerman Royalty Company, Bernie Wolford, and H.G. Westerman.

The dispute here concerns both the proceeds and the costs. Regarding the proceeds, the question is whether the termination of Sheppard's lease also terminated her participation in the unit (in which case she is entitled to 1/8th of 100 percent of production, as both wells are on her tract), or did not do so (in which case she is entitled to 1/8th of only 51.3 percent of production — the proportion her tract bears to total acreage in the unit).[7] Regarding the costs, the question is whether Sheppard should bear any costs incurred *before* her lease terminated, or any costs incurred *after* the lease terminated that relate to the unit but not her lease.

The trial court granted summary judgment for Sheppard, finding that termination of the lease also terminated her participation in the unit, that she was not liable for any costs incurred before termination, and that she was liable for costs incurred after termination only if they pertained solely to her lease; the court of appeals affirmed.[8] For the reasons stated below, we disagree.

II. Does Termination of the Lease Also Terminate the Unit?

Sheppard's 1994 lease contained a standard industry pooling clause that provided:

> Lessee shall have the right but not the obligation to pool all or any part of the leased premises or interest therein with any other lands or interests . . . . Production, drilling or reworking operations anywhere on a unit which includes all or any part of the leased premises shall be treated as if it were production, drilling or reworking operations on the leased premises, except that the production on which Lessor's royalty is calculated shall be that proportion of the total unit production which the net acreage covered by this lease and included in the unit bears to the total gross acreage in the unit . . . . In the absence of production in paying quantities from a unit, or upon permanent cessation thereof, Lessee may terminate the unit by filing of record a written declaration describing the unit and stating the date of termination. Pooling hereunder shall not constitute a cross-conveyance of interests.

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[7] Sheppard's 62.72 acre tract compared to a total of 122.15954 acres in the unit.

[8] 198 S.W.3d 369.

The Designation of Unit signed by the lessees of the various "leases and lands" included in the pool provided that they "hereby pool and combine said leases and the lands . . . into a single pooled unit or unitized area for the development of and production of gas and associated hydrocarbons . . . ."

We disagree with Wagner & Brown that the portion of Sheppard's pooling clause regarding termination for lack of production resolves this case. That clause provides that the unit "*may* terminate" if production ceases, but there is nothing to show this was intended to be the exclusive means. The documents do not specify what happens to the unit when one lease terminates, so this case calls for interpretation rather than plain reading.

But we agree that a proper interpretation of these documents indicates the termination of Sheppard's lease did not terminate her participation in the unit. A lease is not necessarily required for pooling; mineral owners can join a pool even if no lease exists.[9] Here, both Sheppard's lease and the unit agreement pooled certain "premises" and "lands," not just their leased interests. Although Sheppard's lease expired, the lands themselves obviously did not. Thus, while termination of Sheppard's lease changed who owned the mineral interests in the unit, it did not cause the unit to terminate because it was a pooling of lands, not just leases.

On precisely this basis, the Second Court of Appeals held in *Ladd Petroleum Corp. v. Eagle Oil & Gas Co.* that termination of a lease does not terminate a unit.[10] The lease in *Ladd* allowed pooling with "other lands" as well as other leases, so the unit survived the termination of one lease

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[9] *See Westbrook v. Atl. Richfield Co.*, 502 S.W.2d 551, 554 (Tex. 1973) (concluding that mineral owners who were free of any lease ratified unit agreement).

[10] 695 S.W.2d 99, 106 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

because "the continuing validity of any such pooling was not dependent upon a subsisting leasehold estate in the adjacent land."[11] In this case as in *Ladd*, lands as well as leases were pooled, so the tracts dedicated to the unit survived even if the related leases did not.

The court of appeals here distinguished *Ladd* on the ground that it involved termination of an entire pool, while Sheppard seeks only termination of her participation in it.[12] But there cannot be one rule of contract interpretation for small mineral interests and a different rule for large ones. If Sheppard's original mineral interest had been 8/8ths rather than 1/8th, the ruling she seeks would have cut off all production for the other members in the pool just as occurred in *Ladd*. And if her original interest had been 5/8ths or more, her share would have curtailed their share, even though they had nothing to do with letting her lease terminate.[13]

The court of appeals relied on *Texaco, Inc. v. Lettermann*, in which the Seventh Court of Appeals held that the termination of two out of the three leases in a unit resulted in termination of the pool.[14] But the lease in *Lettermann* only authorized pooling "*with the gas leasehold estate*" of adjacent lands.[15] Thus, when those leasehold estates terminated, so did the pool. But that does not mean a unit formed by pooling *lands* must terminate on the same basis as one formed by pooling only *leases*.

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[11] *Id*.

[12] 198 S.W.3d at 375.

[13] A co-tenant owning 5/8ths of the minerals would be entitled to 62.5 percent of production, whereas the other pool members here were entitled to 49.7 percent of production based on their proportional acreage in the pool.

[14] 343 S.W.2d 726, 730 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.).

[15] *Id*. at 727 (emphasis added).

The court of appeals also reasoned from the premise that the pooling agreement transferred only the operator's interest, leaving Sheppard's possibility of reverter unimpinged. But her lease allowed pooling of "all or any part of the leased premises or interest therein," and Sheppard's reverter was certainly an interest in the leased premises. "When a unit is properly pooled, the owners of the minerals *or reversionary interests* in a separate tract within the unit surrender their right to receive their interest in all production from wells located on their own tract . . . ."[16] Just as pooling impinges on a mineral owner's royalty interest,[17] it also may impinge on an owner's possibility of reverter.

The parties invite us to decide the question here based on general principles rather than the terms of the particular documents involved. Wagner & Brown urges that termination of a lease should never terminate a pool, pointing out that pooling benefits mineral owners, operators, the state, and the environment by reducing the number of wells needed to maintain efficient production while protecting correlative rights.[18] Sheppard urges adoption of a treatise's view that "pooling can extend no longer than the lease itself" because a lessor grants only "a power to pool the leasehold rights."[19]

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[16] *Mengden v. Peninsula Prod. Co.*, 544 S.W.2d 643, 648 (Tex. 1976) (emphasis added); *Southland Royalty Co. v. Humble Oil & Ref. Co.*, 249 S.W.2d 914, 916 (Tex. 1952).

[17] *See Southland Royalty*, 249 S.W.2d at 916; *Brown v. Smith*, 174 S.W.2d 43, 46 (Tex. 1943).

[18] *See Mengden*, 544 S.W.2d at 647; Howard R. Williams, *Conservation of Oil and Gas*, 65 HARV. L. REV. 1155, 1164 (1952) (recommending compulsory pooling as a conservation measure because "dense spacing dissipates reservoir energy, occasions some wastage of oil or gas while the wells are being cleaned out, increases the hazards of fire or other accidents which cause loss of minerals or damage to the producing structure, and results in uneconomic use of materials and labor in the drilling of unnecessary wells").

[19] 1 BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING & UNITIZATION § 15.04 (3d. ed. 2006). The authors acknowledge that the question here is "difficult," that "another way of viewing the pooling clause" is that it continues under the normal rules of principal and agent, and that "[i]t is necessary to look at all the circumstances of the pooling in order to determine whether there is a continuation of the pooling once a lease that has been pooled may

But oil and gas leases in general, and pooling clauses in particular, are a matter of contract.[20] Just as owners and operators generally must agree to create a pool,[21] they should also be able to agree when one terminates. If the parties want pooling to expire (or not) upon termination of one lease, they should be free to say so.[22]

The lease here allowed the Sheppard tract (rather than just the lease) to be pooled for purposes of production, and that is what the unit designation did. As termination of the lease changed none of the lands committed to the unit, we hold that it did not terminate the unit. Thus, while Sheppard is entitled as a co-tenant to 1/8th of the proceeds due to the mineral owners of her tract, that does not entitle her to 1/8th of the proceeds that must be shared with mineral owners of other tracts by the terms of the unit agreement.

III. Must Sheppard Pay a Share of Unit Expenses?

Based on the conclusion that the Landers unit had terminated, the courts below denied Wagner & Brown's claim for leasehold, land/legal, and overhead expenses to the extent they related

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be said to have terminated." *Id.* The authors also serve as editors of another treatise stating that "[e]xpiration or other extinguishment of a unitized interest will cause termination of the unit as to such interest." 6 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL & GAS LAW § 931.2 (Patrick H. Martin & Bruce M. Kramer eds., 2007). Both entries rely almost entirely on *Texaco, Inc. v. Lettermann*, in which (as we have noted) the polling clause unitized leases rather than lands.

[20] *Tittizer v. Union Gas Corp*., 171 S.W.3d 857, 860 (Tex. 2005).

[21] *Id*.

[22] *See Southland Royalty*, 249 S.W.2d at 917 (holding that nothing prevented mineral owner "from protecting their estates by express stipulation").

to the unit rather than solely to Sheppard's tract.[23] Because we have held the unit did not terminate, Wagner & Brown properly accounted to Sheppard for both production and expenses on a unit basis.[24]

The record reflects that these expenses were for landman fees, lease bonuses, recording fees, and title opinion expenses, part or all of which related to tracts in the unit other than Sheppard's. Additionally, "overhead" expenses (including administration, supervision, office services, and warehousing) were calculated pursuant to a standard accounting agreement relating to the unit. At trial, Sheppard produced no evidence that any of these expenses were not reasonable and necessary; to the contrary, she stipulated that many of them were.

On appeal, Sheppard suggests no basis for barring these expenses except that they did not all relate to her tract. But the evidence at trial established that two wells could not have been drilled on her tract without the pool, at least not without getting an exception from Railroad Commission that would have curtailed production. From the perspective of other interest holders in the unit, expenses to maintain Sheppard's tract were clearly necessary as all the wells were located there; the same kind of expenses to keep other tracts and leases in the unit were of similar value to Sheppard, not just as a matter of equal treatment but because future wells might be located off her tract.

Although Wagner & Brown's evidence was not contradicted, the trial court was not required to believe all of it. Accordingly, we do not hold that Wagner & Brown conclusively established that all its charges were reasonable and necessary. But some of them certainly were, so there is no

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[23] 198 S.W.3d at 379.

[24] The court of appeals also held that the defendants could not deduct expenses incurred on the first well from the revenues for the second well. *Id.* at 381. As the defendants did not appeal that conclusion, we do not reach it.

evidence to support the trial court's award of none of them. In these circumstances, we must reverse and remand for a reassessment of damages.[25]

IV. Must Sheppard Pay Drilling Costs?

Sheppard concedes that once her lease expired, she must pay her share of expenses to produce and market gas thereafter.[26] But she argues, and the courts below agreed, that she did not have to pay any of the drilling or other costs incurred before the lease expired.[27]

But the general rule regarding improvements is otherwise: "The principle is well established in equity that a person who in good faith makes improvements upon property owned by another is entitled to compensation therefor."[28] Thus, when a son lost a farm because his deed from his father was oral, we held he might still seek reimbursement for improvements he built to the extent they enhanced the farm's value.[29] When a couple used community funds to build a home on realty owned separately by one spouse, we held the community estate had an equitable right of reimbursement for

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[25] *See Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 314 (Tex. 2006).

[26] *See White v. Smyth*, 214 S.W.2d 967, 979 (Tex. 1948) (upholding operating co-tenant's right to assess "payrolls, salaries, depreciation, repairs, insurance, commissions," as well as reasonable compensation for the operator's personal services).

[27] This dispute appears to relate primarily to the drilling costs of the first well, as the second well was drilled after Sheppard's lease had terminated, and she does not complain of the trial court's order allowing drilling costs of that well to be deducted from the proceeds she is owed on that well.

[28] *Sharp v. Stacy*, 535 S.W.2d 345, 351 (Tex. 1976); *see also Resolution Trust Corp. v. Kemp*, 951 F.2d 657, 665 (5th Cir. 1992) ("Under Texas law, a purchaser who makes improvements upon property in the good faith belief that it has good title to the property is entitled to compensation for the improvements."); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10 (Tentative Draft No. 1, 2001) ("A person who improves the real or personal property of another, acting by mistake, has a claim in restitution as necessary to prevent unjust enrichment.").

[29] *See Sharp*, 535 S.W.2d at 351 (holding son's heirs waived that right by submitting issue only regarding costs of improvements rather than enhanced value of farm).

the improvements.[30] And when a co-tenant paid to raise a lot in Galveston above sea-level, we held he was entitled to reimbursement of his costs.[31] As we explained in the latter case, this rule arises in equity:

> When two persons are cotenants in the ownership of land, and one of them incurs expense in the improvement of the property which is necessary and beneficial, it is equitable that the one incurring the expense shall have contribution from his cotenant in an amount which is in proportion to the undivided interest owned by such cotenant.... The law implies a contract between him and his cotenant, authorizing him to spend for him the money which was necessarily spent . . . .[32]

Under Texas law, only a naked trespasser cannot recover for improvements that benefit another's land.[33]

As oil and gas wells are improvements to real property,[34] the same rule applies to them: one who drills a well in good faith is entitled to reimbursement.[35] This rule applies even if an operator's

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[30] *Anderson v. Gilliland*, 684 S.W.2d 673, 675 (Tex. 1985).

[31] *Stephenson v. Luttrell*, 179 S.W. 260, 262 (Tex. 1915).

[32] *Id*.

[33] *Armstrong v. Oppenheimer*, 19 S.W. 520, 521 (Tex. 1892).

[34] *Francis v. Coastal Oil & Gas Corp*., 130 S.W.3d 76, 85 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *see also Fox v. Thoreson*, 398 S.W.2d 88, 92 (Tex. 1966) (referring to costs incurred in drilling and equipping gas well as "improvements").

[35] *Brannon v. Gulf States Energy Corp*., 562 S.W.2d 219, 224 (Tex. 1977) (holding driller under invalid lease entitled to reimbursement of reasonable drilling expenditures if found to have drilled "in good faith belief in the superiority of its lease"); *Texas Co. v. State*, 281 S.W.2d 83, 93 (Tex. 1955) (holding that operator under invalid lease "[a]s a good faith trespasser . . . has been permitted credit for its expenditures in producing the oil and gas, according to its own records").

lease is not valid, so long as the operator believed in good faith that it was.[36] Similarly, a co-tenant who drills without another co-tenant's consent is entitled to reimbursement:

> It has long been the rule in Texas that a cotenant has the right to extract minerals from common property without first obtaining the consent of his cotenants; however, he must account to them on the basis of the value of any minerals taken, *less the necessary and reasonable costs of production and marketing*.[37]

Thus, there is no question that under Texas law Wagner & Brown could have recovered a share of drilling costs from Sheppard had she signed no lease at all. The question is whether the rule should be different because there was a valid lease that was mistakenly allowed to expire. It is of course true that equity does not favor those who sleep on their rights.[38] But it is hard to see why one who obtains a lease and then loses it by mistake is entitled to less equity than one who by mistake never had a valid lease in the first place.

It is true that C.W. Resources breached Sheppard's lease, but a breaching party is not necessarily barred from reimbursement for improvements. For example, Texas law permits recovery to builders upon substantial performance, even if they have breached their building contract.[39] As

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[36] *Brannon*, 562 S.W.2d at 224 (holding driller under invalid lease entitled to reimbursement of reasonable drilling expenditures if found to have drilled "in good faith belief in the superiority of its lease"); *Texas Co.*, 281 S.W.2d at 93 (holding that operator under invalid lease "[a]s a good faith trespasser . . . has been permitted credit for its expenditures in producing the oil and gas, according to its own records").

[37] *Byrom v. Pendley*, 717 S.W.2d 602, 605 (Tex. 1986) (emphasis added); *see also Cox v. Davison*, 397 S.W.2d 200, 201 (Tex. 1965) (holding interest not recoverable even if operator borrowed money to drill) ("The Texas rule is that a cotenant who produces minerals from common property without having secured the consent of his cotenants is accountable to them on the basis of the value of the minerals taken less the necessary and reasonable cost of producing and marketing the same.").

[38] *Atl. Ref. Co. v. Noel*, 443 S.W.2d 35, 41 (Tex. 1968) (Walker, J., dissenting); *Hanks v. Rosser*, 378 S.W.2d 31, 40 (Tex. 1964).

[39] *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 481 (Tex. 1984).

we have explained, this rule is based on "the owner's acceptance and retention of the benefits arising as a direct result of the contractor's partial performance."[40]

Beyond these general principles, the parties assert that several cases establish rules in their favor, but we find none convincing. The closest are two 1965 opinions by the Seventh Court of Appeals. In *Thoreson v. Fox*, the court found that a lease had expired for failure to commence production within 120 days, but nevertheless allowed the operator to recover its drilling costs from amounts it owed for gas sales.[41] After quoting a Pennsylvania Supreme Court case allowing reimbursement to an operator who mistakenly drilled on the wrong lease, the Seventh Court stated:

> Surely, if a trespasser, as in the Pennsylvania case just cited, is entitled to recover for the cost of drilling and for machinery and appliances incident to the operation of the well[,] defendants here would be entitled to recover for the value of the improvements to the land itself, limited to the actual cost to the defendants.[42]

Less than three months later, the same court refused to allow reimbursement in *Steeple Oil & Gas Corp. v. Amend*, in which a lease terminated for failure to pay shut-in royalties.[43] The court distinguished *Thoreson* on two grounds: (1) the mineral owner in *Thoreson* invoked equity by seeking an order barring removal of casing and equipment, and (2) a jury found the *Thoreson* operator had acted in good faith.[44] While in some jurisdictions reimbursement for a builder may

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[40] *Truly v. Austin*, 744 S.W.2d 934, 937 (Tex. 1988).

[41] 390 S.W.2d 308, 317 (Tex. Civ. App.—Amarillo 1965), *rev'd on other grounds*, 398 S.W.2d 88 (Tex. 1966).

[42] *Id.*

[43] 392 S.W.2d 744, 746 (Tex. Civ. App.—Amarillo 1965), *rev'd on other grounds*, 394 S.W.2d 789 (Tex. 1965).

[44] *Id*.

depend on an equitable counterclaim by the owner,[45] that does not appear to have been the general rule in Texas.[46] Nor is it clear why the failure to pay shut-in royalties in *Steeple* was not in good faith while the failure to commence timely production in *Thoreson* was. In any event, both opinions were promptly reversed by this Court on other grounds.[47]

Almost 80 years ago, the Commission of Appeals held in *Broadway v. Stone* that a plaintiff who bought an unleased 1/36th mineral interest after four producing wells had been drilled "was chargeable in equity with a proportionate part of the reasonable value of said improvements."[48] While the Commission said that production after the plaintiff's purchase should be reduced by expenses incurred *after* that date, it also held that such production was "subject to the charge for improvements" made *before* that date.[49] But as *Broadway* did not involve a terminated lease, and

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[45] *See* RESTATEMENT (FIRST) OF RESTITUTION § 42(1) (1937) ("Except to the extent that the rule is changed by statute, a person who, in the mistaken belief that he or a third person on whose account he acts is the owner, has caused improvements to be made upon the land of another, is not thereby entitled to restitution from the owner for the value of such improvements; but if his mistake was reasonable, the owner is entitled to obtain judgment in an equitable proceeding or in an action of trespass or other action for the mesne profits only on condition that he makes restitution to the extent that the land has been increased in value by such improvements, or for the value of the labor and materials employed in making such improvements, whichever is least.").

[46] *See Anderson v. Gilliland*, 684 S.W.2d 673, 675 (Tex. 1985) (upholding right of reimbursement although opposing party made no equitable claims); *Stephenson v. Luttrell*, 179 S.W. 260, 262 (Tex. 1915) (same).

[47] *See Fox v. Thoreson*, 398 S.W.2d 88, 92 (Tex. 1966) (holding lease never terminated, so question of offset was moot); *Steeple Oil & Gas Corp. v. Amend*, 394 S.W.2d 789, 790 (Tex. 1965) (reversing and dismissing appeal as underlying summary judgment was interlocutory).

[48] 15 S.W.2d 230, 232 (Tex. Comm'n App. 1929, holding approved).

[49] *Id*.

was approved by this Court only as to its holding rather than its reasoning,[50] it is not controlling here.[51]

One cannot conclude much from this limited set of cases, except that operators apparently do not let many productive leases expire before recovering their drilling costs. Given the equitable nature of a reimbursement-for-improvements claim,[52] we decline to read Texas law as establishing that drilling costs are *always* or *never* recoverable when a lease expires.

Instead, we believe the equitable nature of such claims must turn on the equities in each case. Thus, for example, an operator who intentionally terminates a lease has a weaker claim to equity than one who does so by accident. One who immediately offers to reinstate an expired lease has cleaner hands than one who does not. As with other equitable actions, a jury may have to settle disputed issues about what happened, but "the expediency, necessity, or propriety of equitable relief" is for the trial court,[53] and its ruling is reviewed for an abuse of discretion.[54]

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[50] *See* TEXAS RULES OF FORM (Texas Law Review Ass'n et al. eds., 10th ed. 2005) ("The Texas Supreme Court's approval of the holding of a commission decision signifies that the Court approved the judgment and adopted each specific holding of the Commission, but did not necessarily approve its reasoning.").

[51] Because the Thirteenth Court of Appeals read *Broadway* to allow recovery only of post-purchase costs without noticing the Commission's holding that pre-purchase costs were also chargeable, we find its opinion in *Hunt v. HNG Oil Co.* unconvincing. *See* 791 S.W.2d 191, 194 (Tex. App.—Corpus Christi 1990, writ denied). Nor do we find applicable the refusal to award recovery of drilling costs in *Eubank v. Twin Mountain Oil Corp.*, 406 S.W.2d 789, 792 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.), as the lease had not only expired but failed to produce anything for five years, so the improvements were no longer benefitting the mineral estate owner.

[52] *See Broadway*, 15 S.W.2d at 232; *Stephenson v. Luttrell*, 179 S.W. 260, 262 (Tex. 1915).

[53] *State v. Texas Pet Foods, Inc.*, 591 S.W.2d 800, 803 (Tex. 1979); *see also Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999) (holding forfeiture of attorney's fee was equitable decision for trial court); *Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex. 1974) (holding equitable remedy of constructive trust was for trial court).

[54] *See, e.g.*, *Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007) (reviewing constructive trust for abuse of discretion); *Lee v. Downey*, 842 S.W.2d 646, 649 n.9 (Tex. 1992) (reviewing denial of permanent injunction for abuse of discretion); *Penick v. Penick*, 783 S.W.2d 194, 198 (Tex. 1988) (reviewing marital equitable reimbursement claim

Based on the summary judgment record here, it appears that the trial court abused its discretion in refusing reimbursement of drilling costs. There is no question Sheppard's tract has enjoyed ten years of production from two gas wells drilled at the sole risk and expense of the defendants. Neither well was drilled by a trespasser; the defendants had title to the other 7/8ths of the minerals on her tract, and thus an unquestionable right to drill the wells where they were. Sheppard had the option to continue collecting royalties free of any drilling costs, as Wagner & Brown offered to reinstate her lease on that basis. Having chosen instead (as was her right) to be a co-tenant with full benefits to the minerals she owned, it would be inequitable to allow her to escape the burdens that come with that choice.

Further, it is well-settled that "equity abhors forfeiture."[55] Consistent with that rule, Texas law requires that in construing mineral leases "doubts should be resolved in favor of a covenant instead of a condition" so that forfeiture is avoided.[56] Sheppard's lease leaves no room for doubt that the operators forfeited the lease when the first royalty was delayed; but it says nothing about whether they forfeited drilling costs too on that basis. While the defendants lost forever their legal claim to Sheppard's minerals, that does not necessarily mean that they also lost their equitable claim for the improvements they had built on her tract. Again, equity might deny such a claim had the lease expired long after production had begun and the operators had recovered most of their drilling costs.

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for abuse of discretion).

[55] *Jones v. N.Y. Guar. & Indem. Co.*, 101 U.S. 622, 628 (1879) ("A court of equity abhors forfeitures, and will not lend its aid to enforce them."); *see, e.g.*, *Bennett v. Copeland*, 235 S.W.2d 605, 608 (Tex. 1951); *Hoover v. Gen. Crude Oil Co.*, 212 S.W.2d 140, 143 (Tex. 1948); *Slaughter v. Qualls*, 162 S.W.2d 671, 676 (Tex. 1942); *Ft. Worth Driving Club v. Ft. Worth Fair Ass'n*, 122 S.W. 254, 254 (Tex. 1909).

[56] *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 79 (Tex. 1989).

But the lease here terminated at the very outset of production, so denying reimbursement would work a substantial forfeiture. Under the facts in the record here, the trial court abused its discretion by allowing Sheppard to reap all the proceeds of production without bearing any of the costs.

The court of appeals denied reimbursement on the basis that Sheppard was a royalty owner at the time drilling costs were incurred, and thus was not liable for them.[57] But Sheppard ceased being a royalty owner shortly after production began. To the extent working interest owners paid drilling costs out of production over the following months, Sheppard too would be liable for those costs as she became a working interest owner after her lease terminated.[58]

Because of the absence of authoritative caselaw, the evidence presented in the parties' cross-motions for summary judgment did not focus on the equitable issues like those we have indicated above. We recognize there might be other facts not appearing in the record that would justify denying Wagner & Brown an equitable right of reimbursement for drilling or other pre-termination costs. Accordingly, in the interest of justice we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.[59]

* * *

For the reasons stated above, we reverse the judgment of the court of appeals, and render judgment that (1) termination of Sheppard's lease did not terminate her participation in the Landers

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[57] 198 S.W.3d 377.

[58] *See Westbrook v. Atl. Richfield Co.*, 502 S.W.2d 551, 554 (Tex. 1973) (holding mineral owners whose lease had expired signed unit agreement as working interest owners).

[59] TEX. R. APP. P. 60.3; *see R.R. St. & Co. v. Pilgrim Enters., Inc.*, 166 S.W.3d 232, 255 (Tex. 2005); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 195 (Tex. 2004).

unit, and (2) Wagner & Brown may account for both production and costs on a unit basis to the extent allowed by the parties' agreements, custom in the industry, and the trial court's order that operating expenses be deducted from production on a well-by-well bases (from which order the defendants have not appealed). We reverse and remand for further proceedings in the trial court consistent with this opinion regarding (1) the reasonable and necessary costs of production to be deducted from amounts due Sheppard for costs incurred after termination of her lease, (2) whether the defendants are entitled to equitable recovery of their pre-termination costs, and if so (3) the reasonable and necessary amount of those costs.

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Scott Brister
Justice

OPINION DELIVERED: November 21, 2008

IN THE SUPREME COURT OF TEXAS

No. 06-0867

PINE OAK BUILDERS, INC., PETITIONER,

v.

GREAT AMERICAN LLOYDS INSURANCE COMPANY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued February 7, 2008

JUSTICE WILLETT delivered the opinion of the Court.

Upon being sued by five different homeowners alleging various construction defects, Pine Oak Builders, Inc. made written demand on its insurers, including Great American Lloyds Insurance Co., for a defense. When the insurers denied any duty to defend, Pine Oak sued for breach of the insurers' defense obligations. This coverage dispute revisits issues addressed in three of our recent cases, which decide some matters in Pine Oak's favor and some in Great American's favor.

I. Background

Great American issued occurrence-based commercial general liability (CGL) policies to Pine Oak, a homebuilder, covering April 1993 to April 2001. Another insurer, Mid-Continent Casualty Co., issued CGL policies covering April 2001 to April 2003. Between February 2002 and March

2003, five homeowners sued Pine Oak, alleging their homes suffered water damage because of defective construction. Four of the suits alleged improper installation of a synthetic stucco product known as an Exterior Insulation and Finish System (EIFS). The other suit, the Glass suit, alleged water damage due to improper design and construction of columns and a balcony.

The insurers denied Pine Oak's request for a defense in the homeowner suits, prompting Pine Oak to file this suit. The insurers in turn sought a declaratory judgment that they had no obligation to defend or indemnify Pine Oak. Both sides sought summary judgment—Pine Oak arguing its right to a defense and damages, and Great American arguing the policies did not cover the claims in the underlying suits. The trial court granted summary judgment for the insurers on all issues.

The court of appeals[1] affirmed the summary judgment for Mid-Continent because of an EIFS exclusion found in Mid-Continent's policies, and Pine Oak does not appeal this ruling. As for Great American, the court affirmed the summary judgment relating to the Glass suit, reasoning that it only alleged defective work by Pine Oak that was excluded under the policies' "your work" exclusion. However, the court concluded Great American had a duty to defend the four other homeowner suits, though Pine Oak could not recover statutory damages under the Prompt Payment of Claims statute[2] for Great American's failure to defend the suits. We granted the parties' cross-petitions.[3]

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[1] ___ S.W.3d ___.

[2] TEX. INS. CODE §§ 542.051–.061 (previously codified as TEX. INS. CODE art. 21.55).

[3] 50 Tex. Sup. Ct. J. 1073–74 (Aug. 31, 2007).

II. Discussion

A. *Lamar Homes* — Whether Faulty Workmanship Claims Are Covered and Whether Insurance Code Article 21.55 Applies

Great American urges us to hold that Pine Oak's faulty-workmanship claims do not allege "property damage" caused by an "occurrence" under the terms of the policies. This argument is foreclosed by *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, where we held that a claim of faulty workmanship against a homebuilder was a claim for property damage caused by an occurrence under a CGL policy.[4] The relevant policy language in the Great American policies is identical to the policy language we construed in *Lamar Homes*.[5]

Pine Oak asks us to reverse the court of appeals' holding that the Prompt Payment of Claims statute does not apply to an insurer's breach of its duty to defend under a liability policy. We agree, as *Lamar Homes* again controls, making clear the statute does apply to such situations.[6]

B. *Don's Building Supply* — What Triggers Coverage Under an Occurrence-Based CGL Policy?

The underlying suits concern homes built in 1996 and 1997. Great American's policies, consecutive one-year policies, cover the period from April 5, 1993 to April 5, 2001. On the question of whether Great American's policies were triggered under facts alleged in the underlying suits, the court of appeals followed the "exposure rule" for determining whether a property-damage claim is

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[4] 242 S.W.3d 1, 4–5, 16 (Tex. 2007).

[5] Great American's briefing concedes that the occurrence and property-damage issues presented in this case are identical to the issues then pending in *Lamar Homes*.

[6] *Lamar Homes*, 242 S.W.3d at 5, 20.

covered under an occurrence-based CGL policy.[7] Great American urges us to adopt the "manifestation rule" for deciding whether a property-damage claim is covered.

We rejected both of these rules in *Don's Building Supply, Inc. v. OneBeacon Insurance Co.*,[8] another case involving insurance coverage of EIFS claims. We adopted instead the actual-injury rule, under which property damage occurs during the policy period if "actual physical damage to the property occurred" during the policy period.[9] As we explained in that case, "the key date is when injury happens, not when someone happens upon it"—that is, the focus should be on "when damage comes to pass, not when damage comes to light."[10] The policy language construed in *Don's Building Supply* is identical to the relevant language in Great American's policies.[11] So property damage occurred under the Great American policies "when a home that is the subject of an underlying suit

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[7] ___ S.W.3d at ___.

[8] 267 S.W.3d 20 (Tex. 2008).

[9] *Id.* at 24.

[10] *Id.* at 22.

[11] The Great American policies provided:

> We will pay those sums that the Insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages.
>
> . . . .
>
> This insurance applies to . . . "property damage" only if . . . the . . . "property damage" is caused by an "occurrence" . . . and . . . the . . . "property damage" occurs during the policy period.
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> . . . .
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> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
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> . . . .
>
> "Property damage" means . . . physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it.

suffered wood rot or other physical damage."[12] On remand, the trial court should apply the actual-injury rule to any remaining disputes about whether the property-damage claims fall within the terms of the Great American policies.

C. *GuideOne Elite* — Extrinsic Evidence and the Eight-Corners Rule

The final issue is whether evidence extrinsic to the eight corners of the policy and the underlying lawsuit may be used to establish the insurer's duty to defend. Exclusion "*l*" of the CGL policy removes coverage for property damage to the insured's completed work. This exclusion contains an exception "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." As *Lamar Homes* explained, coverage therefore depends in part on whether the alleged defective work was performed by Pine Oak or a subcontractor.[13]

In four of the underlying suits against Pine Oak, the petitions expressly alleged defective work by one or more subcontractors. In the Glass case, the petition contains no allegations of defective work by a subcontractor. The petition asserted causes of action for breach of contract and warranty, violation of the Residential Construction Liability Act,[14] and negligence, based on Pine Oak's alleged failure to perform its work in a good and workmanlike manner and a failure to make requested repairs.

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[12] *Don's Bldg.*, 267 S.W.3d at 24.

[13] *See Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 11 (Tex. 2007) (describing identical policy language).

[14] TEX. PROP. CODE §§ 27.001–.007.

In this coverage suit, Pine Oak submitted evidence that the defective work alleged in the Glass case was performed by subcontractors. Based on this extrinsic evidence, Pine Oak contends Great American had a duty to defend Pine Oak in the Glass case.

Under the eight-corners rule, the duty to defend is determined by the claims alleged in the petition and the coverage provided in the policy.[15] "If a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured."[16]

In *GuideOne Elite Insurance Co. v. Fielder Road Baptist Church*, issued six days before the court of appeals' decision in this case, the plaintiff in an underlying suit alleged that an employee of the insured had sexually abused her.[17] The insurer brought a declaratory judgment action to determine coverage.[18] The underlying third-party petition alleged that the abuse occurred from 1992 to 1994.[19] The insurer sought to introduce extrinsic evidence that the employee ceased working for the insured on December 15, 1992, before the insurance policy took effect.[20] We stated:

> Although this Court has never expressly recognized an exception to the eight-corners rule, other courts have. Generally, these courts have drawn a very narrow exception, permitting the use of extrinsic evidence only when relevant to an independent and

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[15] *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA, v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997); *Heyden Newport Chem. Corp. v. S. Gen. Ins. Co.*, 387 S.W.2d 22, 26 (Tex. 1965).

[16] *Nat'l Union*, 939 S.W.2d at 141.

[17] 197 S.W.3d 305, 307 (Tex. 2006).

[18] *Id.*

[19] *Id.*

[20] *Id.*

> discrete coverage issue, not touching on the merits of the underlying third-party claim.[21]

Without recognizing an exception to the eight-corners rule, we held that any such exception would not extend to evidence that was relevant to both insurance coverage and the factual merits of the case as alleged by the third-party plaintiff.[22] We further reasoned that

> the extrinsic evidence here concerning Evans' employment directly contradicts the plaintiff's allegations that the Church employed Evans during the relevant coverage period, an allegation material, at least in part, to the merits of the third-party claim. Under the eight-corners rule, the allegation's truth was not a matter for debate in a declaratory judgment action between insurer and insured.[23]

The extrinsic fact Pine Oak seeks to introduce in this coverage action contradicts the facts alleged in the Glass suit. The petition in the Glass suit alleges that Pine Oak agreed to construct the plaintiffs' house, that Pine Oak alone "constructed columns that provided inadequate support," "failed to properly seal seams," "negligently attempted to correct" a problem with the balcony, failed "to perform the work in a good and workmanlike manner," and failed "to make the repairs described above." These claims of faulty workmanship by Pine Oak are excluded from coverage under the "your work" exclusion. Faulty workmanship by a subcontractor that might fall under the subcontractor exception to the "your work" exclusion is not mentioned in the petition. "If the petition only alleges facts excluded by the policy, the insurer is not required to defend."[24]

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[21] *Id.* at 308 (footnotes omitted).

[22] *Id.* at 309.

[23] *Id.* at 310. Our analysis in *GuideOne Elite* did not consider whether an exception to the eight-corners rule might exist where the parties to the underlying suit collude to make false allegations that would invoke the insurer's duty to defend, because the record did not indicate collusion. *Id.* at 311.

[24] *Fid. & Guar. Ins. Underwriters, Inc. v. McManus*, 633 S.W.2d 787, 788 (Tex. 1982).

Pine Oak urges that the references in the Glass petition to Pine Oak as the culpable party can be read as either Pine Oak or one of its subcontractors. Unlike the petitions in the other four suits, the petition in the Glass case does not accuse any subcontractor—a separate legal entity—of defective work or other legally actionable conduct, nor does it allege that Pine Oak is liable under any theory for the conduct or work of a subcontractor. It does not allege negligent supervision of a subcontractor or any other third party. It alleges that Pine Oak alone is liable for its own actionable conduct. "We will not read facts into the pleadings. . . . Nor will we look outside the pleadings, or imagine factual scenarios which might trigger coverage."[25] Instead, "an insurer is entitled to rely solely on the factual allegations contained in the petition in conjunction with the terms of the policy to determine whether it has a duty to defend."[26]

Pine Oak views *GuideOne Elite* as distinguishable because in that case the insurer was attempting to introduce extrinsic evidence to *limit* its duty to defend, whereas here Pine Oak, the insured, offered extrinsic evidence to *trigger* the duty to defend. This distinction is not legally significant.

In deciding the duty to defend, the court should not consider extrinsic evidence from either the insurer or the insured that contradicts the allegations of the underlying petition. The duty to defend depends on the language of the policy setting out the contractual agreement between insurer

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[25] *Nat'l Union Fire Ins. Co. of Pittsburgh, PA, v. Merchs. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 142 (Tex. 1997).

[26] *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 829 (Tex. 1997).

and insured.[27] A defense of third-party claims provided by the insurer is a valuable benefit granted to the insured by the policy, separate from the duty to indemnify.[28] But the insurer's duty to defend is limited to those claims actually asserted in an underlying suit. Great American's policy provides that it shall "have the right and duty to defend any 'suit' seeking" damages for bodily injury or property damage covered by the policy. "Suit" is defined as "a civil proceeding in which damages because of [property damage or other injuries] to which this insurance applies are alleged." The policy imposes no duty to defend a claim that might have been alleged but was not, or a claim that more closely tracks the true factual circumstances surrounding the third-party claimant's injuries but which, for whatever reason, has not been asserted. To hold otherwise would impose a duty on the insurer that is not found in the language of the policy. Such a construction would subject an insurer to common-law and statutory liability for failing to defend the insured against a third-party claim that has not been alleged, despite policy language limiting the duty to defend to claims that have been alleged.

Such a construction would also "conflate the insurer's defense and indemnity duties," since the duty to defend turns on the "factual allegations that potentially support a covered claim," while "the facts actually established in the underlying suit control the duty to indemnify."[29] The duty to

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[27] *See Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994) ("Interpretation of insurance contracts in Texas is governed by the same rules as interpretation of other contracts. When construing a contract, the court's primary concern is to give effect to the written expression of the parties' intent." (citations omitted)).

[28] *See Cowan*, 945 S.W.2d at 821–22 (noting that "the duty to defend and the duty to indemnify by an insurer are distinct and separate duties."); *Heyden Newport Chem. Corp. v. S. Gen. Ins. Co.*, 387 S.W.2d 22, 25 (Tex. 1965) (noting that duty to indemnify protects insureds "from payment of damages they may be found legally obligated to pay," while duty to defend "protects the same parties against the expense of any suit seeking damages" covered by the policy).

[29] *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 310 (Tex. 2006).

defend protects the insured by requiring a legal defense to allegations without regard to whether they are true,[30] but it does not extend to allegations, true or false, that have not been made. Great American's duty to defend was not triggered by the Glass petition in the record before us.

III. Conclusion

We affirm in part and reverse in part the court of appeals' judgment, and remand the case to the trial court for further proceedings consistent with this opinion.

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Don R. Willett
Justice

OPINION DELIVERED: February 13, 2009

[30] *See Heyden Newport Chem. Corp.*, 387 S.W.2d at 24 ("We think that in determining the duty of a liability insurance company to defend a lawsuit the allegations of the complainant should be considered in the light of the policy provisions without reference to the truth or falsity of such allegations and without reference to what the parties know or believe the true facts to be, or without reference to a legal determination thereof.").

IN THE SUPREME COURT OF TEXAS

NO. 06-0875

FORD MOTOR COMPANY, PETITIONER,

v.

EZEQUIEL CASTILLO, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued February 5, 2008

JUSTICE JOHNSON delivered the opinion of the Court.

JUSTICE WAINWRIGHT filed a concurring opinion.

Ford Motor Company and Ezequiel Castillo, the plaintiff in a products liability action, settled while the jury was deliberating. The settlement occurred after the presiding juror sent a note to the judge asking the maximum amount that could be awarded. Based on later discussions with jurors, Ford suspected that outside influence may have been brought to bear on the presiding juror. After Ford sought, but was refused, permission to obtain discovery on the outside influence question, it withdrew its consent to the settlement. Castillo sought summary judgment against Ford for breach of the settlement agreement. Ford's response renewed its request for discovery, but the trial court rendered summary judgment for Castillo on the breach of settlement agreement claim. We hold that the trial court erred by refusing to allow discovery on Castillo's action for breach of contract,

including whether there was any outside influence on the jury. We reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

I. Background

Ezequiel Castillo and other occupants of Castillo's 2001 Ford Explorer (collectively, "Castillo") sued Ford in a products liability action arising from an accident. The jury charge contained two liability questions: was there a design defect in the roof strength and was there a design defect in the vehicle's handling or stability. The jury began deliberating on a Friday, broke for the weekend, then continued deliberating on the following Monday. Deliberations were recessed on Tuesday because a member of the presiding juror's family became ill. When the jury resumed deliberations on Wednesday morning, the presiding juror sent a note to the court that asked, "What is the maximum amount that can be awarded?" The parties promptly settled.

The judge released the jurors and advised them that they could discuss the case with the attorneys and parties. The presiding juror left immediately, but other jurors stayed and voluntarily talked to Ford. The jurors told Ford that they had decided the first liability question (roof strength) in Ford's favor and were deliberating on the second liability question when the presiding juror sent the note. On the second liability question, eight jurors had voted in Ford's favor, two were undecided, and two had voted in Castillo's favor. Ford learned that some of the jurors were unaware of the presiding juror's note and that she sent the note over the objection of other jurors.

Ford filed a Motion to Delay Settlement in which it requested "it be allowed to take discovery, or that the Court independently undertake discovery, on the issue of outside influence in the drafting of this note." The motion was supported by four jurors' affidavits, which described the

course of the jury deliberations and the behavior of the presiding juror. At the hearing, Ford's attorney reiterated the discovery request:

> [I]t is to me something that should be of concern to the Court if there was any outside influence, and it may be that nothing will show up about it at all, but there's only one way to find out and that's to have either the Court do its own investigation and or the Court allow us to bring the jurors in and have a hearing in front of the Court and or to depose them and then come back to the Court with our findings and make a determination as to where we go from there.

The trial court denied Ford's Motion to Delay Settlement. Although the judge encouraged Ford's counsel to conduct its own investigation concerning the matter, he refused to "disturb the jury" absent specific evidence of misconduct.

Castillo filed a motion to enforce the settlement agreement. At the hearing on the motion, Ford's attorney stated that Ford was willing to proceed with the settlement and asked for two weeks to finalize the details. The trial court granted Ford's request for additional time and extended the payment date to November 5.

On November 2, Ford filed a motion asking the court to reconsider its order directing Ford to pay the settlement. In its motion, Ford stated that it had withdrawn its consent to the settlement. Ford urged that because it had withdrawn its consent to the entry of an agreed judgment, Castillo's only remedy would be to plead and sue on a breach of contract claim. Ford also asked the court to set aside the Rule 11 settlement agreement and grant a new trial, or in the alternative, to grant a mistrial based on juror misconduct. Attached to Ford's motion were transcripts of interviews with ten jurors that had been conducted by private investigators.[1] Ford asserted that the settlement

[1] Ford ultimately submitted affidavits from four jurors and transcripts from interviews with ten jurors. None of these involved the presiding juror.

agreement should be set aside under the theory of mutual mistake because both parties acted under the mistaken belief that the presiding juror sent the note on behalf of the jury and that the jury had reached the issue of damages. The trial court denied both of Ford's motions and struck the juror interview transcripts on the grounds that they were unsworn and hearsay. The court found no showing of juror misconduct, mutual mistake, or other grounds to rescind the settlement agreement.

Ford did not fund the settlement, so Castillo filed a motion for summary judgment for breach of contract. Ford responded and urged that before moving for summary judgment, Castillo must first plead a claim for breach of contract and then proceed through the traditional course of litigation on that claim. Ford asserted that "[g]ranting summary judgment at this juncture, without allowing Ford an opportunity to conduct discovery, assert defenses, or have contested fact issues tried by a finder-of-fact will deny Ford all its rights as a litigant." Ford urged that it was entitled to conduct discovery to "determine the motivation of the presiding juror's actions and any outside influences that possibly swayed her." In its response, Ford referenced the four affidavits it had filed with its motion to delay the settlement agreement and argued that the affidavits raised fact issues on Ford's potential affirmative defenses. Castillo objected to the four affidavits on the grounds that they were impermissible under Texas Rule of Evidence 606 and Texas Rule of Civil Procedure 327(b) because they contained testimony on matters that occurred during jury deliberations and portions of them constituted hearsay. The trial court sustained Castillo's objections, ordered the affidavits stricken, and granted Castillo's motion for summary judgment. Ford appealed.

The court of appeals affirmed. 200 S.W.3d 217. The court held that Ford waived any error regarding both the trial court's denial of its motion to delay and the discovery request in its response

to Castillo's summary judgment motion. *Id.* at 227, 230. The appeals court also concluded that even if Ford had not waived error, any error would be harmless because Ford ultimately conducted its own investigation and gathered virtually all the evidence it sought to discover and failed to identify any evidence it would have uncovered through discovery procedures. *Id.* at 230-31. Ford disagrees with both holdings.

First, Ford asserts that the court of appeals erred by holding that Ford waived error as to its discovery requests. Next, Ford urges that the trial court erred in denying it the right to conduct discovery because Castillo's claim for breach of the settlement agreement is the same as any other claim for breach of contract and is subject to the same procedures, including discovery procedures, that apply to any other breach of contract claim. We agree with Ford.

II. Discussion

A. Standard of Review

We review a trial court's actions denying discovery for an abuse of discretion. *See TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004).

B. Preservation of Error

The court of appeals held that Ford failed to preserve error regarding the discovery requests it made in both its (1) motion to delay the settlement, and (2) response to Castillo's motion for summary judgment. 200 S.W.3d at 227, 230. As for Ford's request in the motion to delay settlement, the court of appeals determined that the trial court did not actually deny the requested

discovery because it encouraged Ford to conduct its own informal investigation, which Ford did. *Id.* at 229. We conclude, however, that Ford's presentation and the trial court's response were sufficient to preserve error. The trial court clearly understood Ford's request and just as clearly refused to grant it: the court told Ford that it refused to disturb the jurors and offered Ford nothing more than encouragement in conducting an informal investigation. *See* TEX. R. APP. P. 33.1(a). Although Ford interviewed most of the jurors, there is a significant difference between interviewing witnesses and taking sworn testimony from them as is allowed in discovery. One difference is demonstrated by Castillo's hearsay objection to Ford's juror interview transcripts and the trial court's granting of it. *See* TEX. R. CIV. P. 203.6(b) (providing that a deposition may be used for any purpose in the same proceeding it was taken). Another difference is if a witness—such as the presiding juror—declines to voluntarily give an interview or sworn statement, compulsory process is available under discovery procedures to require the witness to attend and give testimony under penalty of perjury. *See* TEX. R. CIV. P. 176.6(a). Because the trial court denied Ford's request, Ford was unable to obtain discovery by compulsory process from the presiding juror whose conduct is directly at issue.

The court of appeals also held that even if the trial court denied the motion, Ford effectively withdrew its discovery complaint by sending the trial court "mixed messages" through its statement that it would comply with the trial court's order but then filing a motion to set aside the settlement agreement without a request for discovery. 200 S.W.3d at 229. However, we need not address the question of whether Ford waived or withdrew the requests for discovery it made before withdrawing

its consent to the settlement agreement because after it withdrew its consent, Ford requested that it be allowed discovery in its response to the motion for summary judgment.

Finally, the court of appeals concluded that Ford also waived its discovery request in its response to Castillo's motion for summary judgment on the breach of a settlement agreement claim because Ford did not file either an affidavit explaining the need for further discovery or a verified motion for continuance. *Id.* at 226-27 (citing TEX. R. CIV. P. 166a(g), 251, 252, and *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996)).

Texas Rule of Civil Procedure 166a(g) states that if a party opposing summary judgment files an affidavit stating that he or she cannot present the facts in support of his position, a trial court may order a continuance "to permit affidavits to be obtained or depositions to be taken or discovery to be had." In *Tenneco*, this Court reiterated that "[w]hen a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance." 925 S.W.2d at 646-47. But in the cases requiring a party to file an affidavit or a motion for continuance to preserve error, the parties had conducted formal discovery and were seeking time to conduct additional discovery. *See Joe*, 145 S.W.3d at 160-62; *Tenneco*, 925 S.W.2d at 647. Ford is not complaining that it needed more time for discovery—it is complaining that the trial court denied it *any* discovery on the breach of contract action. In its response to Castillo's summary judgment motion, Ford pled that granting summary judgment without allowing Ford an opportunity to conduct discovery would "deny Ford all its rights as a litigant," and that "[u]nder Texas law, Ford is entitled to conduct . . . pretrial discovery before enforcement of the settlement." A continuance in this

situation would have served no purpose other than to delay the proceedings. Ford's response referenced the four juror affidavits and clearly notified the trial court of Ford's position: it was the same position Ford took when the trial court held a hearing and ruled that it would not allow jurors to be disturbed by discovery proceedings unless Ford could first show evidence of outside influence. Under these circumstances, Ford was entitled to take the trial court's rulings at face value. It was not required to re-file juror affidavits the trial court had already stricken or assert what the record demonstrates would have been a useless motion for continuance. By granting Castillo's motions to strike the juror affidavits and for summary judgment, the court implicitly denied Ford's request for discovery in Castillo's breach of contract suit.

The court of appeals also reasoned that if Ford had filed a motion for continuance, the trial court could have revisited its prior ruling and perhaps would have ordered a continuance to permit discovery. 200 S.W.3d at 227 n.4. However, as we have noted above, the trial court had made its position clear, Ford restated its request for discovery on the new contract action in its response to Castillo's motion for summary judgment, there is no indication the trial court did not understand Ford's request, and requesting a continuance so the trial court can revisit a prior ruling is not required to preserve error. *See* TEX. R. APP. P. 33.1(a) (providing that to preserve error, a party must present a timely request, motion, or objection to the trial court stating the grounds to make the trial court aware of the complaint and obtain a ruling). The trial court had already ruled that discovery was not going to be allowed on the question of outside influence on the jury. Ford's response to Castillo's motion for summary judgment, in light of Ford's prior filings and presentations to the trial court and

the trial court's rulings, sufficiently preserved Ford's complaint that the trial court improperly denied it the opportunity to conduct discovery.

C. Availability of Discovery in the Claim for Breach of Settlement Agreement

Written settlement agreements may be enforced as contracts even if one party withdraws consent before judgment is entered on the agreement. *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995). When consent is withdrawn, however, the agreed judgment that was part of the settlement may not be entered. *Id.* at 462. The party seeking enforcement of the settlement agreement must pursue a separate claim for breach of contract. *Id.*

Castillo urges that his motion to enforce the settlement agreement was sufficient as a pleading to support a judgment for breach of contract. *See* TEX. R. CIV. P. 301 ("The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any . . . ."). Ford does not contend otherwise. Rather, Ford asserts that it was entitled to conduct discovery and develop its defenses regarding Castillo's breach of contract claim just as it would have been allowed to do for any breach of contract claim. We agree.

Like any other breach of contract claim, a claim for breach of settlement agreement is subject to the established procedures of pleading and proof. *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996) (orig. proceeding) (per curiam). Parties are "entitled to full, fair discovery" and to have their cases decided on the merits. *Able Supply Co. v. Moye*, 898 S.W.2d 766, 773 (Tex. 1995) (orig. proceeding); *see State v. Lowry*, 802 S.W.2d 669, 671 (Tex. 1991) ("Only in certain narrow circumstances is it appropriate to obstruct the search for truth by denying discovery."). A trial court abuses its discretion when it denies discovery going to the heart of a party's case or when

that denial severely compromises a party's ability to present a viable defense. *Able*, 898 S.W.2d at 772. The validity of a settlement agreement cannot be determined without "full resolution of the surrounding facts and circumstances." *Quintero v. Jim Walter Homes, Inc.*, 654 S.W.2d 442, 444 (Tex. 1983). Because the trial court denied discovery, Ford was unable to develop facts relevant to the presentation of its defense. Therefore, the trial court abused its discretion by denying Ford the right to conduct discovery on the breach of settlement agreement claim.

Castillo further argues that Ford's request to conduct discovery was an insufficient reason to require the trial court to lift the agreed discovery deadlines. However, the discovery deadlines Castillo refers to pertain to Castillo's tort action against Ford, not his breach of contract claim. Because the claim for breach of a settlement agreement is a separate cause of action that arose subsequent to the deadlines Castillo references, the discovery deadlines pertaining to Castillo's tort action have no bearing on the breach of contract cause of action. *See Padilla*, 907 S.W.2d at 461-62.

D. Did Ford Seek Discoverable Information?

Castillo asserts that the trial court did not abuse its discretion in denying Ford's discovery request because the evidence Ford sought to develop was immaterial as it did not bear on any proper defense to the breach of contract action.[2] Ford offers mutual mistake as one such potential defense. The parties disagree as to whether mutual mistake is applicable in this case, but a party is not required to demonstrate the viability of defenses before it is entitled to conduct discovery. Rather,

[2] Castillo also asserts that the trial court properly denied Ford's discovery request in its motion to delay settlement because Ford had not withdrawn its consent to settle at that time so any discovery would have been an improper "fishing expedition." However, Ford reasserted its request for discovery after it withdrew its consent to the settlement.

a party may obtain discovery "regarding any matter that is not privileged and is relevant to the subject matter of the pending action." TEX. R. CIV. P. 192.3. The phrase "relevant to the subject matter" is to be "liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial." *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 (Tex. 1990). The trial court's preemptive denial of discovery could have been proper only if there existed no possible relevant, discoverable testimony, facts, or material to support or lead to evidence that would support a defense to Castillo's claim for breach of contract. This record does not demonstrate such a situation.

Castillo further asserts that Ford's suspicion that discovery *might* uncover relevant evidence is insufficient to render the trial court's denial of discovery an abuse of discretion. We agree that in some cases the denial of more time to conduct discovery is not an abuse of discretion when the discovery "might have" raised a fact question. *Tenneco*, 925 S.W.2d at 647; *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). But in such cases, the parties had not been completely precluded by the trial court from conducting discovery to begin with. *See Tenneco*, 925 S.W.2d at 647. Rather, the facts in those cases were "sufficiently developed" and "all the relevant information [was] at hand." *Id.* In this case, facts and matters relevant to the question of outside influence were not developed and the question of whether follow-up discovery on the issue should be undertaken was foreclosed.

Castillo also cites *Texas Co. v. State*, 281 S.W.2d 83, 91 (Tex. 1955), as support for the argument that discovery under these circumstances was immaterial, asserting that Ford was not entitled to rescind the contract as rescission is only allowed when the party seeking cancellation can

restore the original status. *Id.* ("[O]ne seeking a cancellation of an instrument, with certain exceptions not pertinent here, must restore the original status . . . ."). Castillo argues that restoring the original status in this case—the original jury deliberating toward a verdict—is impossible. But the cases requiring a party to restore the original status refer to returning money or property received pursuant to the contract. *See, e.g.*, *id.* at 91 ("[I]t was not beyond the power of the trial court to require Duval to do equity by returning the money it had received . . . ."); *Tex. Employers Ins. Ass'n v. Kennedy*, 143 S.W.2d 583, 585 (Tex. 1940) ("The general equitable rule is that a plaintiff in a suit for the rescission or cancellation of a contract to which he is a party must return, or offer to return, any consideration which he has received under the contract."); *Gibson v. Lancaster*, 39 S.W. 1078, 1079 (Tex. 1897) ("[I]f any part of the purchase price has been paid, in order to [obtain] a rescission the money so paid must be tendered by the seller to the purchaser."). The rule is one of justice, designed to ensure that parties do not repudiate an agreement while retaining benefits received by reason of the agreement. *See Tex. Co.*, 281 S.W.2d at 91. We decline to extend the rule to a case such as this. First, Ford has not unfairly benefitted by receipt of tangible benefits that in equity should be returned in order for it to assert an equitable remedy. Any benefits Ford received could just as well be said to have been received by Castillo. Neither party knows whether the jury would have eventually found for Ford or Castillo and, if for Castillo, what amount of damages would have been awarded. Both parties were at risk by allowing the jury to continue deliberating—that is why they settled. Further, the rule is an equitable one. *Kennedy*, 143 S.W.2d at 585. Equitable rules by necessity are flexible and adaptable. *See Johnson v. Cherry*, 726 S.W.2d 4, 8 (Tex. 1987). In this instance, facts have been disclosed that raise a legitimate question about the integrity of the trial

process. It would be an anomalous application of the Court's equitable powers for those powers to be exercised to preclude inquiry into possible outside influence on jurors deliberating a verdict. We refuse to so apply an equitable doctrine.

E. Discovery as to Jury Deliberations

Castillo next cites Texas Rule of Civil Procedure 327(b) and Texas Rule of Evidence 606 in support of his position. Rule 327 is found in the "New Trials" subchapter of the Rules of Civil Procedure and is entitled "For Jury Misconduct." It provides:

> a. When the *ground of a motion for new trial*, supported by affidavit, is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury, or that a juror gave an erroneous or incorrect answer on voir dire examination, the court shall hear evidence thereof from the jury or others in open court, and *may grant a new trial* if such misconduct proved, or the communication made, or the erroneous or incorrect answer on voir dire examination, be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party.
>
> b. A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from *the verdict* concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

TEX. R. CIV. P. 327 (emphasis added). Rule of Evidence 606(b) is entitled "Competency of Juror as a Witness" and provides:

> Upon an inquiry into *the validity of a verdict or indictment*, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be

> precluded from testifying be admitted in evidence *for any of these purposes*. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

TEX. R. EVID. 606(b) (emphasis added).

Noting that both rules provide jurors may not testify about matters or statements made during jury deliberations, Castillo urges they apply to protect the jury's deliberations from all discovery. But, by their plain language, the rules apply to motions for new trials, reasons jurors voted for or against verdicts, and inquiries into the validity of verdicts or indictments. TEX. R. CIV. P. 327(b); TEX. R. EVID. 606(b). Even when those types of issues are involved, the rules specifically allow jurors to testify about outside influence brought to bear on any of them. TEX. R. CIV. P. 327(b); TEX. R. EVID. 606(b).

In this case, there was no verdict. Ford is not seeking discovery to impeach a verdict or to take testimony of jurors as to their votes on a verdict. And although the net effect of Ford's success in having the settlement agreement set aside will be a new trial, Ford is not asserting error in the trial court's denial of discovery as to a motion for new trial. So, although rules 327(b) and 606 do not strictly apply here, the policies inherent in those rules are implicated by this record and the positions of the parties. We have previously articulated some reasons underlying the prohibition of unfettered probing into jury deliberations: (1) keeping jury deliberations private to encourage candid discussion of a case, (2) protecting jurors from post-trial harassment or tampering, (3) preventing a disgruntled juror whose view did not prevail from overturning the verdict, and (4) protecting the need for finality. *See Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 366-67 (Tex. 2000). Not all

these reasons apply when no attempt is being made to impeach a verdict, but the overarching principles are the same any time discovery is sought as to what occurred during jury deliberations. Jurors are summoned to court to do public service and they should not be subjected to unfettered post-trial proceedings regardless of whether their deliberations resulted in a verdict. Discovery involving jurors will not be appropriate in most cases, but in this case there was more than just a suspicion that something suspect occurred—there was some circumstantial evidence that it did.

Once the trial court discharges them, jurors are not prohibited from discussing what took place during deliberations. But there is a difference between jurors choosing to talk about their service and their being compelled to do so in discovery depositions and court hearings. We believe the better policy, in general, is to conform discovery involving jurors to those matters permitted by Rule of Civil Procedure 327 and Rule of Evidence 606. That is, discovery involving jurors should ordinarily be limited to facts and evidence relevant to (1) whether any outside influence was improperly brought to bear upon any juror, and (2) rebuttal of a claim that a juror was not qualified to serve.[3] And although we have determined that the trial court abused its discretion by entirely depriving Ford of discovery on the breach of contract claim, it remains within the trial court's discretion to reasonably control the limits of discovery and the manner in which the discovery may be obtained. *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (per curiam).

[3] We express no opinion about discovery or matters involving the breach of contract claim other than discovery involving jurors.

III. Exclusion of Juror Affidavits

Ford asserts that the trial court erred by sustaining Castillo's objections and striking the four juror affidavits it initially filed in conjunction with its motion for new trial and which it referenced in its opposition to Castillo's motion for summary judgment. Ford was entitled to discovery on Castillo's separate breach of contract claim regardless of the admission or contents of the affidavits. *See Quintero*, 654 S.W.2d at 444 (noting that when a settlement agreement is enforced in a new action for breach of contract, the validity of the settlement agreement cannot be determined without "proper pleadings and full resolution of the surrounding facts and circumstances"). The affidavits might be useful to the trial court in setting parameters and procedures for discovery, but because Ford did not need the affidavits to be entitled to at least some type of discovery on the breach of contract claim, we do not reach the issue of whether the trial court erred by excluding the affidavits.

IV. Harmful Error

If the trial court abuses its discretion in a discovery ruling, the complaining party must still show harm on appeal to obtain a reversal. *See* TEX. R. APP. P. 44.1(a). Harmful error is error that "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case to the court of appeals." *Id.*

The court of appeals determined that even if the trial court erred, its error was harmless because Ford collected virtually all the evidence it sought to discover and failed to identify what type of evidence it would have obtained and presented if the trial court had granted its motion to delay. 200 S.W.3d at 230-31. It held that these considerations indicate the trial court's denial of Ford's request for discovery did not harm Ford. *Id.* at 231. We disagree.

First, while Ford interviewed some of the jurors, it did not have the opportunity to question the presiding juror while she was under oath and required to respond under penalty of perjury. *See*, *e.g.*, TEX. R. CIV. P. 176.6, .8 (requiring a nonparty to comply with a discovery subpoena subject to being held in contempt of court); TEX. R. CIV. P. 199.5(b) (requiring a person whose deposition is taken to be placed under oath); TEX. PENAL CODE § 37.02 (providing that it is a criminal offense to make a false statement under oath). Additionally, when discovery is denied and because of the denial the evidence sought does not appear in the record, determining harm from the denial is impossible and the party is prevented from properly presenting its case on appeal. *See Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 558 (Tex. 1990) (orig. proceeding) ("[T]he protective order shields the witnesses from deposition and thereby prevents the evidence from being part of the record. Therefore, it would be impossible to determine on appeal if the denial were harmful error."); *Jampole v. Touchy*, 673 S.W.2d 569, 576 (Tex. 1984) (orig. proceeding). The lack of direct evidence about whether the presiding juror was subjected to outside influence probably prevented Ford from properly presenting its case on appeal. Accordingly, the trial court's abuse of discretion in denying discovery was harmful. *See* TEX. R. APP. P. 44.1(a).

V. Conclusion

The trial court committed harmful error by denying Ford the opportunity to conduct discovery on Castillo's claim for breach of the settlement agreement. We reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

Phil Johnson
Justice

OPINION DELIVERED: April 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0875

FORD MOTOR COMPANY, PETITIONER,

v.

EZEQUIEL CASTILLO, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued February 5, 2008

JUSTICE WAINWRIGHT, concurring, joined by JUSTICE MEDINA.

I join the Court's opinion and write separately to highlight an additional reason supporting the decision and to emphasize the limited circumstances in which I believe the Court's opinion authorizes targeted discovery related to the actions of jurors.

In this case, Ford Motor Company and Castillo were prompted to settle their products liability lawsuit by a note from the jury room to the trial judge asking: "What is the maximum amount that can be awarded?" The judge and the parties subsequently learned that the note did not come from the *jury*, but rather appears to have come from a *juror,* before Ford had been found liable in the jury's deliberations. The damages question was conditioned on a liability finding, and the jury would not have had to discuss damages unless it found Ford liable. There is evidence that the

presiding juror either did not tell some jurors about the note or ignored objections of other jurors prior to sending it to the judge. There are two potential reasons for the presiding juror's action. One potential reason is the juror had an agenda, possibly prompted or guided by outside agents, and attempted to influence the result in the case improperly. The other is that a well-meaning juror sought to have her question answered during deliberations, albeit without the permission of the rest of the jury. The concrete risk that the first possibility motivated the question from the jury room is the reason the Court allows discovery in this case.

The parties, their attorneys, and the trial court reasonably assumed that the note signed by the presiding juror was not coming from a single juror, but rather the jury as a whole. Rule 285 of the Texas Rules of Civil Procedure[1] provides that the jury may communicate with the court verbally or in writing through the presiding juror. However, neither Rule 285 nor other procedural rules set the parameters for when questions may be sent by the jury to the judge. And the rules of procedure do not require that all jurors be aware that a juror submitted a question to the court. The participants in trials in Texas courts presume, and reasonably expect, that a note coming from the jury room represents the concerns (if not the opinions) of at least a majority of jurors. *See* Tex. R. Civ. P. 285 (permitting communications between "the jury" and the court "either verbally or in writing"). Other jurisdictions provide more guidance. *See, e.g.*, KEVIN F. O'MALLEY, JAY E. GRENIG, & HON.

[1] Texas Rule of Civil Procedure 285 provides:

> The jury may communicate with the court by making their wish known to the officer in charge, who shall inform the court, and they may then in open court, and through their presiding juror, communicate with the court, either verbally or in writing. If the communication is to request further instructions, Rule 286 [relating to the procedure for providing the jury with further instruction "touching any matter of law"] shall be followed.

WILLIAM C. LEE, Federal Jury Practice and Instructions § 103.50 (6th ed. 2006) ("[I]f you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, signed by one or more jurors.").[2]

The Court should set parameters for when the jury may send questions to the judge about the case during deliberations.[3] The rules of procedure and the instructions to the jury should be amended to specify that only the jury can send questions about the deliberations to the judge during deliberations. At a minimum, the entire jury should know that a question about deliberations is being sent to the judge. This will preclude an individual juror or a group of jurors from sending a question to the judge under circumstances that suggest, as in this case, that the question was from the jury.

When improper outside influence is exerted on a juror, or a juror tries to manipulate the outcome of a dispute, both parties are misled, and the integrity of the jury trial is subverted. The Texas Constitution, the Government Code, the Rules of Civil Procedure, and our case law all recognize that the parties to a civil case have a right to a fair trial, including an impartial and untainted jury. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 374 (Tex. 2000) (discussing "guarantees of the right to a fair and impartial jury trial in Article I, Section 15 and Article V, Section

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[2] *Accord* 1ST CIR. PATTERN CRIM. JURY INSTR. (1997); 7TH CIR. FED. JURY INSTR.—CIVIL 1.33 (2008); 8TH CIR. CIV. JURY INSTR. 3.06 (2005); 9TH CIR. CIV. JURY INSTR. 3.2 (2007) (all providing instructions for jury notes, requiring that each note be signed by one or more jurors); *see also* 10TH CIR. CRIM. PATTERN JURY INSTR. 1.43 (2005) ("If you [the jury] want to communicate with me at any time during your deliberations, please write down your message or question and give it to . . . [the bailiff] . . . , who will bring it to my attention.").

[3] This is not to suggest that individual jurors cannot communicate with the judge about other important matters, such as a single parent advising the judge that she received a call from a school nurse to tell her that her daughter is very sick.

10 of the Texas Constitution"); TEX. CONST. art. I § 15 ("The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to . . . maintain its purity and efficiency."); Tex. Gov't Code § 62.105(4) (disqualifying from jury service any person who "has a bias or prejudice in favor of or against a party in the case"); Tex. R. Civ. P. 327(a) (providing for a new trial when jury misconduct exists); *see also Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749 (Tex. 2006) (recognizing the constitutional right to a trial by a "fair and impartial jury"); *id.* at 768 (Medina, J., dissenting) (noting that an "improperly impaneled jury is also akin to the denial of one"); *Tex. Employers' Ins. Ass'n v. McCaslin*, 317 S.W.2d 916, 919 (Tex. 1958) (noting that juror bias and misconduct "have never been regarded lightly by the Texas courts"). The fact that the parties in this case attempted to settle before the jury returned a verdict does not dilute their substantive right to a pure and efficient jury.

Just as this Court cannot allow to stand a favorable verdict obtained by one party due to possible jury misconduct, *e.g.*, *Tex. Employers' Ins. Ass'n*, 317 S.W.2d at 918, it should not enforce a settlement agreement if it is prompted by impermissible outside influence on a jury member. The rule we pronounce today is necessary for the integrity of trial by jury and crucial for litigants to trust in the twelve individuals empaneled as the triers of fact. Castillo would have been entitled to the same limited discovery if he had entered into a meager settlement following the reading of a juror note, potentially prompted by improper influence, asking, "What is the minimum amount of damages we can award?" Both plaintiffs and defendants rely upon a jury system devoid of outside influence and manipulation. *See id.* at 920 (noting that when a juror has been subjected to improper influence, it is "often impossible for that juror to maintain an impartial attitude between the litigating parties.

And this is true whether the juror is prejudiced in favor of or against the party guilty of the improper act.").

The discovery permitted by the Court in such situations is proper, but it is limited. Questions from the jury room are not definite declarations of where the jury stands in its deliberations. In fact, many jury instructions caution the jurors not to communicate how their votes stand numerically. *See, e.g.*, 10TH CIR. CRIM. PATTERN JURY INSTR. 1.43 ("I caution you, however, that with any message or question you might send, you should not tell me any details of your deliberations or indicate how many of you are voting in a particular way on any issue."); *accord* 8TH CIR. CIV. JURY INSTR. 3.06; O'MALLEY, § 103.50 (similarly warning jurors not to disclose votes in written questions). If the parties merely misread an implied message from a jury note, settle based on that note, and later discover that the jury may have come out the other way had it been allowed to reach a verdict, there is no automatic claim for recision of the settlement contract on mutual mistake grounds, and it remains difficult for the doors to the jury room to be opened for discovery of impropriety or external influence. But when there is specific evidence to suggest that a juror may have been improperly influenced by outside agents, the integrity of the jury trial process requires that the adversely affected parties be entitled to targeted formal discovery to investigate the alleged misconduct. The discovery in this case may show no such improper external influence, but under the circumstances presented, I agree that the trial court should prudently and cautiously tailor discovery to protect one of the important guarantors of our constitutional liberties—the jury.

Dale Wainwright
Justice

OPINION DELIVERED: April 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0890

NABORS DRILLING, U.S.A., INC., PETITIONER,

v.

FRANCISCA ESCOTO, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued February 5, 2008

JUSTICE GREEN delivered the opinion of the Court.

Employers in Texas generally do not owe a duty to third parties for the tortious activities of off-duty employees occurring off the work site. *Loram Maint. of Way, Inc. v. Ianni*, 210 S.W.3d 593, 594 (Tex. 2006). We have recognized a limited exception to this rule when an employer exercises control over the injury-causing conduct of its employee, imposing a duty, for example, when an employer sent an obviously intoxicated employee to drive home, *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 308, 311 (Tex. 1983), and when an employer required its employee to consume alcohol while on the job, *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 457 (Tex. 2002). In this case, we consider whether such a limited duty should extend to an employer whose work conditions could induce extreme fatigue in its employees. For the reasons expressed below, we hold that the employer

had no duty to prevent injury due to the fatigue of its off-duty employee or to train employees about the dangers of fatigue.

I

Nabors Drilling U.S.A., Inc., the largest land-based driller in the continental United States, hired nineteen-year-old Robert Ambriz to work in its oil fields. Nabors's work schedule required that Ambriz work twelve-hour day shifts from 6:00 a.m. to 6:00 p.m. one week, take a week off, and then work twelve-hour night shifts from 6:00 p.m. to 6:00 a.m. the following week. After working approximately four months at several of Nabors's sites, Ambriz was sent to work at Nabors's McCook site, where he began with a week of night shifts. The supervisor inspected the crew the evening that Ambriz started his first shift, to ensure that the employees were fit to work. Ambriz's shift ended at 6:00 a.m., and he left the site about ten minutes later. Just before he left, a coworker who did not believe that Ambriz looked or acted tired told Ambriz to stay at the work site in trailers provided by Nabors, but Ambriz chose to leave. While driving along a farm-to-market road at approximately 6:30 a.m., Ambriz crossed to the wrong side of the road and collided with a vehicle driven by Martin Rodriguez and occupied by Robert Escoto, Jose Gutierrez, and Leovarda Torres. The accident resulted in the death of Ambriz, Rodriguez, and all three passengers.

On behalf of themselves, the decedents' estates, and others, Fransisca Escoto, Dora Rodriguez, and Noelia Torres (collectively, Escoto) sued Ambriz's estate and Nabors. Escoto alleged that the negligence of both Ambriz and Nabors caused the collision, and sought various forms of money damages. The jury found that Ambriz was 57% responsible for the accident and Nabors was 43% responsible, and awarded Escoto $5.95 million. However, the trial court signed

a take-nothing judgment, ruling that Nabors owed Escoto no duty. The court of appeals reversed, holding that Nabors owed the plaintiffs a duty and rejecting Nabors's other arguments in support of the take-nothing judgment. 200 S.W.3d 716 (Tex. App.—Corpus Christi 2006).

II

A

The existence of a duty is a question of law. *E.g.*, *Tri v. J.T.T.*, 162 S.W.3d 552, 563 (Tex. 2005); *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 395 (Tex. 1991) (reviewing judgment notwithstanding the verdict and recognizing that "[t]he existence of a legal duty is a question of law for the court although in some instances it may require the resolution of disputed facts or inferences which are inappropriate for legal resolution"). Negligence actions in Texas require "a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach." *Love*, 92 S.W.3d at 454 (citing *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987)). "Liability is grounded in the public policy behind the law of negligence which dictates every person is responsible for injuries which are the reasonably foreseeable consequence of his act or omission." *El Chico Corp.*, 732 S.W.2d at 315. Generally, "one person is under no duty to control the conduct of another, even if he has the practical ability to exercise such control." *Otis*, 668 S.W.2d at 309 (internal citation omitted). An employer ordinarily will not be liable for torts committed by off-duty employees except when the torts were committed on the employer's premises or with the employer's chattels. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 317 (1965)). As a general rule, "an employer owes no duty to protect the public from the wrongful acts of its off-duty employees that are committed off the work site." *Ianni*, 210 S.W.3d at 594.

We have recognized limited exceptions to that general rule, though. "[C]ertain relationships do impose, as a matter of law, certain duties upon parties." *Otis*, 668 S.W.2d at 309; *accord Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); RESTATEMENT (SECOND) OF TORTS § 315 (1965).[1] We have held, for example, that under certain circumstances the employment relationship may impose limited duties on employers to control the activities of employees. *See Love*, 92 S.W.3d at 457; *Otis*, 668 S.W.2d at 311. Those situations have arisen when an employer affirmatively exercised control over its employee because of that employee's incapacity, *see Otis*, 668 S.W.2d at 311, and when an employer required its employee to consume alcohol to the point of intoxication while working, *see Love*, 92 S.W.3d at 457. We conclude that neither of those exceptions applies to impose a duty here.

1

In *Otis Engineering Corp. v. Clark*, plaintiffs sued Otis Engineering Corp. for wrongful death after Robert Matheson, an Otis employee, caused a fatal automobile accident shortly after leaving work. 668 S.W.2d at 308. Matheson had a history of drinking on the job, and had gone to his car to consume alcohol several times on the day of the accident. *Id.* "Matheson's extreme state of intoxication was well known to his supervisor and fellow workers," causing several employees to report to the Otis supervisor that Matheson was exhibiting signs of some incapacity, perhaps intoxication. *Id.* Halfway through his shift, the supervisor suggested that Matheson drive home.

[1] *Cf. Buchanan v. Rose*, 159 S.W.2d 109, 110 (Tex. 1942) ("Using familiar illustrations, it may be said generally, on the one hand, that if a party negligently creates a dangerous situation it then becomes his duty to do something about it to prevent injury to others if it reasonably appears or should appear to him that others in the exercise of their lawful rights may be injured thereby.").

Id. While escorting Matheson to the parking lot, the supervisor asked if Matheson was all right and could make it home, and Matheson answered yes. *Id.* Matheson caused a fatal automobile accident thirty minutes later. *Id.* His blood alcohol level was 0.268, a level at which the medical examiner testified all persons would exhibit signs of intoxication observable to the average person. *Id.*

Otis began its duty analysis with the familiar observation that the "factors which should be considered in determining whether the law should impose a duty are the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and consequences of placing that burden on the employer." *Id.* at 309. But *Otis* viewed the ultimate question simply: "What we must decide is if changing social standards and increasing complexities of human relationships in today's society justify imposing a duty upon an employer to act reasonably when he exercises control over his servants." *Id.* at 310. *Otis* formulated the resulting duty principle by focusing on the existence of an incapacity, a sufficient risk of harm, and the employer's control over the employee:

> Therefore, the standard of duty that we now adopt for this and all other cases currently in the judicial process, is: *when, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others.* Such a duty may be analogized to cases in which a defendant can exercise some measure of reasonable control over a dangerous person when there is a recognizable great danger of harm to third persons.

Otis, 668 S.W.2d at 311 (emphasis added). The Court held that Otis owed a duty to exercise reasonable care to control its employee. *Id.* "[In *Otis*,] [w]e imposed the duty upon the employer, not because of the mere knowledge of the intoxication, but because of the employer's negligent

exercise of control over the employee. The defendant acted affirmatively in sending the drunken employee home and created an unreasonable and foreseeable risk of harm to others." *Phillips*, 801 S.W.2d at 526 (internal citations and emphasis omitted). In the present case, however, Nabors did not have the requisite knowledge of employee impairment, nor did it exercise the requisite control.

The court of appeals imposed a duty based on evidence that Nabors was aware of the dangers of fatigue and that a coworker from the night shift before the accident testified that the shift was particularly exhausting, and "we were all tired." 200 S.W.3d at 725–26. However, the record contains no evidence that Nabors knew of any incapacity Ambriz may have exhibited. In fact, Ambriz's supervisor observed that Ambriz was "fit and ready to go to work" during his shift, and a coworker who saw Ambriz at the end of his shift testified that Ambriz did not look or act tired. Although that same coworker said generally that "we were all tired," he also testified that Ambriz "looked all right," that "[Ambriz] was fine," and although he believed it possible to determine if someone is tired by the way they act, Ambriz "didn't act like he was." Moreover, the record indicates that Ambriz never complained about fatigue, never had trouble staying awake while driving, and stayed in the trailers Nabors provided when he thought he was too tired to drive following his night shifts. *Otis* requires more than general awareness of employee fatigue—an employer must have actual knowledge that its employee was impaired when leaving work on the day of the accident. *See* 668 S.W.2d at 308, 311; *see also Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 758 (Tex. 2007) (holding that an employer's general knowledge of an employee's lengthy commute and demanding work schedule does not prove knowledge that the employee "was

an incompetent driver due to insufficient sleep").[2] The evidence does not establish that Nabors had that requisite knowledge of any incapacity of Ambriz at the end of his shift.

Even if Nabors satisfied the knowledge component of the duty analysis, "simply knowing that an employee is intoxicated or incapacitated is not enough for a duty to arise. Rather, the employer must *affirmatively* exercise control over the incapacitated employee." *Ianni*, 210 S.W.3d at 597 (internal citations omitted and emphasis added). Unlike the employer in *Otis*, however, Nabors did not exercise any post-incapacity control over its employee. Ambriz completed his shift without incident and was not sent home early because of any impairment. Nabors did not instruct Ambriz to drive home or escort him to his car. *Cf. Robertson v. LeMaster*, 301 S.E.2d 563, 567–68 (W. Va. 1983). The only control that Nabors exercised was in establishing work conditions and setting the shift work schedule, and thus occurred before any incapacity on Ambriz's part. But *Otis* requires an affirmative act of control following, and prompted by, the employee's incapacity. 668 S.W.2d at 311 (holding that an employer has a duty "when, *because of an employee's incapacity*, an employer exercises control over the employee") (emphasis added); *see Robertson*, 301 S.E.2d at 567–68 (cited in *Otis*, 668 S.W.2d at 310–11, as support for imposing a duty on employers who affirmatively exercise control and send employees out on the highway after the employee's

[2] *See also Duge v. Union Pac. R.R. Co.*, 71 S.W.3d 358, 362–64 (Tex. App.—Corpus Christi 2001, pet. denied) (finding no duty when employee who had worked twenty-seven hours "was not obviously impaired" and "did not know the extent of his own fatigue," so the employer "cannot be charged with such knowledge"); *McNeil v. Nabors Drilling USA, Inc.*, 36 S.W.3d 248, 250 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (holding that *Otis* applies only when "the employer is aware of the employee's incapacity"); *Jenkins v. Kemlon Prods. & Dev. Co.*, 923 S.W.2d 224, 226 (Tex. App.—Houston [14th Dist.] 1996, no writ) (rejecting the argument that "allowing a tired employee to go home after work" imposed a duty on the employer); *J & C Drilling Co. v. Salaiz*, 866 S.W.2d 632, 638–39 (Tex. App.—San Antonio 1993, no writ) (finding no duty when employee was on twenty-four-hour call and had not slept in two or three days); *Moore v. Times Herald Printing Co.*, 762 S.W.2d 933, 935 (Tex. App.—Dallas 1988, no writ) (finding "no evidence of knowledge of incapacity" where the employer required the employee to work about twenty hours in one day).

incapacity becomes apparent).[3] We have never extended *Otis* to create a duty where an employer's only affirmative act of control preceded the employee's shift and incapacity and amounted only to establishing work conditions that may have caused or contributed to the accident. *See Phillips*, 801 S.W.2d at 526 (noting that in *Otis*, "[t]he defendant acted affirmatively in sending the drunken employee home and created an unreasonable and foreseeable risk of harm to others").

Every other court of appeals to address the issue has rejected such a duty. *See Duge*, 71 S.W.3d at 364 (finding no duty when the employer "did not exercise control over an incapacitated employee who posed a foreseeable risk to others"); *McNeil*, 36 S.W.3d at 250 (holding that "an employer assumes a duty over its employee's off-duty conduct when the employer is aware of the employee's incapacity and affirmatively attempts to control the employee"); *Diamond M Onshore, Inc. v. Guiterrez*, No. 04-96-01030-CV, 1998 WL 553455, at *2 (Tex. App.—San Antonio Aug. 31, 1998, pet. denied) (not designated for pub.) (finding no duty when an employer did not exercise control to place an employee on the road before his shift was over because he was too tired to work);

[3] Other states also require an element of affirmative employer control before finding a duty to prevent fatigue-related accidents. *See Ex Parte Shelby County Health Care Auth.*, 850 So. 2d 332, 339–40 (Ala. 2002) (holding that an employer's statutory duty to provide "reasonably safe working conditions at the workplace" extends "only so far as [employers] have control over the physical conditions of the workplace and the premises of the workplace" and does not require employers to "schedul[e] work hours for employees in an attempt to ensure their safety traveling home from work"); *Baggett v. Brumfield*, 99-1484 (La. App. 3 Cir. 3/1/00); 758 So. 2d 332, 337–38 (rejecting employer duty to prevent employees from driving home after working a twenty-one-hour shift, to provide sleeping quarters, or to keep employees from working such long shifts); *Fonder v. Workers' Comp. Appeal Bd. (Fox Integrated)*, 842 A.2d 512, 514 (Pa. Commw. Ct. 2004) (rejecting employer duty to prevent fatigue-related accident, even where a truck driver employee was engaged in work-related activities for forty-eight hours before the accident, but where employer provided employees with a sleep trailer to use); *Black v. William Insulation Co., Inc.*, 141 P.3d 123, 129–31 (Wyo. 2006) (holding that an employer had no duty to prevent an automobile accident because the employer did not knowingly contribute to an employee's fatigue); *see also Pilgrim v. Fortune Drilling Co., Inc.*, 653 F.2d 982, 985–86 (5th Cir. 1981) (holding that a Texas employer did not owe a duty to prevent employees from driving home "when they are so exhausted from working that their driving would create an unreasonable risk of harm to others" because the employer had no right to control the employee "once he had finished his day's work").

Jenkins, 923 S.W.2d at 226 (holding that an employer must "have knowledge of the employee's incapacity, and then exercise control over the incapacitated person") (emphasis omitted); *J & C Drilling Co.*, 866 S.W.2d at 639 (finding no duty when an employer did not take "any affirmative action to put [the employee] on the public highway" in a fatigued state but made available at the work site a trailer with a bed); *Moore*, 762 S.W.2d at 935 (finding no duty when an employer had taken no affirmative act to control an employee's decision to drive home after a lengthy shift). Likewise, a federal district court applying Texas law refused to recognize a duty based on "acts that came before the employee's incapacity." *Andrews v. United States*, 561 F. Supp. 2d 707, 713–14 (E.D. Tex. 2007) (holding that no duty existed when the Texas Army National Guard took no affirmative act to control a guard member's conduct because of an incapacity, even if the National Guard did have knowledge of the member's fatigue). We hold that because Nabors took no affirmative action as a result of any perceived employee fatigue or incapacity, as required by *Otis*, Nabors owed no legal duty to the plaintiffs in this case.

2

Escoto also argues that, under *D. Houston, Inc. v. Love*, the work conditions demanded by Nabors created a duty to take reasonable steps to prevent an off-duty employee's automobile accident caused by fatigue. *See* 92 S.W.3d 450. In *Love*, an employee sued her night club employer for negligence after she was injured in a car accident on the way home from work. *Id.* at 452–53. The night club employed Melissa Love as an independent contractor, but Love offered evidence that the club controlled her alcohol consumption through official employment manuals and informal instructions, requiring her to drink large amounts of alcohol during her shift. *Id.* at 452, 454–56.

As Love was leaving the club at the end of her shift one night, after consuming at least twelve alcoholic beverages, the owner asked if Love was all right and she answered that she was "fine." *Id.* at 452. On her way home, Love's car struck a guardrail, resulting in serious physical injuries. *Id.* After the accident, Love's blood alcohol level was measured at 0.225, more than double the 0.10 legal limit at that time. *Id.* As in *Otis*, *Love*'s duty analysis focused on the incapacity, the risk of harm, and the employer's control:

> If [the employer] required Love to consume alcohol at work, it may well have compromised Love's ability to judge whether she was fit to drive. Therefore, we decline to hold as a matter of law that Love bears sole legal responsibility for her actions.
>
> Likewise, some might argue that [the employer] could not foresee that its negligence, if any, might have harmed Love. However, [the employer] allegedly required its worker to consume alcohol when she might not otherwise have chosen to do so. If proven, that conduct would impose a duty on [the employer] under Texas law. . . .
>
> . . . .
>
> We hold that when an employer exercises some control over its independent contractor's decision to consume alcoholic beverages to the point of intoxication, such that alcohol consumption is required, the employer must take reasonable steps to prevent foreseeable injury to the independent contractor caused by drunk driving.

Id. at 456–57. Despite language restricting the holding to the limited facts, Escoto argues that *Love* is not limited to intoxication and applies generally to fatigue caused by workplace conditions.

Although we did recognize a duty to the independent contractor in *Love*, the facts of this case are significantly different, and nothing in *Love* demands that we recognize a duty to the general public in the fatigue context. In *Love*, drinking to the point of intoxication was a condition of employment, and the nightclub owner knew that Love would be impaired. *Id.* at 452, 454–56. In

fact, Love's objectively measurable blood alcohol content was so high that her doctor opined she would have been "unmistakably intoxicated to anyone coming in contact with her . . . well beyond being too intoxicated to drive." *Id.* at 452. The record in the present case does not support a conclusion that impairment was a condition of Ambriz's employment, or even that it was an inevitable consequence of working for Nabors. In addition, the record does not establish actual knowledge of impairment, as we required of the employer in *Otis* and as was present in *Love.* The record in this case contains evidence that a coworker thought everyone who worked the shift must have been tired, but that same coworker testified that Ambriz did not look or act tired at the end of his shift, and that he spoke coherently with others for ten minutes before driving home. On these facts, we conclude that the limited duty recognized in *Love* does not apply.

Escoto argues that the principles expressed in *Otis* and *Love*, taken together, apply equally to employee fatigue. But we have never extended liability under these intoxication cases to incapacity related to fatigue, and we are not persuaded that we must do so now.[4] In fact, in *Loram Maintenance of Way, Inc. v. Ianni*, a case that did not involve employee intoxication, we held that an employer owes no duty to protect the public from an employee's wrongful off-duty conduct. 210 S.W.3d at 594. In that case, in which there was evidence that the employer knew about and sometimes even encouraged the use of methamphetamine by employees, we rejected a duty based

[4] *See also Duge*, 71 S.W.3d at 363–64 (finding no duty where an employee worked a total of twenty-seven hours, was not sent home early, and gave no indication that he was fatigued); *McNeil*, 36 S.W.3d at 250–51 (involving an employee who worked a similar schedule as Ambriz, and holding that Nabors had no duty to monitor employees before allowing them to leave work); *Jenkins*, 923 S.W.2d at 225–27 (rejecting argument that the employer had a duty to prevent injury caused by fatigued driving because it had incapacitated the employee by overworking him); *J & C Drilling Co.*, 866 S.W.2d at 638–39 (finding no duty where an employee was on twenty-four-hour call and had not slept in two or three days); *Moore*, 762 S.W.2d at 934–35 (finding no duty where an employee worked twenty hours in one day).

on employer-created risk related to job conditions. *Id.* at 595, 597. *Ianni* was decided after *Love* but did not cite *Love*, instead concluding that *Otis* controlled and ruling that, for a duty to arise, "the employer must affirmatively exercise control over the incapacitated employee." *Id.* at 597. As we did in that case, we again hold that an employer owes no duty to protect the public from the tortious acts of an off-duty employee unless the employer affirmatively exercised control because of the employee's incapacity. *See id.* at 597–98. In this case, that control exception does not apply. We therefore need not decide whether *Otis* or *Love*, both involving intoxication, could extend that exception in a case involving an employee's excessive fatigue.

We note that fatigue is distinguishable from intoxication in significant respects. Unlike intoxication, there is no quantitative physical measure of fatigue that could be used to determine whether an employee is impaired. *Cf.* TEX. PENAL CODE § 49.01(2)(B) (establishing measurable legal blood alcohol limit of intoxication). An employer could inspect its employees for signs of fatigue at the end of each shift, as Nabors did at the beginning of each shift, but it is not clear that an employer could consistently judge when employees have gone beyond tired and become impaired. In addition, unlike intoxication, it is not clear that employers could effectively prevent impairment due to fatigue because amounts and types of work will affect employees differently, and an employee's off-duty conduct will affect when and how the employee may become fatigued.

3

Even if *Otis* and *Love* do not impose a duty, Escoto urges the Court to recognize a new duty on Texas employers whose work conditions may contribute to fatigue in an off-duty employee. The decision to impose a new common law duty involves complex considerations of public policy

including "social, economic, and political questions and their application to the facts at hand." *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 182 (Tex. 2004). The Court balances "the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the defendant." *Id.* (quoting *Praesel v. Johnson*, 967 S.W.2d 391, 397–98 (Tex. 1998)). The Court also considers "whether one party would generally have superior knowledge of the risk or a right to control the actor who caused the harm." *Id.* Here, the court of appeals focused on foreseeability. 200 S.W.3d at 725–26. We acknowledge that traffic accidents may occur when drivers are excessively fatigued, but we do not believe that this generally known risk of driving while fatigued justifies holding an employer liable for an employee's off-duty fatigue-related automobile accident.[5]

Considering the large number of Texans who do shift work and work long hours (including doctors, nurses, lawyers, police officers, and others), there is little social or economic utility in

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[5] There is some debate among commentators about how questions of duty should be analyzed and whether we should apply a broad definition of duty, leaving questions regarding the reasonableness of defendants' conduct to juries, or apply more particularized, narrow duty rules that would shift some of the normative determinations to the courts. *See generally* William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497, 1531–33 (2000); William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1699–1719 (1997). The final draft of the Restatement (Third) of Torts: Liability for Physical Harm, which has been approved by the American Law Institute but not yet published in final form, recognizes this conflict. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM, Chapter 3, § 7 (Proposed Final Draft No. 1, 2005). Comment a to section 7 states:

> [A]ctors engaging in conduct that creates risks to others have a duty to exercise reasonable care to avoid causing physical harm. In most cases, courts can rely directly on § 6 and need not refer to duty on a case-by-case basis. Nevertheless, in some categories of cases, reasons of principle or policy dictate that liability should not be imposed. In these cases, courts use the rubric of duty to apply general categorical rules withholding liability.

Id. § 7 cmt. a. The parties presented the issue in this case as a duty question, and we apply duty principles in analyzing whether employers owe a duty to protect the public from accidents cause by fatigued, off-duty employees.

requiring every employer to somehow prevent employee fatigue or take responsibility for the actions of off-duty, fatigued employees. In *Love*, there was little or no social value involved in a nightclub owner compelling its employees to drink to intoxication while working. In this case, however, there is undeniable utility in allowing employers to require a productive day's work from its employees, even when shifts may be long. *See Nat'l Convenience Stores, Inc. v. Matherne*, 987 S.W.2d 145, 151 n.15 (Tex. App.—Houston [14th Dist.] 1999, no pet.) ("In no event do we believe that an employer can be held to a duty to prevent or overcome the effects of fatigue that results from: (i) even a reasonably demanding work schedule, or (ii) factors arising outside the workplace.").

Escoto argues that Nabors affirmatively created a dangerous situation that posed a foreseeable risk to the public. Unlike *Otis* and *Love*, in which supervisors put clearly intoxicated workers on the road, Nabors did nothing to affirmatively create a risk of fatigue-related, off-duty accidents. Nabors merely established a shift work schedule and allowed its employees to decide for themselves if they were too tired to drive following their shifts. Under these facts, we cannot say that Nabors created any significant foreseeable risk of harm to Texas motorists. *See Swett v. United States*, No. 8:06-CIV-1805-T-24TGW, 2007 WL 1017664, at *4 & n.2 (M.D. Fla. Mar. 30, 2007) (citing but declining to follow the court of appeals' *Escoto* decision, and holding that "allowing [the employee] to leave work without assessing [his] physical condition, can not be said to have created any foreseeable zone of risk of harm to [third parties]").

Even if we assume that injury to third persons from employee fatigue is sufficiently foreseeable, foreseeability alone is not sufficient to create a new duty. *See, e.g.*, *Love*, 92 S.W.3d at 456 ("We have declined to hold an alcohol provider liable for [drunk driving] injuries in some

cases, not because the harm was unforeseeable, but because the defendant had no duty."); *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 353 (Tex. 1995) (finding no duty even assuming significant likelihood that defendant could and did foresee the relevant harm); *Bird v. W.C.W.*, 868 S.W.2d 767, 769 (Tex. 1994) (acknowledging that the harm in question was foreseeable but finding no duty). A duty to protect the public from fatigued employees would impose a substantial burden on employers, which we do not believe can be reasonably justified. Employers would have to inspect employees for signs of fatigue impairment, but as we already noted, no quantitative measure or criteria are available to determine an employee's level of fatigue or assess whether an employee is merely tired or is actually incapacitated. In addition, employers would be compelled to take steps to eliminate fatigue at work, a very difficult task when no certain amount or type of work is known to consistently cause fatigue impairment in all persons, and when an employee's off-duty conduct will affect his level of fatigue. In this case, for example, the evidence indicates that Ambriz had been awake for twenty hours before the accident, but Nabors only had control over Ambriz for the last twelve of those hours. Even Escoto's expert, Dr. Samuel Schiflett, conceded that off-duty factors such as an employee's commute length, lifestyle, sleep cycle during weeks off, sleep disorders, and medications can affect worker fatigue. Expecting employers to monitor or control such factors would be unreasonable, especially when the risk of driving while fatigued is within the common knowledge of all drivers, and employees generally know not to drive when they are too tired. A duty that could, in effect, impose liability on employers for allowing employees to leave the work site if they exhibit any signs of possible fatigue would be far-reaching and onerous. *See Pilgrim*, 653 F.2d at 986 (recognizing that a Texas employer "had no legal ability [and no right] to exercise control

over its employees after their shift was over by detaining those employees it determined to be too exhausted to drive," and concluding that a fatigued employee "was not subject to control by the company in any respect once he had finished his day's work"). Because "an employer owes no duty to act to control the conduct of an impaired off-duty employee," *Ianni*, 210 S.W.3d at 597, off-duty employees must be trusted to determine whether they are sufficiently rested to drive safely.[6]

B

Escoto also argues that Nabors had an independent duty to train its employees, especially inexperienced employees, regarding the dangers of fatigue. Having held that there is no employer duty with respect to off-duty accidents involving fatigue, we also decline to create a new duty requiring employers to train employees about fatigue.

In the employment context, an employer has a duty to "warn an employee of the hazards of employment and provide needed safety equipment or assistance." *Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566, 568 (Tex. 2007) (per curiam) (quoting *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006) (per curiam)). The employee's age and experience in the work he is assigned should also be considered. *See Allen v. A & T Transp. Co., Inc.*, 79 S.W.3d 65, 70 (Tex. App.—Texarkana 2002, pet. denied) (citing *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 754 (Tex. 1975)). However,

[6] Several other states have also declined to hold employers liable as a matter of law for employees' off-duty, fatigue-related automobile accidents. *See, e.g., Shelby County Health Care Auth.*, 850 So. 2d at 335, 340 (respiratory technician); *Depew v. Crocodile Enter., Inc.*, 73 Cal. Rptr. 2d 673, 678 (Cal. App. 1998) (restaurant employee); *Swett*, 2007 WL 1017664, at *1, 4 (M.D. Fla. Mar. 30, 2007) (citing *Hernandez v. Tallahassee Med. Ctr., Inc.*, 896 So. 2d 839, 840–44 (Fla. Dist. Ct. App. 2005)) (postal employee); *Behrens v. Harrah's Ill. Corp.*, 852 N.E.2d 553, 557 (Ill. App. Ct. 2006) (casino worker); *Baggett,* 758 So. 2d at 333–34 (carpenter); *Trusiani v. Cumberland & York Dist., Inc.*, 538 A.2d 258, 262 (Me. 1988) (delivery truck driver); *Lesser v. Nordstrom*, 96-8121, 1998 WL 480832, at *3–6 (E.D. Pa. Aug. 14, 1998) (department store employee) (citing *Hill v. Acme Mkts., Inc.*, 504 A.2d 324 (Pa. Super. Ct. 1986)); *Black*, 141 P.3d at 125 (construction worker); *cf. Faverty v. McDonald's Rests. of Ore., Inc.*, 892 P.2d 703, 705–09 (Or. Ct. App. 1995) (fast food worker); *Robertson v. LeMaster*, 301 S.E.2d 563, 564, 569 (W. Va. 1983) (railroad employee).

the employer "owes no duty to warn of hazards that are commonly known or already appreciated by the employee." *Skiles*, 221 S.W.3d at 568–69 (quoting *Kroger Co.*, 197 S.W.3d at 794, and holding that an employer had no duty to warn an employee about the dangers associated with using a ladder to jump over a lift gate, which was "common and obvious to everyone"); *see also Praesel*, 967 S.W.2d at 398 (declining to impose a duty on doctors to warn epileptic patients not to drive because "the risk that a seizure may occur while driving and the potential consequences should be obvious to those who suffer from epilepsy"); *Wilhelm v. Flores*, 195 S.W.3d 96, 98 (Tex. 2006) (per curiam) (holding that there is no duty to warn about dangers of bee stings); *Kroger Co.*, 197 S.W.3d at 795 (holding that there is no duty to warn about dangers of using a vehicle doorjamb for leverage); *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 382 (Tex. 1995) (holding that there is no duty to warn of "obvious risks" that are common knowledge). Likewise, we do not impose a duty to train employees regarding the commonly-known dangers of driving while fatigued. *See J & C Drilling Co.*, 866 S.W.2d at 638 (rejecting argument that employer had a duty to instruct worker "on when to call for relief or how long to rest before driving the company car"); *Matherne*, 987 S.W.2d at 150–52 (rejecting duty to train employee regarding fatigued driving on the job, and holding that employer has no duty to warn or instruct an employee "with regard to dangers that are ordinarily incident to driving a vehicle and require no special skills or knowledge other than that expected of all licensed drivers"). In this case, it appears that the Nabors shift workers generally knew they should not drive while fatigued, and a police officer agreed that "it is just common sense, you know when you are too tired to drive." The testimony of Ambriz's mother, father, and a coworker all indicates that Ambriz knew not to drive if he was too tired. On the day of the accident, Ambriz had

brought clothes, towels, and groceries to the job site and was apparently prepared to stay in a trailer. But at the end of his shift, Ambriz changed clothes, talked with coworkers for about ten minutes, mentioning that he wanted to go home to pick up his girlfriend, and ultimately left in his truck. We conclude that, because the risk associated with driving while fatigued is common knowledge and appears to have been appreciated by Ambriz, Nabors owed no duty to train employees about those risks. *See also Praesel*, 967 S.W.2d at 398 (recognizing that "[t]he consequences of placing a legal duty . . . to warn may subject [employers] to substantial liability even though their warnings may not be effective to eliminate the risk in many cases," and "[w]e cannot simply assume that a person who is advised not to drive will actually respond and refrain from driving").

III

We hold that Nabors owed no duty to prevent injuries resulting from fatigue following an employee's shift-work schedule. We further hold that Nabors owed no duty to train its employees regarding the dangers of fatigue. We need not reach Nabors's remaining issues. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's judgment.

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Paul W. Green
Justice

OPINION DELIVERED: June 19, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0911

EDWARDS AQUIFER AUTHORITY ET AL., PETITIONERS,

v.

CHEMICAL LIME, LTD., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued April 1, 2008

JUSTICE HECHT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON and JUSTICE WILLETT joined.

JUSTICE BRISTER filed a concurring opinion.

JUSTICE WILLETT filed a concurring opinion.

Whether, as a general matter, an appellate court's decision takes effect the moment the court issues its opinion, order, or judgment, or later when rehearing is denied or the time for rehearing expires, or still later when the clerk issues the mandate, is a difficult question under Texas law and procedure, as reflected by the competing arguments in JUSTICE BRISTER's and JUSTICE WILLETT's separate opinions, and one we need not answer today. We all agree that if an appellate court

expressly states the time for its decision to take effect, that statement controls. That rule applies here.

In *Barshop v. Medina County Underground Water Conservation District*, we prescribed a filing deadline "six months after the [Edwards Aquifer] Authority becomes effective".[1] As it happened, the Authority began operations the day we issued our opinion and thus became effective. The deadline was set at six months from that date. We hold that the Authority correctly applied *Barshop*, and therefore we reverse the judgment of the court of appeals.[2] We remand the case to the trial court for further proceedings.

I

The Edwards Aquifer is an underground layer of porous, water-bearing rock, 300-700 feet thick, and five to forty miles wide at the surface, that stretches in an arced curve from Brackettville, 120 miles west of San Antonio, to Austin. It is the primary source of water for south central Texas and therefore vital to the residents, industry, and ecology of the region, the State's economy, and the public welfare.

Record droughts in the early 1950s prompted the Legislature to create the Edwards Underground Water District in 1959[3] "for the purpose of conserving, protecting and recharging the

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[1] 925 S.W.2d 618, 630 (Tex. 1996).

[2] 212 S.W.3d 683 (Tex. App.–Austin 2006) (op. on reh'g).

[3] *See* House Research Org., Bill Analysis, Tex. S.B. 1477, 73rd Leg., R.S. (1993) ("From 1950-1956, Texas experienced a record draught [sic], causing Comal Springs in New Braunfels to go dry for five months and reducing the flow of San Marcos Springs . . . . In response, the Edwards Underground Water District (EUWD) was legislatively created in 1959 to conserve, protect and recharge the groundwater in the five counties known as the Edwards Aquifer region.").

[aquifer's] underground water-bearing formations . . . and for the prevention of waste and pollution".[4] Although the District's powers were broadened over the years, it still lacked the regulatory authority the Legislature came to believe was essential. In 1993, the Legislature passed the Edwards Aquifer Authority Act (EAAA),[5] which replaced the District with the Edwards Aquifer Authority, giving the Authority broad powers "for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state."[6] The EAAA also expanded the covered territory.

The EAAA prohibits withdrawals of water from the aquifer without a permit issued by the Authority,[7] limits the total permitted withdrawals per calendar year,[8] and gives preference to

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[4] Act of April 9, 1959, 56th Leg., R.S., ch. 99, §1, 1959 Tex. Gen. Laws 173, 173, *as amended by* Act of Apr. 12, 1979, 66th Leg., R.S., ch. 69, 1979 Tex. Gen. Laws 110; Act of May 23, 1979, 66th Leg., ch. 306, 1979 Tex. Gen. Laws 706; Act of May 19, 1983, 68th Leg., R.S., ch. 1010, 1983 Tex. Gen. Laws 5422; Act of May 29, 1987, 70th Leg., R.S., ch. 332, 1987 Tex. Gen. Laws 1746; Act of May 29, 1987, 70th Leg., R.S., ch. 333, 1987 Tex. Gen. Laws 1747; Act of May 26, 1987, 70th Leg., R.S., ch. 629, 1987 Tex. Gen. Laws 2411; Act of May 28, 1987, 70th Leg., R.S., ch. 652, 1987 Tex. Gen. Laws 2457; Act of May 29, 1989, 71st Leg., R.S., ch. 599, 1989 Tex. Gen. Laws 1988; *repealed by* Act of May 30, 1993, 73rd Leg., R.S., ch. 626, § 1.41(a), 1993 Tex. Gen. Laws 2350, 2368.

[5] Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, *as amended by* Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; Act of May 6, 1999, 76th Leg., R.S., ch. 163, 1999 Tex. Gen. Laws 634; Act of May 27, 2001, 77th Leg., R.S., ch. 966, §§ 2.60–.62, 6.01–.05, 2001 Tex. Gen. Laws 1991, 2021–2022, 2075–2076; Act of May 25, 2001, 77th Leg., R.S., ch. 1192, 2001 Tex. Gen. Laws 2696; Act of June 1, 2003, 78th Leg., R.S., ch. 1112, § 6.01(4), 2003 Tex. Gen. Laws 3188, 3193; Act of May 23, 2007, 80th Leg., R.S., ch. 510, 2007 Tex. Gen Laws 900; Act of May 28, 2007, 80th Leg., R.S., ch. 1351, §§ 2.01–2.12, 2007 Tex. Gen Laws 4612, 4627–34; Act of May 28, 2007, 80th Leg. R.S., ch. 1430, §§ 12.01–12.12, 2007 Tex. Gen. Laws 5848, 5901–09; Act of May 21, 2009, 81st Leg., R.S., ch. __, 2009 Tex. Gen. Laws ___ (Tex. H.B. 4762, to become effective Sept. 1, 2009).

[6] EAAA § 1.01.

[7] EAAA § 1.15(b) ("Except as provided by Sections 1.17 ["Interim Authorization"] and 1.33 [wells producing less than 25,000 gallons per day for domestic or livestock use] of this article, a person may not withdraw water from the aquifer or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority."); EAAA § 1.35(a) ("A person may not withdraw water from the aquifer except

"existing user[s]" — defined as persons who "withdr[ew] and beneficially used underground water from the aquifer on or before June 1, 1993."[9] With few exceptions, water may not be withdrawn from the aquifer through wells drilled after June 1, 1993.[10] A permit applicant must file with the Authority on a prescribed form[11] a "declaration of historical use of underground water withdrawn from the aquifer during the historical period from June 1, 1972, through May 31, 1993."[12] Subject to the limit on total withdrawals of water from the aquifer, an existing user who files a declaration "as required", pays an application fee (set at $25), and "establishes by convincing evidence beneficial use of underground water from the aquifer"[13] is entitled to "a permit for withdrawal of an amount

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as authorized by a permit issued by the authority or by this article.").

[8] Initially, the EAAA only capped withdrawals. EAAA § 1.14(b) (stating that, with certain exceptions, "for the period ending December 31, 2007, the amount of permitted withdrawals from the aquifer may not exceed 450,000 acre-feet of water for each calendar year"), *repealed by* Act of May 28, 2007, 80th Leg., R.S., ch. 1351, § 2.09, 2007 Tex. Gen. Laws 4612, 4634, *and by* Act of May 28, 2007, 80th Leg., R.S., ch. 1430, § 12.09, 2007 Tex. Gen. Laws 5848, 5908. The EAAA now sets both the maximum and minimum withdrawals permitted per calendar year. Act of May 28, 2007, 80th Leg., R.S., ch. 1351, § 2.02, 2007 Tex. Gen. Laws 4612, 4627 (amending EAAA § 1.14(c) to state that, with certain exceptions, "for the period beginning January 1, 2008, the amount of permitted withdrawals from the aquifer may not exceed or be less than 572,000 acre-feet of water for each calendar year, which is the sum of all regular permits issued or for which an application was filed and issuance was pending action by the authority as of January 1, 2005"); Act of May 28, 2007, 80th Leg., R.S., ch. 1430, § 12.02, 2007 Tex. Gen. Laws 5848, 5902 (same).

[9] EAAA § 1.03(10).

[10] EAAA § 1.14(e) ("The authority may not allow withdrawals from the aquifer through wells drilled after June 1, 1993, except additional water as provided by Subsection (d) and then on an interruptible basis."), *amended by* Act of May 28, 2007, 80th Leg., R.S., ch. 1351, § 2.02, 2007 Tex. Gen. Laws 4612, 4627 (amending EAAA § 1.14(e) to state: "The authority may not allow withdrawals from the aquifer through wells drilled after June 1, 1993, except for replacement, test, or exempt wells or to the extent that the authority approves an amendment to an initial regular permit to authorize a change in the point of withdrawal under that permit."), *and by* Act of May 28, 2007, 80th Leg., R.S., ch. 1430, § 12.02, 2007 Tex. Gen. Laws 5848, 5902 (same).

[11] EAAA § 1.16(b).

[12] EAAA § 1.16(a).

[13] EAAA § 1.16(d).

of water equal to the user's maximum beneficial use of water without waste during any one calendar year of the historical period."[14] After existing users' applications have been processed, the Authority may issue additional permits up to the cap on total annual withdrawals.[15] The Authority's board of directors is required to "adopt rules necessary to carry out the authority's powers and duties . . . , including rules governing procedures of the board and authority."[16]

The EAAA was enacted May 30, 1993. The Authority was to commence operations September 1, 1993, the general effective date of the statute, but the new regulatory scheme was to be phased in over six months.[17] Existing users had until March 1, 1994, to file permit applications,[18] at which point the permit requirement would take effect. After March 1, a filer could generally continue to withdraw water pending approval of its application.[19]

But implementation of the EAAA was delayed. Prior to September 1, 1993, the United States Department of Justice refused administrative preclearance for the new Authority under section

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[14] EAAA § 1.16(e).

[15] EAAA § 1.18 states: "(a) To the extent water is available for permitting after the issuance of permits to existing users, the authority may issue additional regular permits, subject to limits on the total amount of permitted withdrawals determined under Section 1.14 of this article. (b) The authority may not consider or take action on an application relating to a proposed or existing well of which there is no evidence of actual beneficial use before June 1, 1993, until a final determination has been made on all initial regular permit applications submitted on or before the initial application date of March 1, 1994."

[16] EAAA § 1.11(a).

[17] Act of May 30, 1993, 73d Leg., R.S., ch. 626, § 4.02, 1993 Tex. Gen. Laws 2350, 2371 ("This Act takes effect September 1, 1993, except Section 1.35 of Article 1 takes effect March 1, 1994.").

[18] EAAA § 1.16(b) ("An existing user's declaration of historical use must be filed on or before March 1, 1994, on a form prescribed by the board. An applicant for a permit must timely pay all application fees required by the board.").

[19] EAAA § 1.17.

5 of the Voting Rights Act of 1965.[20] On May 29, 1995, the Legislature amended the EAAA to meet the Department's objections, and the Department granted preclearance. The amended statute was to be effective August 28, 1995,[21] but on August 22, a group of landowners and others sued for a declaration that the EAAA was facially unconstitutional. The district court issued a temporary restraining order the same day prohibiting the Authority from beginning operations. On November 27, 1995, the district court rendered judgment declaring the EAAA unconstitutional and permanently enjoining implementation of its provisions. But on direct appeal, this Court in *Barshop v. Medina County Underground Water Conservation District* held that the EAAA was not unconstitutional on its face and therefore reversed the district court's judgment, dissolved the injunction, and remanded the case to determine whether attorney fees should be awarded.[22] We issued our opinion and judgment on June 28, 1996, denied rehearing on August 16, 1996, and issued our mandate on February 10, 1997.

The Authority began operations the day our opinion issued, taking over all the assets, offices, personnel, and papers of the District,[23] which had continued in existence. A temporary board of

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[20] *See* 42 U.S.C. § 1973c(a). The District's governing board consisted of fifteen elected directors. Act of April 9, 1959, 56th Leg., R.S., ch. 99, § 5, 1959 Tex. Gen. Laws 173, 175. The Authority's governing board consisted of nine appointed directors. EAAA § 1.09.

[21] Act of May 29, 1995, 74th Leg., R.S., ch. 261, 1995 Tex. Gen. Laws 2505; *see also* TEX. CONST. art. III, § 39 ("No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless the Legislature shall, by a vote of two-thirds of all the members elected to each House, otherwise direct . . . .").

[22] 925 S.W.2d 618, 637-638 (Tex. 1996).

[23] EAAA § 1.41 states in part: "(b) All files and records of the Edwards Underground Water District pertaining to control, management, and operation of the district are transferred from the Edwards Underground Water District to the authority on the effective date of this article. (c) All real and personal property, leases, rights, contracts, staff, and obligations of the Edwards Underground Water District are transferred to the authority on the effective date of this

directors appointed by the Legislature governed the Authority pending a November election.[24] The Authority's activities were widely reported in the media because of severe drought conditions existing in south central Texas,[25] diverse interests competing for permits,[26] and a lawsuit filed by the Sierra Club in June 1996 in the United States District Court for the Western District of Texas, seeking federal judicial management of the Edwards Aquifer to protect endangered species. On August 23, 1996, the federal court, convinced that it was facing an emergency, issued a preliminary injunction imposing a plan to manage the aquifer. The United States Court of Appeals for the Fifth Circuit stayed the injunction and later reversed it on the ground that the federal court should have

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article. (d) On September 1, 1993, all unobligated and unexpended funds of the Edwards Underground Water District shall be transferred to the authority."

[24] EAAA § 1.092(a) ("Until a board is elected as provided by this section and takes office, the authority is governed by a temporary board that consists of: (1) Mr. Phil Barshop; (2) Mr. Ralph Zendejas; (3) Mr. Mike Beldon; (4) Ms. Rosa Maria Gonzales; (5) Mr. John Sanders; (6) Ms. Sylvia Ruiz Mendelsohn; (7) Mr. Joe Bernal; (8) Mr. Oliver R. Martin; (9) Mr. A. O. Gilliam; (10) Mr. Bruce Gilleland; (11) Mr. Rogelio Munoz; (12) Mr. Doug Miller; (13) Ms. Paula DiFonzo; (14) Mr. Mack Martinez; (15) Ms. Jane Houghson; (16) one temporary director appointed by the South Central Texas Water Advisory Committee from among the members of the committee; and (17) one temporary director appointed jointly by the Commissioners Courts of Medina County and Uvalde County who must be a resident of one of those counties.").

[25] *See*, *e.g.*, Tom Dukes, *Water Use from Edwards Aquifer Must Be Cut*, DALLAS MORNING NEWS, July 14, 1996, at J6 ("Pumping too much water from the Edwards during the current drought threatens the aquifer's water quality as well as the amount of water available."); Editorial, *Aquifer Pumping Rules*, AUSTIN AM.-STATESMAN, July 2, 1996, at A8 ("A severe drought has made water a precious resource in Central Texas and throughout the state. Now more than ever, the water in the Edwards Aquifer must be managed to the advantage of everyone."); Jerry Needham, *The Water Crisis*, SAN ANTONIO EXPRESS-NEWS, June 30, 1996, at A1 ("The Texas Supreme Court's OK Friday for a regional authority to go to work managing the Edwards Aquifer still leaves the region wallowing in drought-induced water woes, but it provides a solid framework for problem solving, officials said Saturday."); *Texas: State Supremes Back Regulation of Edwards Aquifer*, GREENWIRE, July 2, 1996 ("A recent drought and unregulated pumping have substantially depleted the aquifer.").

[26] Needham, *supra* note 25 ("Diverse interests across the aquifer — farmers, San Antonio and other cities, recreational interests at aquifer-fed springs as well as municipal and industrial users downstream — still will be jockeying for a favorable share of the aquifer's bounty through permits.").

abstained to allow the Authority, which was "in the process of taking comments and formulating rules for permits and emergency measures", time to function.[27]

The EAAA directed the temporary board to "adopt rules governing the authority" "as soon as practicable."[28] On August 31, 1996, the Authority issued proposed rules to govern the process for filing a permit application, including a declaration of historical use.[29] The Authority set Saturday, December 28, 1996 — six months from the date of our *Barshop* opinion — as the filing deadline.[30] In response to comments, the Authority moved the deadline to December 30, the following Monday.[31] With few other changes, the Authority adopted the proposed rules on October 31, effective November 21, 1996.[32] As the Authority explained, although the initial rules did not lay out a complete permitting process, the Authority proposed them because it "believed it needed to provide notice to existing users as early as possible that December 30, 1996 will be the deadline for filing

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[27] *Sierra Club v. City of San Antonio*, 112 F.3d 789, 796 (5th Cir. 1997).

[28] EAAA § 1.092(d).

[29] 21 Tex. Reg. 8401 (1996) (to be codified at 31 Tex. Admin. Code §§ 701.1-.6 and 701.11-.22) (proposed Aug. 26, 1996) (Edwards Aquifer Auth.).

[30] *Id*. at 8402 ("The injunction [in *Barshop*] was dissolved by the Texas Supreme Court, and the Act thereby became effective, on June 28, 1996. . . . In keeping with the intent of the Legislature, these rules require the filing of declarations of historical use by December 28, 1996, the date six months following the actual effective date of the Act.").

[31] 21 Tex. Reg. 11377, 11381 (1996) ("The proposed rule called for a filing date of Saturday, December 28, 1996. After further review, the filing date has been changed to Monday, December 30, 1996, because the Authority believes that this date is more consistent with legislative intent and will avoid difficulties for applicants who find themselves needing to file their applications on a Saturday when the offices of the Authority are closed.").

[32] *Id.* at 11384.

declarations of historical use."[33] On November 1, 1996, the Authority proposed further rules governing the process for reviewing permit applications,[34] which did not become effective until February 18, 1997.[35]

The Authority took steps to publicize the December 30 deadline as widely as possible. Respondent Chemical Lime, Ltd.'s predecessor in interest, APG Lime Corp., received a permit application form by mail mid-November, noticed the December 30 deadline prominently printed at the top of the form, and began gathering the historical data needed to submit it. APG's New Braunfels plant had been in operation since 1907, using limestone, water, and heat to manufacture lime used in purifying water and controlling sulphur emissions from coal-fired plants. For twenty-five years, the plant had used on average some 600 acre-feet — around 200 million gallons — of water a year.[36] APG's plant engineer, James Johnson, undertook to complete the permit application for the Authority but had trouble finding water usage data going back to 1972. In mid-December he telephoned the Authority to ask whether he could estimate water usage and was told he needed hard data. A few days before the deadline, he telephoned the Authority again to say that he would

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[33] *Id*. at 11379 ("There simply was not adequate time to develop a full review and hearings process on applications for historical use by the time the Authority believed it needed to publish this initial set of rules. The Authority believed it needed to provide notice to existing users as early as possible that December 30, 1996 will be the deadline for filing declarations of historical use. With that goal in mind these rules were developed. The Authority and staff knew at the time of proposal that additional rules would have to be developed to complete most of the sections with regard to the review and hearings on applications for permits.").

[34] 21 Tex. Reg. 11071 (1996) (to be codified at 31 Tex. Admin. Code §§ 701.31-.35, 701.51-.59, 701.71-.77, 701.91-.102, 701.121-.131, & 701.141-.147) (proposed Nov. 1, 1996) (Edwards Aquifer Auth.).

[35] 22 Tex. Reg. 1393, 1405 (1997).

[36] An acre-foot of water — 43,560 cubic feet — is equal to about 325,851 gallons.

not be able to gather all the historical information in time. He was told that others were having problems, too, and that he should, as he recalled, "get it in when you get it — when you get that data on it." Based on that conversation, Johnson believed he could submit the application late. He was not told that if the application was late, APG would lose its water, or that he could file an incomplete application by the deadline and supplement it later, which was the Authority's policy.

APG did not file its permit until January 17, 1997. The Authority did not notice that it was late and continued to process it, notifying APG in April 1998 that a permit would issue for 618.2326 acre-feet of water. In 1999, Chemical Lime acquired APG's plant and its interest in the permit application. Not until November 2000 did the Authority notify Chemical Lime that the application would be denied because it was filed after the deadline. Chemical Lime protested, but the Authority refused to reconsider.

Chemical Lime sued the Authority and its general manager and directors in their official capacities,[37] seeking a declaration that the application deadline should have been set no sooner than six months from this Court's denial of rehearing in *Barshop*, which would make Chemical Lime's application timely. Alternatively, Chemical Lime sought a declaration that it had substantially complied with the EAAA's permit requirements.[38] The deadline-validity issue was presented to the

[37] The Authority acknowledges that governmental immunity from suit is waived by section 36.251 of the Texas Water Code, which states: "A person, firm, corporation, or association of persons affected by and dissatisfied with any provision or with any rule or order made by a district is entitled to file a suit against the district or its directors to challenge the validity of the law, rule, or order. The suit shall be filed in a court of competent jurisdiction in any county in which the district or any part of the district is located. The suit may only be filed after all administrative appeals to the district are final." The term "district" includes an "authority created under . . . Section 59, Article XVI, Texas Constitution". TEX. WATER CODE § 36.001(1). The Authority was created under that provision. EAAA § 1.02(b).

[38] Chemical Lime urged other claims that are not before us, including a takings claim that was severed in the trial court.

trial court on stipulated facts. The court concluded that the EAAA "became effective on August 16, 1996", the date rehearing was denied in *Barshop*; that the December 30, 1996 deadline "established by the Authority rule . . . is not a valid, legal deadline"; that the proper deadline was February 16, 1997; and that Chemical Lime's permit application was timely filed. The substantial-compliance issue was tried to a jury, which found for Chemical Lime. Based on its conclusions and the jury verdict, the trial court rendered judgment for Chemical Lime. The court awarded Chemical Lime $481,948.72 attorney fees, plus attorney fees on appeal.

The court of appeals affirmed but concluded that the permit application deadline should be six months from issuance of the mandate in *Barshop*, or August 10, 1997.[39] The court "express[ed] no opinion regarding the legal status or validity of acts performed under color of the EAA Act between the June 28, 1996 supreme court judgment in *Barshop* and the court's issuance of its mandate" on February 10, 1997.[40] Having determined that Chemical Lime's application was timely filed, the court did not reach Chemical Lime's argument that it had substantially complied with the statutory permit requirements.[41] The court affirmed the award of attorney fees to Chemical Lime.[42]

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[39] 212 S.W.3d 683, 696 (Tex. App.–Austin 2006).

[40] *Id.*

[41] *Id.*

[42] *Id.* at 698.

We granted the Authority and its agents' petition for review.[43] Because their interests are aligned, we refer only to the Authority in addressing their arguments.[44] The Authority contends that (1) the December 30, 1996 permit application filing deadline was valid, (2) by missing the deadline Chemical Lime failed to substantially comply with the statutory requirements for a permit as a matter of law, (3) chapter 36 of the Texas Water Code precludes an award of attorney fees to Chemical Lime under the Declaratory Judgment Act and requires an award of attorney fees to the Authority. We address these arguments in turn.[45]

II

To determine the validity of the Authority's December 30, 1996 permit application filing deadline, we begin with our decision in *Barshop*. One argument in that case against the constitutionality of the EAAA was that it set an impossible condition for compliance: a March 1, 1994 filing deadline that had expired before the Authority had even come into existence.[46] But the Legislature had amended the EAAA in 1995 to meet preclearance objections so that the Act could take effect, yet had not changed the deadline. So the argument had to be, not only that the deadline set by the EAAA turned out to be impossible, but that the Legislature *intended* — given its action

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[43] 51 Tex. Sup. Ct. J. 329 (Jan. 25, 2008).

[44] We have received amicus briefs for the State of Texas and the City of San Antonio, both in support of reversal.

[45] The State of Texas, as amicus curiae, argues that, because a judgment against the State is always superseded by the State's filing of a notice of appeal, the Authority had the discretion to implement the EAAA at any time while *Barshop* was pending. Thus, it argues, the December 30, 1996 filing deadline was valid regardless of when our decision in *Barshop* became legally effective. Our analysis of the case does not require us to reach this argument, and we express no opinion on it.

[46] *Barshop v. Medina County Underground Water Conserv. Dist.*, 925 S.W.2d 618, 628 (Tex. 1996).

in 1995 — to set an impossible deadline, so that when the EAAA took effect, it would prohibit any withdrawal of water from the Edwards Aquifer by regular permit. The argument was that the Legislature had created a regulatory scheme to preserve a crucial resource that was not only destined to fail but intended to fail. We characterized this argument as "nonsensical" and the logical result of it "absurd".[47]

We explained the State's position this way:

> The State urges that we should interpret the March 1, 1994 date as directory rather than mandatory. The State maintains that we should consider the intent of the Legislature and construe this date to merely require that the declarations be filed with the Authority six months after the eventual effective date of the statute. We agree with the State.[48]

Thus, instead of adopting a "too literal construction of a statute, which would prevent the enforcement of it according to its true intent,"[49] we took a more pragmatic approach. We noted that in *Stephenson v. Stephenson*,[50] we had held that a statutory period for filing an appellate transcript with the newly created courts of civil appeals did not begin to run until "the appellate court clerk began operations".[51] "Similarly," we held that "the March 1, 1994 deadline contained in the [EAAA] was intended to provide existing users six months to file their declarations of historical use."[52]

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[47] *Id.* at 629.

[48] *Id*. at 628.

[49] *Id*. at 629 (quoting *State v. Dyer,* 200 S.W.2d 813, 815 (Tex. 1947) (internal quotation marks omitted)).

[50] 22 S.W. 150 (Tex. 1893).

[51] 925 S.W.2d at 630.

[52] *Id.*

Accordingly, we interpreted the EAAA "as requiring declarations of historical use to be filed six months after the Authority becomes effective."[53]

Because of the prolonged delays in implementing the EAAA, it was not clear how long it would take the Authority to begin operations. In fact, the Authority took over from the District the same day our opinion in *Barshop* issued. The EAAA instantly transferred to the Authority all that was the District's. Because the EAAA became effective immediately in a practical sense, the Authority read *Barshop* to require a filing deadline six months later, irrespective of further proceedings in this Court,[54] although it extended the deadline two days from Saturday to Monday.[55] Not only was the Authority under pressure to act expeditiously, it was concerned that any later deadline would be subject to challenge.[56]

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[53] *Id.*

[54] 21 Tex. Reg. 11377, 11381 (Nov. 22, 1996) ("A commenter contended that the filing date should be February 28, 1997, which is six months after the date the Texas Supreme Court issued its mandate on August 31, 1996 in Barshop v. Medina County Underground Water Conservation District, sending the case back to the trial court. The filing date stated in the rule is December 30, 1996, six months after the Texas Supreme Court dissolved the trial court injunction that had blocked the Act from taking effect. The staff adheres to the December date, because the Act became fully effective on June 28, 1996, when the injunction was dissolved. The dissolution of the injunction was immediately effective, and was not delayed by subsequent procedural steps in the Supreme Court. The staff recommends against adopting the February date because it is inconsistent with the Legislature's intent to require filing of declarations of historical use six months after the actual effective date of the Act. Adopting the later date would also expose those applicants who would file after December 30, 1996, to litigation attacking the filings as untimely.").

[55] *See supra* note 31; *see Pitcock v. Johns*, 326 S.W.2d 563, 565-566 (Tex. Civ. App.–Austin 1959, writ ref'd) (citing G*ardner v. Universal Life & Accident Ins. Co.*, 164 S.W.2d 582 (Tex. Civ. App.–Dallas 1942, writ dism'd w.o.j.) and former TEX. REV. CIV. STAT. art. 23, § 15 (1925) ("'Month' means a calendar month."), first codified as TEX. REV. CIV. STAT. art. 3140, § 10 (1879), and currently as TEX. GOV'T CODE § 312.011(7)); *see also Cambell & Son v. William G. Lane & Co.*, 25 Tex. 93 (1860); Op. Tex. Att'y Gen. No. 0-1492 (1939); *cf.* TEX. GOV'T CODE § 311.014(b), (c) (providing that, in construing a code provision, "[i]f the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.").

[56] 21 Tex. Reg. at 11381.

Despite the fact that the Authority began operations June 28, 1996, Chemical Lime argues, as the court of appeals held, that the EAAA did not become "effective" within the meaning of *Barshop* until the mandate issued in that case on February 10, 1997. Chemical Lime points to Rule 18.6 of the Texas Rules of Appellate Procedure, which provides that "[t]he appellate court's judgment on an appeal from an interlocutory order takes effect when the mandate is issued." Chemical Lime argues that the same rule should apply in an appeal from a final judgment. Alternatively, Chemical Line argues that the EAAA did not become effective until rehearing was denied in *Barshop* on August 16, 1996. But none of these arguments find support in *Barshop* itself. As Chemical Lime properly acknowledges, *Barshop*'s approach to resetting the filing deadline was entirely pragmatic.[57] *Barshop* set a new filing deadline based not on the legal effect of some procedural occurrence in that case but on the practical reality of the Authority's commencement of operations.

Further in the alternative, and focusing instead on practicalities, Chemical Lime argues that since the Legislature's intent in the EAAA was, as we stated in *Barshop*, "to provide existing users six months to file their declarations of historical use",[58] the period should run from the effective date of the Authority's rules governing the application process — November 21, 1996 — or at the earliest, from the date those rules were proposed — August 31, 1996. But this is an argument, not

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[57] Brief for Respondent 5 ("The Court selected that prospective trigger date for the six-month clock based on *Stephenson v. Stephenson*, 22 S.W. 150 (Tex. 1893), where the Court pragmatically held that a deadline for filing an appellate transcript did not expire before the newly-created courts of civil appeals were ready to accept such filings. *See Barshop*, 925 S.W.2d at 630.").

[58] 925 S.W.2d at 630.

that the Authority misconstrued *Barshop*, but that *Barshop* was wrongly decided. There is nothing to indicate that the inevitable delay in promulgating rules would have been any less had the EAAA taken effect in 1993. It was never possible for final rules to be in effect six months before the filing deadline. Nor did the lack of final rules hamper the filing process. The difficulty applicants faced lay not in any uncertainty over what rules would apply but in gathering the required data on water use. Out of more than a thousand applications the Authority received, only twenty-two were late, and there is no evidence that any delay was attributable to the promulgation of the Authority's rules.

The parties have devoted much attention to the problems in determining when, as a general matter, an appellate court decision takes effect. The concurring opinions shed helpful light on these problems and strongly suggest that this is an aspect of Texas appellate procedure that could well benefit from more definite rules and procedures. We conclude, however, that this case turns not on when our decision in *Barshop* became effective, but when the Authority became effective. On that issue, the facts leave no doubt that the Authority permissibly set the permit application filing deadline at December 30, 1996.

III

The jury found that Chemical Lime substantially complied with the EAAA's permit application requirements, and the trial court rendered judgment on their verdict. The Authority contends that Chemical Lime failed to substantially comply with the statutory requirements as a matter of law. The issue was not addressed by the court of appeals, but it has been briefed in this Court, and we elect to resolve it.

The doctrine of substantial compliance, though certainly familiar to the law, lacks comprehensive definition, so we begin with several limiting assumptions based on what the parties here do and do not argue. We assume, because the Authority does not argue to the contrary, that the EAAA does not require strict compliance with permit application requirements. The assumption is a reasonable one, since one of the EAAA's express requirements is that a "declaration of historical use must be filed . . . on a form prescribed by the board [of directors]",[59] though there is nothing to indicate that filing the same information on plain paper would require rejection of the application. We also assume that substantial compliance with a statute means compliance with its essential requirements, since the parties agreed that this was a correct statement of the law for the jury charge. We assume further, to the extent it is relevant, again because the Authority does not argue otherwise, that Chemical Lime tried in good faith to file its permit application by the deadline. Although it would seem that a person who meets essential statutory requirements has substantially complied, even if not acting in complete good faith, it is clear that a person's good faith is not enough for substantial compliance when essential statutory requirements like a deadline are not met. Finally, since the Authority initially approved Chemical Lime's application before noticing that it was late-filed, we assume that Chemical Lime complied with all statutory requirements except the December 30, 1996 filing deadline — that is, that Chemical Lime is an existing user that established by convincing evidence beneficial use of underground water from the aquifer during the 21-year period before June 1993. Since the Authority barely mentions late payment of the fee, the question we

[59] EAAA § 1.16(b).

decide boils down to this: did the Legislature consider the permit application filing deadline essential to the EAAA?

We think the answer must be yes. To be clear, the issue is not whether Chemical Lime substantially complied with the filing deadline. A deadline is not something one can substantially comply with. A miss is as good as a mile.[60] As the United States Supreme Court has explained:

> The notion that a filing deadline can be complied with by filing sometime after the deadline falls due is, to say the least, a surprising notion, and it is a notion without limiting principle. If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it. Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. Any less rigid standard would risk encouraging a lax attitude toward filing dates. A filing deadline cannot be complied with, substantially or otherwise, by filing late — even by one day.[61]

Rather, the issue is whether Chemical Lime substantially complied with the permit application process, one requirement of which was the filing deadline.

The importance of a fixed filing deadline is apparent in the EAAA. The Legislature picked a specific, calendar date by which permit applications were required to be filed. It did not delegate that responsibility to the Authority. It made no provision for extensions and did not empower the

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[60] More accurately: "An ynche in a misse is as good as an ell." W. CAMDEN, REMAINS CONCERNING BRITAIN 303 (2d ed. 1614). An ell was a unit of measurement used by English tailors, usually 45 inches.

[61] *United States v. Locke*, 471 U.S. 84, 100-101 (1985) (citation and internal quotation marks omitted). Justice O'Connor, concurring, opined that, because the Court's prior decisions did not necessarily bar the use of equitable estoppel in those circumstances, the Court's reversal did not in itself establish that the claimants would ultimately forfeit their mining claims, in further proceedings after remand. *Id.* at 110-112. In the case at bar, other claims remain pending in the district court, but we offer no opinion on the claims not before us.

Authority to do so. Its intent that applicants strictly adhere to the deadline is thus fairly clear. Though it became necessary for this Court to reset the deadline to preserve the constitutionality of the EAAA, it was not necessary, nor would it have been proper, to change the character of the new deadline, making it less mandatory than the Legislature originally intended.

The need for a filing deadline, with no exceptions, is also apparent. The Legislature found it necessary to cap annual water withdrawals to protect the aquifer. Because applications would exceed the cap, with no fixed cutoff, the Authority would be required to constantly readjust allocations among permittees to provide for late applicants. Indeed, the Authority argues that if Chemical Lime's application is deemed timely and approval required, all permits must be adjusted, albeit slightly (about 0.1%[62]), for total annual withdrawals from the aquifer to remain at the statutory limit. The Legislature could certainly have concluded that such readjustments should be avoided.

Had Chemical Lime filed an incomplete or inaccurate application, its argument for substantial compliance would be stronger, even though as a practical matter, it would make no discernible difference to the permitting process whether an application was amended after the deadline or filed a few days late. But a line must be drawn somewhere, and the Legislature was not required to draw it with perfect precision. Chemical Lime points out that in *Barshop* we agreed with the State that the March 1, 1994 filing deadline in the EAAA was "directory rather than mandatory".[63] Chemical Lime contends that the law permits substantial compliance with non-

[62] Chemical Lime's temporarily approved permit for 618.2326 acre-feet would be about one-thousandth of the 572,000 acre-feet total annual withdrawals now permitted by the EAAA.

[63] *Barshop v. Medina County Underground Water Conserv. Dist.*, 925 S.W.2d 618, 628 (Tex. 1996).

mandatory filing deadlines. But in *Barshop*, we held only that the expired deadline was directory because, as we have already explained, any other reading would have led to an absurd result. We did not suggest that a viable deadline would also be merely directory.

Although the EAAA states that a declaration of historical use "must be filed" by the deadline,[64] Chemical Lime argues that because the EAAA prescribes no penalty for late filing, the deadline should not be treated as mandatory. We have said that "[t]he word 'must' is given a mandatory meaning when followed by a noncompliance penalty"[65] but this does not suggest that when no penalty is prescribed, "must" is non-mandatory. "When the statute is silent [regarding the penalty for noncompliance], we have looked to its purpose for guidance."[66] The EAAA does not suggest that an applicant can be fined for a late filing or that the water allocated should be reduced accordingly. The only penalty the EAAA suggests is that late applications will not be considered.

We recognize the hardship of this penalty to Chemical Lime, but we believe the EAAA requires a firm deadline. Chemical Lime's late filing did not substantially comply with the statute's permitting requirements.

IV

The trial court awarded Chemical Lime attorney fees under the Declaratory Judgment Act (DJA). The Authority argues that it can be sued only under chapter 36 of the Texas Water Code, and

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[64] EAAA § 1.16(b).

[65] *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (internal quotation marks omitted). *See also* TEX. GOV'T CODE § 311.016(3) ("'Must' creates or recognizes a condition precedent.").

[66] *Hines v. Hash*, 843 S.W.2d 464, 468 (Tex. 1992).

that chapter does not provide for recovery of attorney fees by the plaintiff. While section 36.251 does provide for suit against the Authority,[67] section 36.254 states that that remedy "do[es] not affect other legal or equitable remedies that may be available." The Authority has not advanced an argument why we should not take section 36.254 at its word. Nor does the Authority argue that the DJA permits an award of attorney fees only to a prevailing party, an issue on which we express no opinion.[68] The Authority does not challenge the reasonableness or necessity of the fees awarded by the trial court.[69] But an award must be equitable and just,[70] considerations addressed to the trial court's discretion.[71] Now that Chemical Lime is no longer the prevailing party, the trial court should have the opportunity to reconsider its award.

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[67] *See supra* note 37.

[68] *Compare Vincent v. Bank of Am., N.A.*, 109 S.W.3d 856, 868 (Tex. App.–Dallas 2003, pet. denied) (a nonprevailing party may recover attorney fees under the Declaratory Judgment Act), *Brush v. Reata Oil & Gas Corp.*, 984 S.W.2d 720, 731 (Tex. App.–Waco 1998, pet. denied) (same), *Maris v. McCraw*, 902 S.W.2d 191, 194 (Tex. App.–Eastland 1995, writ denied) (same), *and Tanglewood Homes Ass'n, Inc. v. Henke*, 728 S.W.2d 39, 45 (Tex. App.–Houston [1st Dist.] 1987, writ ref'd n.r.e.) (same), *with City of Houston v. Harris County Outdoor Adver. Ass'n*, 732 S.W.2d 42, 56 (Tex. App.–Houston [14th Dist.] 1987, no writ) (stating that it is an abuse of discretion to award attorney fees to a party who is not entitled to declaratory relief).

[69] The trial court awarded Chemical Lime $481,948.72 for attorney fees incurred through rendition of final judgment, plus $100,000.00 for attorney fees through proceedings in this Court.

[70] *See* TEX. CIV. PRAC. & REM. CODE § 37.009 ("In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.").

[71] *Bocquet v. Herring*, 972 S.W.2d 19, 20-21 (Tex. 1998).

Because the Authority has prevailed, it is entitled to attorney fees under section 36.066(g) of the Water Code.[72] The parties stipulated below to the amount of those fees.[73]

V

Accordingly, the court of appeals' judgment is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion.

Nathan L. Hecht
Justice

Opinion delivered: June 26, 2009

[72] TEX. WATER CODE § 36.066(g) ("If the district prevails in any suit other than a suit in which it voluntarily intervenes, the district may seek and the court shall grant, in the same action, recovery for attorney's fees, costs for expert witnesses, and other costs incurred by the district before the court. The amount of the attorney's fees shall be fixed by the court.").

[73] The parties stipulated that the Authority's reasonable attorney fees were $253,525.50 in the trial court and would be $100,000.00 on appeal.

IN THE SUPREME COURT OF TEXAS

NO. 06-0911

EDWARDS AQUIFER AUTHORITY ET AL., PETITIONERS,

v.

CHEMICAL LIME, LTD., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued April 1, 2008

JUSTICE BRISTER, concurring.

It has been said that "any law student, after a month in law school, knows that the answer to the question 'Define X,' is: 'For what purpose are we defining this term?'"[1] In this case, we must define "take effect" for the purpose of deciding when our judgments become the law, not when they become final. One would think judgments from this Court would become the law immediately. Indeed, there is no foreboding in the term "Judgment Day" if nothing happens until "Mandate Day."

I agree with the Court that our decisions can take effect whenever we say they do. For example, in the school finance cases we postponed the effective date of one judgment for seven

[1] Alan Hyde, *Response to Working Group on Chapter 1 of the Proposed Restatement of Employment Law: On Purposeless Restatement*, 13 EMP. RTS. & EMP. POL'Y J. 87, 87 (2009).

months,[2] another for six months,[3] and another for more than a year[4] — all long after the judgment was final and the mandate had issued. Similarly, in a handful of special cases the Legislature has provided that an appellate judgment takes effect *before* the mandate,[5] *with* the mandate,[6] and *after* the mandate.[7]

But except in such special cases, it would be a waste of time for courts to set each effective date individually. Circumstances may dictate when a special judgment should take effect, but for all other judgments we need a general rule. Accordingly, I join in the Court's judgment and all parts of its opinion except those that leave the general rule up in the air. For several reasons, the obvious and logical general rule is that our decisions should take effect on the date of judgment.

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[2] *See Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 399 (Tex. 1989) (postponing effective date of October 2, 1989 opinion until May 1, 1990).

[3] *See Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 799 (Tex. 2005) (postponing effective date of November 22, 2005 opinion until June 1, 2006).

[4] *See Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 523 (Tex. 1992) (postponing effective date of January 30, 1992 opinion until June 1, 1993).

[5] *See* TEX. LAB. CODE § 102.074(c) (providing that labor arbitration takes effect 11 days after date of appellate decision).

[6] *See* TEX. ALCO. BEV. CODE § 61.34(c) (providing that if alcoholic beverage license issued by order of district court is reversed on appeal, "the mandate of the appellate court automatically invalidates the license").

[7] *See* Tex. Bus. Corp. Act art. 7.02(F) (allowing period to cure corporate defaults up to 60 days after appellate mandate issues).

I. What Matters Is The Judgment

First of all, we should start with the principle that cases are decided by judgments, not mandates. Judgments are rendered by the court,[8] and a majority of the court must agree to them.[9] Mandates, by contrast, are drafted and signed by the clerk;[10] judges rarely even see them. As Justice Pope wrote for this Court 30 years ago in *Burrell v. Cornelius*: "Judges render judgment; clerks enter them on the minutes."[11] Our decisions should take effect when the justices act, not the clerk.

Second, the appellate rules recognize in many places that the operative act binding the parties is the judgment, not the mandate:

- when a party dies during an appeal, "the appellate court's *judgment* will have the same force and effect as if rendered when all parties were living";[12]
- when public officials leave office, their successors "will be bound by the appellate court's *judgment* . . . .";[13] and
- when a party voluntarily appears on appeal, or learns of its outcome, that party "is bound by the opinion, *judgment*, or order . . . ."[14]

Because the judgment is the operative act of a court, its date should be the operative date.

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[8] *See, e.g.*, TEX. R. APP. P. 43.1, 43.3, 43.5, 46.1, 46.2, 60.5.

[9] TEX. R. APP. P. 41.1.

[10] *See* TEX. R. APP. P. 18.1.

[11] 570 S.W.2d 382, 384 (Tex. 1978).

[12] TEX. R. APP. P. 7.1(a)(1) (emphasis added).

[13] TEX. R. APP. P. 7.2(b) (emphasis added).

[14] TEX. R. APP. P. 15.2 (emphasis added).

Third, our judgments should mean what they say. "The controlling intention of the court's judgment is that expressed on the face of the judgment . . . ."[15] If our judgment says something can or can't be done, then that ought to be the law — immediately.[16] If a judgment orders children taken from or returned to their parents, that should not wait for the mandate. If a judgment declares a fee unconstitutional, collection ought to stop at once.[17] If our judgments have no effect until the mandate issues, then they do not mean what they say.[18]

Fourth, our standard treatment of stay orders shows we intend judgments to take effect immediately. The clerk cannot lift a stay order; the court must do so, and our standard procedure has been to lift a stay when we issue our judgment.[19] The same practice is used in the courts of appeals:

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[15] *Harrison v. Manvel Oil Co.*, 180 S.W.2d 909, 915 (Tex. 1944).

[16] *See Flanary v. Wade*, 113 S.W. 8, 10 (Tex. 1908) (holding appellate reversal of trial court judgment immediately barred enforcement of it, even though judgment had not been superseded and appeal was not final); *Carpenter v. First Nat'l Bank*, 20 S.W. 130, 131 (Tex. 1892) (holding Supreme Court order quashing writ "took effect at once, and put the parties in the same position as if no order of quashal had ever been entered"); *Bichsel v. Heard*, 328 S.W.2d 462, 467 (Tex. Civ. App.—San Antonio 1959, no writ) (holding police chief could not be held in contempt for insisting on polygraph allowed by court of appeals during pendency of rehearing because court could not "punish him for taking for granted that we meant just what we said when we stated that the injunction was dissolved"); *accord*, *Matter of Bohart*, 743 F.2d 313, 321 n.7 (5th Cir. 1984).

[17] In *In re Long* we held the Dallas County Clerk could not be held in contempt for charging an improper fee "until the appeals were final and mandate issued." 984 S.W.2d 623, 626 (Tex. 1999). But in that case the Clerk filed a writ of error in this Court, thereby superseding the court of appeals' judgment so that it did not take effect immediately. *See* TEX. R. APP. P. 51.1(b).

[18] Applying the same rule, if we order the trial court to vacate an injunction rather than doing so ourselves, *see, e.g.*, *HEB Ministries, Inc. v. Texas Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 661 (Tex. 2007), then the effective date would be postponed until then.

[19] *See, e.g.*, *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) (noting that this Court lifted stay when it denied mandamus relief); *In re Helena Chem. Co.*, No. 13–09–00040–CV, 2009 WL 866838 *2 (Tex. App.—Corpus Christi Mar. 31, 2009, orig. proceeding) (noting that Texas Supreme Court lifted stay when it granted mandamus relief).

stays are lifted when the judgment issues.[20] If our judgments do not take effect immediately, then parties can do whatever they want in the purgatory between judgment and mandate.

Fifth, for several decades we have tried to simplify the rules of procedure by insisting that judgments bear a date and that deadlines run from it. To quote Justice Pope in *Burrell* again:

> Law professors should teach, writers of legal form books should so correct their books, lawyers should so draft documents, and judges should make certain that above the signature on each judgment or order there are the words: "Signed this_____ day of_____, 19___."[21]

Today, an appellate decision takes effect on the date of judgment for many purposes, including: when plenary power expires in the court of appeals;[22] when a judgment becomes dormant;[23] when limitations runs for filing a bill of review;[24] when indemnity and third-party claims accrue;[25] and when tolling ends on alter ego claims.[26] Clarity and certainty are lost if the judgment date counts for these purposes, but does not count when deciding when the judgment takes effect.

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[20] *See, e.g.*, *In re Office of Attorney Gen.*, 257 S.W.3d 695, 697 (Tex. 2008) (noting that court of appeals lifted stay when it denied mandamus relief); *In re Dallas Area Rapid Transit*, 967 S.W.2d 358, 359 (Tex. 1998) (same); *Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (dismissing appeal as moot and lifting stay).

[21] *Burrell v. Cornelius*, 570 S.W.2d 382, 384 (Tex. 1978).

[22] *See* TEX. R. APP. P. 19.1.

[23] TEX. CIV. PRAC. & REM. CODE § 34.001; *John F. Grant Lumber Co. v. Bell*, 302 S.W.2d 714, 715 (Tex. Civ. App.—Eastland 1957, writ ref'd).

[24] *See Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex. 1998); *see also* TEX. PROB. CODE § 55(a).

[25] *See Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 210 (Tex. 1999); *J.M.K. 6, Inc. v. Gregg & Gregg, P.C.*, 192 S.W.3d 189, 200 (Tex. App.-Houston [14th Dist.] 2006, no pet).

[26] *See Matthews Constr. Co., Inc. v. Rosen*, 796 S.W.2d 692, 694 (Tex. 1990).

Sixth, judgments take effect immediately for all who are not parties in the case. Usually our opinions apply both prospectively and retroactively,[27] but sometimes we apply a decision prospectively only, in which case our standard practice has been to declare the law from the date of judgment, not the date of finality or the mandate.[28] This appears to be the practice of our sister court too.[29] It would be very odd for our decisions to take effect for third parties *before* they take effect for the parties involved in the case.

Seventh and finally, we expect lower courts to follow our decisions without receiving an explicit order to do so.[30] In mandamus cases, we generally grant the writ conditionally because we expect lower courts to comply without receiving the writ. But how can we expect lower courts to comply with our opinions immediately if they have not yet taken effect?

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[27] *See Centex Homes v. Buecher*, 95 S.W.3d 266, 277 (Tex. 2002); *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992).

[28] *See State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696, 720 (Tex. 1996) (applying decision prospectively from date of opinion); *Elbaor*, 845 S.W.2d at 251 (same); *Reagan v. Vaughn*, 804 S.W.2d 463, 468 (Tex. 1990) (same); *Huston v. F.D.I.C.*, 800 S.W.2d 845, 849 (Tex. 1990) (same); *see also Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 103 (Tex. 1984) (applying opinion prospectively from date of first opinion rather than opinion on rehearing); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 434 (Tex. 1984) (same); *In re J. J.*, 617 S.W.2d 188, 188 (Tex. 1981) (applying prospective decision to case still pending when decision issued); *see also Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 115 (Tex. 1984) (applying prospective decision from date rehearing was overruled). *But cf. Lohec v. Galveston County Comm'rs Ct.*, 841 S.W.2d 361, 366 n.4 (Tex. 1992) (applying decision prospectively from date of trial court's judgment); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971) (applying decision prospectively from date accident occurred).

[29] *See State v. Cullen*, 195 S.W.3d 696, 699 (Tex. Crim. App. 2006) ("Effective from the date of this opinion, the requirement is: upon the request of the losing party on a motion to suppress evidence, the trial court shall state its essential findings."); *Geesa v. State*, 820 S.W.2d 154, 164–5 (Tex. Crim. App. 1991) (applying decision prospectively from date of opinion).

[30] *See Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 666 (Tex. 2008) ("It is fundamental to the very structure of our appellate system that this Court's decisions be binding on the lower courts.").

II. What About the Opinion?

One could argue that our decisions should take effect on the date of opinion rather than the date of judgment. In cases remanded for proceedings consistent with our opinion, the lower courts must have the opinion to carry out the judgment.[31] Of course in most cases the opinion and judgment issue together, so the effective date for both is the same.[32] But in a few cases they are different, and in those cases the date of judgment is more important.

In a few emergencies, we have issued judgments or orders with opinions to follow.[33] For example, in *In re Doe* we issued a judgment on March 10, 2000 and the opinions three months later.[34] In such cases, we clearly intended the judgments to take effect immediately; there was no other reason to issue them before the opinions were ready. And we certainly did not intend those judgments to take effect only when the mandate issued much later. Opinions, motions for rehearing, and mandates can issue in due course, but judgments ought to take effect immediately.

It is true that in emergency cases we can order the mandate issued early and deny the parties the right to file a motion for rehearing.[35] But prohibiting motions for rehearing can mean missing

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[31] *See Perry Nat'l Bank v. Eidson*, 340 S.W.2d 483, 487 n.2 (Tex. 1960) (noting that where a judgment refers to further proceedings consistent with the court's opinion, "[t]he nature of the judgment is therefore determined by an inspection of the opinion").

[32] *See* TEX. R. APP. P. 63 (requiring Supreme Court to "hand down a written opinion in all cases in which it renders a judgment," and our clerk to send both opinion and judgment to the lower court clerks, the regional administrative judge, and the parties); *see also* TEX. R. APP. P. 48.1 (requiring court of appeals' clerk to send both opinion and judgment "[o]n the date when an appellate court's opinion is handed down").

[33] *See, e.g.*, *In re Doe 1*, 19 S.W.3d 300, 300 (Tex. 2000); *Texas Water Comm'n v. Dellana*, 849 S.W.2d 808, 809 n.1 (Tex. 1993); *Davenport v. Garcia*, 837 S.W.2d 73, 73 (Tex. 1992).

[34] 19 S.W.3d 346, 349 (Tex. 2000).

[35] *See* TEX. R. APP. P. 18.1(c), 49.4, 64.1.

an opportunity to correct a mistake. The best way to make judgments effective immediately, while still allowing for mistakes, is to make the effective date the date of judgment.

III. What About the Mandate?

JUSTICE WILLETT'S proposal that our decisions should take effect only when the mandate issues will not work for one primary reason: after many of our opinions there is no mandate. Mandates issue only after a judgment.[36] No mandate issues when we deny a petition, even if we do so by written opinion. Nor do mandates issue in mandamus proceedings, which we decide by "orders" rather than "judgments."[37] If a mandate is required before this Court's decisions take effect, then many of them never have and never will.

But there's more. From 1892 until 1978, Texas law prohibited clerks from issuing a mandate until court costs were paid.[38] Thus, for example, the first rules of civil procedure in 1941 provided:

> On the rendition of a final judgment or decree in the Supreme Court, the clerk of said court shall not issue and deliver the mandate of the court, nor certify the proceedings to the lower court, until all costs accruing in the case in the Supreme Court and the Court of Civil Appeals have been paid . . .[39]

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[36] *See* TEX. R. APP. P. 18.1 ("The clerk of the appellate court that rendered the judgment must issue a mandate in accordance with the judgment . . . .").

[37] *See* TEX. R. APP. P. 52.8(c) ("If the court determines that relator is entitled to relief, it must make an appropriate order.").

[38] Act approved April 13, 1892, 22nd Leg., 1st C.S., ch. 14 § 1, 1892 Tex. Gen. Laws 19, 23 (codified as rule of civil procedure 443 in 1941, amended 1978) ("The clerk of the Supreme Court shall not deliver the mandate of the court until all costs of that court and of the court of civil appeals have been paid."); *see also* Act approved April 13, 1892, 22nd Leg., 1st C.S., ch. 15, § 47, 1892 Tex. Gen. Laws 25, 33 (amended 1978) (companion provision for court of civil appeals).

[39] TEX. R. CIV. P. 507 (adopted Oct. 29, 1940, eff. Sept. 1, 1941, amended 1978); *see also* TEX. R. CIV. P. 443 (adopted Oct. 29, 1940, eff. Sept. 1, 1941, amended 1978) (companion rule for courts of civil appeals).

If costs were not paid within 12 months, the case was simply dismissed *and no mandate ever issued*.[40] These rules were replaced in 1978,[41] but it is hard to say how many judgments before then were never followed by a mandate. So which of our opinions have never taken effect? And how would anyone know without looking through files perhaps 100 years old?

As we explained in *Continental Casualty Co. v. Street* in 1963, a mandate is a procedural device intended to keep courts from issuing conflicting orders:

> The rules relating to the return of the mandate from the appellate to the trial court are . . . primarily procedural in nature. They provide for an orderly dispatch of judicial business by adopting procedures under which both the appellate and trial courts may have knowledge of the status of pending litigation and thus prevent the issuance of conflicting orders by the courts of the trial and appellate levels.[42]

Mandates are thus a means of communication between courts; they were not even required to be sent to the parties until 2003.[43]

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[40] TEX. R. CIV. P. 509 (adopted Oct. 29, 1940, eff. Sept. 1, 1941, repealed 1978) ("When a case is reversed and remanded, no mandate shall issue after twelve months from the rendition of final judgment of the Supreme Court, or the overruling of a motion for rehearing. When a cause is reversed and remanded by the Supreme Court, and the mandate is not taken out within twelve months as hereinbefore provided, then, upon the filing in the court below of a certificate of the clerk of the Supreme Court that no mandate has been taken out, the case shall be dismissed from the docket of said lower court."); *see also* TEX. R. CIV. P. 445 (adopted Oct. 29, 1940, eff. Sept. 1, 1941, repealed 1978) ("In cases which have been reversed and remanded by a Court of Civil Appeals, if no mandate shall have been taken out and filed in the court where the cause originated within one year after the motion for rehearing is overruled or final judgment rendered, then upon the filing in the court below of a certificate of the clerk of the Court of Civil Appeals where the cause was pending that no mandate has been taken out, the case shall be dismissed from the docket."); Act approved April 10, 1901, 27th Leg., R.S., ch. 54, § 1, 1901 Tex. Gen. Laws 122, 123 (repealed 1978). For examples of the application of these rules, *see Dignowity v. Fly*, 210 S.W. 505, 506 (Tex. 1919); *Davy Burnt Clay Ballast Co. v. St. Louis Sw. Ry. Co.*, 32 S.W.2d 209, 211 (Tex. Civ. App.—Dallas 1930), *writ ref'd*, 32 S.W.2d 822 (Tex. 1930).

[41] *See* TEX. R. CIV. P. 507 & 443 (amended by order of July 11, 1977, eff. Jan. 1, 1978).

[42] 364 S.W.2d 184, 187 (Tex. 1963).

[43] TEX. R. APP. P. 12.6 (1997, amended 2003); TEX. R. APP. P. 18.1 (1997, amended 2003).

This is why the rules provide for enforcement of our decisions only after the mandate.[44] Postponing *enforcement* of our decisions is not the same as postponing when they are *effective*; indeed an injunction or declaratory judgment cannot be enforced by contempt unless it becomes effective sometime earlier. Appellate courts do not entertain motions for turnover, garnishment, or contempt; those must be filed in the trial court. Absent supersedeas, this means the case can be proceeding in two courts at once. In such cases, the mandate is our notice to the trial court that it can start enforcing a new judgment or proceed with enforcement of the old one without stepping on our toes.

This is also why a judgment in an interlocutory appeal "takes effect when the mandate is issued."[45] Here again, an interlocutory appeal (unlike a final appeal) means the case is pending in two courts at once. As a result, there is a daily potential for conflicting orders. The standard solution is to abate action in one of the two courts, as we do in cases of dominant jurisdiction.[46] Sometimes, a statute or stay from the appeals court keeps the trial court from issuing conflicting orders.[47] But in other cases, it may be best for the trial court to proceed, with the appellate court's orders taking effect only with the mandate. The reason our rules abate the effective date in interlocutory appeals

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[44] *See* TEX. R. APP. P. 51.1(b) ("When the trial court clerk receives the mandate, the appellate court's judgment must be enforced."); TEX. R. APP. P. 65.2 ("If the Supreme Court renders judgment, the trial court need not make any further order. Upon receiving the Supreme Court's mandate, the trial court clerk must proceed to enforce the judgment of the Supreme Court as in any other case.").

[45] TEX. R. APP. P. 18.6.

[46] *See Perry v. Del Rio*, 66 S.W.3d 239, 252 (Tex. 2001) ("As a rule, when cases involving the same subject matter are brought in different courts, the court with the first-filed case has dominant jurisdiction and should proceed, and the other cases should abate.").

[47] *See* TEX. CIV. PRAC. & REM. CODE § 51.014; TEX. R. APP. P. 52.10.

until the mandate, but say nothing about abating the effective date for final appeals, is because the two cases are not the same.

IV. What About Finality?

If finality is the goal, the mandate is not the answer. First of all, mandates issue 10 days *after* our judgment is final;[48] any argument to postpone the effective date until finality does not justify postponing it 10 days more. Moreover, mandates can be recalled;[49] so while judgments and opinions can change, mandates can too.

The problem is that it is hard to say when our decisions are final. The rules of procedure place no explicit limit on our plenary power, as they do for the courts of appeals.[50] And as we have noted several times before, judgments become "final" for different purposes at different times.[51] Thus, for the purpose of review by the United States Supreme Court, a judgment from this Court is "final" immediately, not when the mandate issues.[52] For purposes of res judicata and collateral

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[48] *See* TEX. R. APP. P. 18.1(b); *John F. Grant Lumber Co. v. Bell*, 302 S.W.2d 714, 717 (Tex. Civ. App.—Eastland 1957, writ ref'd) (Although a mandate cannot issue until the judgment is final, "the issuance of a mandate was not necessary 'to render the judgment final.'") (citing *Cont'l Gin Co. v. Thorndale Mercantile Co.*, 254 S.W. 939, 941 (Tex. Com. App. 1923, judgment adopted)).

[49] TEX. R. APP. P. 18.7.

[50] *See* TEX. R. CIV. P. 19.

[51] *See Sultan v. Mathew*, 178 S.W.3d 747, 751 (Tex. 2005) (noting that "the term 'final,' as applied to judgments, has more than one meaning"); *Street v. Hon. Second Ct. of Appeals*, 756 S.W.2d 299, 301 (Tex. 1988).

[52] See SUP. CT. R. 13(3) ("The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice).").

estoppel, a judgment is also "final" even if the appeal is not.[53] Holding that our judgments do not take effect until they are "final" serves only to confuse when they actually take effect.

As a historical matter, our judgments almost never change on rehearing. In the last 10 fiscal years, this Court issued more than 1100 majority and per curiam opinions. On rehearing, we changed less than 50 of the opinions, and those almost always in minor respects that had no effect on the judgment. In only four cases did the prevailing party in the judgment change.[54] Thus, the chance that an original judgment will differ from the final judgment is about 1 in 300. We should not let such long odds dictate the general rule about when our judgments take effect.

Finally, there are also constitutional considerations in deciding when our decisions take effect. The Texas Constitution grants the Legislature alone the power to suspend laws.[55] That provision has never prevented the courts from suspending a law that is itself unconstitutional. But once we decide that a law *is* constitutional, keeping the law suspended during our administrative steps leading to finality and a mandate is (to say the least) problematic.

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[53] *See Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).

[54] *See Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008); *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (Tex. 2008); *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680 (Tex. 2007); *John G. & Marie Stella Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268 (Tex. 2002).

[55] *See* TEX. CONST. art. I, § 28 ("No power of suspending laws in this State shall be exercised except by the Legislature.").

When a mandate conflicts with a judgment or opinion, it is the mandate that must yield.[56] The same should be true regarding when our decisions take effect. Perhaps "it ain't over till it's over," but a judgment from the Supreme Court of Texas ought to mean "it's over." Accordingly, as a general rule I would hold that our decisions take effect when we issue a judgment.

OPINION DELIVERED: June 26, 2009

[56] *See, e.g.*, *O'Neil v. Mack Trucks, Inc.*, 551 S.W.2d 32, 32 (Tex. 1977).

IN THE SUPREME COURT OF TEXAS

NO. 06-0911

EDWARDS AQUIFER AUTHORITY ET AL., PETITIONERS,

v.

CHEMICAL LIME, LTD., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued April 1, 2008

JUSTICE WILLETT, concurring.

I agree with the Court that under *Barshop*[1] the Edwards Aquifer Authority became effective on the date of our opinion in that case. The issue as briefed to us, however, and as addressed at length by the court of appeals, raised a more fundamental legal question: When does an appellate-court judgment become final and take effect? This vexing question will no doubt recur and, in my view, warrants the Court's rulemaking attention. To some degree, the issue has a certain "angels dancing on the head of a pin" quality to it, interesting (to some) as a matter of logic and perplexing (to all) as a matter of practice. It is confounding, to be sure, but also consequential.

[1] *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996).

So I join in the Court's judgment and, like JUSTICE BRISTER, most of its opinion. But as a general matter the better default date is the mandate, the formal order declaring our review complete, our decision final, and our judgment enforceable. Yogi Berra was right: In law as in life, "It ain't over 'til it's over."[2]

* * *

An appellate court's mandate is the official order declaring to the district court, the parties, and all other interested persons that the court has closed the book on its review and is once-and-for-all finished. I can understand, therefore, why the court of appeals and Chemical Lime view the date of our mandate in *Barshop* as when the Authority and the Edwards Aquifer Authority Act became effective. Their position is hardly unreasonable. A decision from this Court, of course, is subject to a motion for rehearing, and can also be reconsidered on our own motion.[3]

The Authority says the date of the *Barshop* mandate is inappropriate because issuance of the mandate is merely the "ministerial act" of a court clerk.[4] I disagree. The mandate under our rules

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[2] Yogi Berra with Dave Kaplan, *When You Come to a Fork in the Road, Take It!* 88 (Hyperion 2001); *see also* Carlo DeVito, *Yogi: The Life & Times of an American Original* 285-286 (Triumph Books 2008) (explaining the offbeat etymology of this famous Yogi-ism); *see also generally* Stacy Obenhaus, *It Ain't Over 'Til It's Over: The Appellate Mandate in Texas Courts*, 15 THE APPELLATE ADVOCATE: STATE BAR OF TEXAS APPELLATE SECTION REPORT 4, 8 (2003).

[3] As to the authority of a court to reissue an opinion on its own motion, see *Raborn v. Davis*, 795 S.W.2d 716, 717 (Tex. 1990) (holding that the Court, after settlement and change in the law, "on its own motion, vacates its opinion and judgment"); *Cocke v. Smith*, 179 S.W.2d 958, 958 (Tex. 1944) (holding, after granting mandamus petition, that "[u]pon further consideration of this matter by this court upon its own motion, we are of the opinion that we are without jurisdiction to grant such writ"); *Prouty v. Musquiz*, 58 S.W. 996, 996 (Tex. 1900) (holding that where the Court discovers error in its answer to certified question, "[i]t is proper that the mistake should be rectified, and therefore, of our own motion, we order that the specific answer given in our former opinion be set aside, and that in lieu thereof the following answer be certified . . . ").

[4] The City of San Antonio likewise refers to the issuance of the mandate as "a purely ministerial procedure."

is not a mere ministerial postscript or duplicative reminder. Our rules require appellate courts to prepare a mandate, without which an appellate-court judgment cannot be enforced.[5]

Several statutes also tie the finality of appellate-court decisions to issuance of the mandate.[6] If the mandate served no meaningful purpose there would be no need to require one.

In addition, Texas Rule of Appellate Procedure 18.6 makes clear that appellate-court judgments in accelerated appeals, when time is of the essence, are not effective until the mandate issues. It would be peculiar to hold, as the Authority urges, that our judgment in an ordinary, unexpedited appeal takes effect instantly when the rules make plain that our judgment in an accelerated appeal[7] takes effect only "when the mandate is issued."[8]

The parties make several arguments as to whether the trial court's judgment was superseded while *Barshop* was on appeal, and whether the trial court was obliged to follow *Barshop* immediately upon its issuance. The Authority argues the State was exempt from the requirement of

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[5] *See* TEX. R. APP. P. 51.1 (providing that the appellate clerk must prepare a mandate and that the appellate court's judgment must be enforced in the trial court once the trial court receives the mandate); TEX. R. APP. P. 65.2 (providing that the trial court clerk must enforce the judgment of the Supreme Court upon receipt of the Court's mandate); *In re Ford Motor Co.*, 165 S.W.3d 315, 321 (Tex. 2005) (orig. proceeding) (noting that plaintiff has no right to recover damages from defendant "unless or until a mandate to that effect issues after trial, judgment, and possible appeals").

[6] *See* TEX. ALCO. BEV. CODE § 61.34(c) ("If a license is issued on the basis of a district court judgment and that judgment is reversed on appeal, the mandate of the appellate court automatically invalidates the license and the applicant is entitled to a proportionate refund of fees for the unexpired portion of the license."); TEX. BUS. CORP. ACT art. 7.02 § F (providing that if judgment of revocation or dissolution of corporate certificate of authority is appealed, appellate court shall in certain circumstances "remand the case to the trial court with instructions to grant the corporation opportunity to cure such defaults, such cure to be accomplished within such time after issuance of the mandate as the appellate court shall determine but in no event more than sixty (60) days thereafter"); TEX. GOV'T CODE § 30.00142(d) (providing that appointment of special appellate judge "automatically terminates at the time the mandate or mandates issue in the case he was appointed to hear").

[7] *See* TEX. R. APP. P. 28.1.

[8] TEX. R. APP. P. 18.6.

filing a supersedeas bond under Section 6.001 of the Civil Practice and Remedies Code, and therefore the trial court's declaratory judgment was automatically suspended when the State perfected its appeal.[9]

The Authority also argues that the trial court's injunction against enforcement of the Act dissolved immediately when we issued our decision in *Barshop*. The Authority cites *Poole v. Giles*, where we stated that an appellate "order dissolving a temporary injunction is effective immediately even though not final."[10] It further cites *Texas Workers' Compensation Commission v. Garcia*, in which we observed that even though the trial court and court of appeals had declared the Workers' Compensation Act unconstitutional, they had not issued injunctions, and the Workers' Compensation Commission had "accordingly continued implementing the Act notwithstanding the judgments of the courts below."[11] In contrast, we stated in *Barshop* that "[b]ecause of the district court's injunction," the Act "has yet to be implemented," but we concluded by holding that the injunction "is dissolved."[12]

The court of appeals distinguished the trial court's injunction and its declaratory judgment, reasoning that even if, immediately after our *Barshop* decision, "the district court could not enforce its injunction with contempt power . . . this does not mean that the supreme court's judgment declaring the [Act] constitutional and reversing the district court's contrary declaration also became

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[9] The State makes this argument as well, contending that its "notice of appeal in *Barshop* automatically superseded the trial court's judgment."

[10] *Poole v. Giles*, 248 S.W.2d 464, 465 (Tex. 1952).

[11] *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 517 (Tex. 1995).

[12] *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 625, 638 (Tex. 1996).

effective at that time."[13] Chemical Lime, too, contends that the *Barshop* judgment had no effect on the trial court's declaratory judgment until our mandate issued, and that "[d]istinctions between injunctive and declaratory relief are irrelevant for this purpose."

Chemical Lime further takes issue with the Authority's contention that the State's notice of appeal in *Barshop* automatically superseded the trial court's judgment, characterizing this position as inconsistent with the position the State took in *Barshop*. In *Barshop* we noted the State's position that it was before the Court "seeking authorization to implement the Act," and that we should construe the Act "to merely require that the declarations be filed with the Authority six months after the *eventual* effective date of the statute."[14] Chemical Lime argues that even if ordinarily the State was not required to post a supersedeas bond, the trial court in *Barshop* purported in its judgment to exercise its discretion "to deny supersedeas of this Judgment." Chemical Lime contends the State chose not to challenge the order denying supersedeas and should not now be heard to argue that its notice of appeal in *Barshop* automatically superseded the judgment in that case.[15] Indeed, taking the Authority's argument to its logical conclusion might mean the Act was effective when the State filed its notice of appeal in *Barshop* in 1995, and the six-month window for filing declarations of historical use expired before our opinion issued on June 28, 1996.

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[13] 212 S.W.3d at 694.

[14] *Barshop*, 925 S.W.2d at 628 (emphasis added).

[15] The State contends it had concluded in the *Barshop* appeal that "it would make little sense to implement the Act while the direct appeal was pending," and that it voluntarily chose to delay implementation of the permit program, but that the trial court in *Barshop* nevertheless erred in reasoning that it could deny supersedeas of its judgment. The State argues that its notice of appeal in *Barshop* automatically superseded the trial court's judgment and that its subsequent conduct in that appeal did not effect a waiver of the automatic suspension of the judgment, issues the Court need not resolve today.

As the Court notes, these arguments regarding supersedeas and other issues are not dispositive,[16] and they obscure a key point. I do not believe the trial court or the parties would have acted in a manner inconsistent with our opinion in *Barshop* after it issued, regardless of whether, in some technical sense, the injunction immediately dissolved when we so stated in *Barshop* or the trial-court judgment was superseded at the time. I assuredly do not suggest parties may flout an appellate-court decision or judgment merely because the mandate has not yet issued.

Nevertheless, our *Barshop* decision was still not "final"[17] when issued in one important sense: *We* were still free to reconsider it and hold the Act unconstitutional or otherwise correct or modify our opinion or judgment. This authority of the issuing court to modify its own opinion or judgment ordinarily extends until the mandate issues, regardless of whether the judgment awards monetary, injunctive, or declaratory relief.

Although in exceptional circumstances we can recall the mandate,[18] the date of the mandate is ordinarily the appellate court's formal and final order signaling it is finished with its review of the case and considers its decision final and its judgment enforceable.[19] Indeed, by correspondence the

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[16] __ S.W.3d at __ n.45. As the Authority argues in its briefing, "The effective date of the Act should not turn on a complex question of law regarding whether and in what circumstances supersedeas is automatic under a tangled web of facts regarding supersedeas at the trial court in the *Barshop* case (which are outside the record in this case)."

[17] I caution that "final" for purposes of describing a judgment has several meanings, and can, depending on the context, refer to finality for purposes of determining (1) whether the judgment is appealable, (2) whether the time for altering the judgment has expired, or (3) whether the judgment operates as res judicata. *See Sultan v. Mathew*, 178 S.W.3d 747, 751 (Tex. 2005).

[18] *See* TEX. R. APP. P. 18.7.

[19] *See In re Long*, 984 S.W.2d 623, 626 (Tex. 1999) (orig. proceeding) (per curiam) (noting that appeal was not "exhausted" or "final" until court of appeals issued its mandate); *Traders & Gen. Ins. Co. v. Hicks Rubber Co.*, 169 S.W.2d 142, 145 (Tex. 1943) ("After the judgment in the J.W. Harper suit became final, mandate was duly issued and returned to the district court."); *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 302 (1995) ("The United States Court

clerk advised the trial court and parties in *Barshop* as follows when the mandate issued: "The judgment of the Supreme Court of Texas is now final in the above referenced cause. As Rule 186, Tex. R. App. P., has been satisfied, we have issued the mandate as of today." As the court of appeals aptly noted, the period between judgment and mandate affords the court "the opportunity to correct an appellate judgment before commanding its execution and enforcement in the lower court."[20] An appellate court can issue a mandate earlier than the rules ordinarily prescribe if it has good cause for making its judgment more immediately final and enforceable.[21] Moreover, this Court has discretion to shorten the time for filing a motion for rehearing or even to disallow such a motion altogether.[22] Again, if opinions were immediately final for all purposes upon issuance, there would be no need for a mandate and no reason for courts sometimes to issue mandates early or to shorten the usual timetable for rehearing motions.

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of Appeals for the Fifth Circuit affirmed, issuing its mandate on October 12, 1990, and thus rendering 'final' respondents' judgment against Celotex."); *Charpentier v. Ortco Contractors*, 480 F.3d 710, 713 (5th Cir. 2007) ("Before our mandate issues, we have the power to alter or modify our judgment. Accordingly, our decision is not final until we issue a mandate." (footnotes omitted)); *In re City of Cresson*, 245 S.W.3d 72, 74 (Tex. App.—Fort Worth 2008, orig. proceeding) ("It is true that this court's judgment is not enforceable in the trial court until it is final and mandate issues.").

Indeed, it is not uncommon for parties to jointly request that the Court expedite issuance of the mandate so the parties can complete a settlement and ask the trial court to issue an agreed dismissal order. *See* TEX. R. APP. P. 18.1(c) (allowing for early issuance of the mandate "if the parties so agree, or for good cause on the motion of a party").

[20] 212 S.W.3d at 695.

[21] *See* TEX. R. APP. P. 18.1(c). The United States Supreme Court has on occasion followed a similar procedure. *See Bush v. Gore*, 531 U.S. 98, 111 (2000) ("Pursuant to this Court's Rule 45.2, the Clerk is directed to issue the mandate in this case forthwith."); *United States v. Nixon*, 418 U.S. 683, 716 (1974) ("Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.").

[22] TEX. R. APP. P. 64.1.

The date of the mandate, therefore, is generally the date the parties' duties become fixed.[23] In this case, it was the date that all uncertainties regarding the Act's constitutionality were finally and definitively dispelled.

JUSTICE BRISTER points out many peculiarities in the law (complicated, it seems, by our inconsistent adherence to myriad rules and internal practices).[24] As between the opinion and the judgment, I agree with JUSTICE BRISTER that the judgment is more "operative" — the judgment takes action; the opinion explains why. I also agree that "judgments should mean what they say," but the

[23] *See* FED. R. APP. P. 41(c) advisory committee's note (1998 amendments) ("A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed.").

[24] I do question the persuasiveness of some of JUSTICE BRISTER's comparisons, such as his references to mandamus proceedings, "which we decide by 'orders' rather than 'judgments.'" __ S.W.3d at __ (Brister, J., concurring). The fact that we don't issue mandates in mandamus cases — typically involving interlocutory, conditional, emergency rulings directed to the lower court only and not the parties — seems unrelated to the question of the mandate's effect in a case involving a final, unconditional judgment. (In fairness, I also make some reference to interlocutory appeals and mandamus law.) Our settled practice is to grant writs of mandamus only conditionally, with our final sentence usually reading something like this: "We are confident the trial court will comply, and our writ will issue only if it does not." *In re Schmitz*, __ S.W.3d __ (Tex. 2009). So while a writ will issue when necessary to enforce our decision and require the respondent to take action — similar to a mandate in an appeal — we rarely have to do so.

I also cannot completely agree with JUSTICE BRISTER's assertion that no mandate issues when we deny a petition for review. __ S.W.3d at __ (Brister, J., concurring). If we deny a petition, the court of appeals then issues a mandate to enforce its judgment. *See* TEX. R. APP. P. 18.1(a)(2).

question remains: Which judgment?[25] An appellate court can reconsider its judgment and the opinion on which it rests until the mandate issues, the date finality attaches.[26]

I appreciate JUSTICE BRISTER's point that the judgment merits instant respect. But if a judgment is operative for all purposes upon issuance, what exactly is the mandate of a mandate — why enact rules and statutes that tie finality and enforceability to something that amounts to

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[25] JUSTICE BRISTER states, "First of all, we should start with the principle that cases are decided by judgments, not mandates. Judgments are rendered by the court, and a majority of the court must agree to them. Mandates, by contrast, are drafted and signed by the clerk; judges rarely even see them." __ S.W.3d at __ (Brister, J., concurring) (footnotes omitted). Until this case, I had certainly never seen a mandate. But I have a slightly different view, which may be more stylistic than substantive. While judgments are in a sense more "operative" than opinions, I think cases are decided — that is to say *reasoned* — by opinions, not judgments. The judgment, like the mandate, is a separate document that sets forth the court's bottom-line decision and addresses the payment of costs. And like mandates, judgments are drafted by the Court's staff and usually not reviewed by judges. Our judgments, for example, are not signed by anyone, either a judge or anyone in the clerk's office. But the fact that the Court designates a task to its staff doesn't mean the action taken is not an official act of the Court, nor does it diminish its significance. Our mandates state, "**[W]e command you** to observe the order of our said Supreme Court in the behalf, and in all things to have recognized, obeyed, and executed." (emphasis in original). And by its terms, the mandate is issued "BY ORDER OF THE SUPREME COURT OF THE STATE OF TEXAS."

[26] JUSTICE BRISTER contends the mandate is an imperfect proxy for finality because "mandates issue 10 days *after* our judgment is final" — so why postpone the effective date for ten days if the judgment is final? __ S.W.3d at __ (Brister, J., concurring) (footnote omitted). This ten-day period sometimes applies, but not always, and there is a sound practical reason for it. When the Court denies rehearing, the mandate issues immediately because the judgment is final. There is no second motion for rehearing. TEX. R. APP. P. 64.4. When no rehearing is sought, the mandate issues ten days after the deadline for filing a motion for rehearing or seeking an extension of time to file such a motion — that is, forty days after judgment. *See* TEX. R. APP. P. 64.1 ("[a] motion for rehearing may be filed . . . within 15 days from the date when the Court renders judgment"); TEX. R. APP. P. 64.5 ("[t]he Court may extend the time to file a motion for rehearing . . . if a motion . . . is filed . . . no later than 15 days after the last date for filing a motion for rehearing"); TEX. R. APP. P. 18.1(b) (the clerk must issue the mandate "[t]en days after the time has expired for filing a motion to extend time to file a motion for rehearing"). The ten-day postponement is justified by the so-called mailbox rule, which provides that if a motion is received within ten days of the filing deadline it is considered timely filed if it was sent to the proper clerk by U.S. mail in a properly addressed envelope and deposited in the mail on or before the last day of filing. *See* TEX. R. APP. P. 9.2(b). Since the Court has no way of knowing whether a motion for rehearing or an extension of time to file a motion for rehearing will be timely filed until ten days after the deadline, we simply factor in the mailbox rule and sit tight.

Seinfeld-ian nothingness?[27] It seems odd that a decision would be fully effective yet neither final nor enforceable.[28]

I agree with the Court that our decision in *Barshop* itself decides today's case. I agree, too, with JUSTICE BRISTER that our decisions "can take effect whenever we say they do,"[29] but as a general default rule, I would treat the mandate as a more-than-clerical act. It is the judicial equivalent of "Yes, that's my final answer" — the dispositive order concluding the appeal, declaring the judgment final and enforceable, and commanding that the judgment be "recognized, obeyed, and executed." I trust the Court's rulemaking process will focus its expertise on this important issue and deliver bright-line guidance going forward.

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Don R. Willett
Justice

OPINION DELIVERED: June 26, 2009

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[27] Not that there's anything wrong with that. As a matter of fact — and law — there *is* something wrong with that.

[28] *See* TEX. R. APP. P. 51, 65.

[29] __ S.W.3d at __ (Brister, J., concurring). In *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 851 (Tex. 1979), we stated what I believe is a sensible general rule, deeming "this opinion to be effective . . . after the date on which our judgment herein becomes final," which we clarified in a later case was "the date of the overruling of the last motion for rehearing," *Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 115 (Tex. 1984). That date happens to be when the mandate issues. Interestingly, we decided *Acord* just seventeen days after amending a rule making it clear that a court's judgment regarding an interlocutory order did not take effect until the mandate issued. Steven McConnico & Daniel W. Bishop II, *Practicing Law with the 1984 Rules: Texas Rules of Civil Procedure Amendments Effective April 1, 1984*, 36 BAYLOR L. REV. 73, 120-21 (1984).

IN THE SUPREME COURT OF TEXAS

NO. 06-0933

SOUTHWESTERN BELL TELEPHONE, L.P., D/B/A SBC TEXAS, PETITIONER,

v.

HARRIS COUNTY TOLL ROAD AUTHORITY AND HARRIS COUNTY, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued January 15, 2008

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

A telephone company that was forced to relocate its facilities due to road construction demanded reimbursement from the county and its toll road authority. Neither our statutes nor our constitution, however, authorize the relief sought. Because the utility has no vested property right to relocation of its facilities at county expense, and because the Legislature has not waived the governmental entities' immunity from suit, we affirm the court of appeals' judgment.

I
Background

Southwestern Bell ("SBC") provides local telephone service in Harris County and throughout Texas. SBC maintains underground telecommunications facilities in the public right-of-way along the Westpark Tollway (formerly Westpark Road) pursuant to section 181.082 of the Texas Utilities

Code. *See* TEX. UTIL. CODE § 181.082 ("A telephone . . . corporation may install a facility of the corporation along, on, or across a public road, a public street, or public water in a manner that does not inconvenience the public in the use of the road, street, or water.").

When the Harris County Toll Road Authority and Harris County ("Harris County") began construction of the Westpark Tollway in 2001, they required SBC to relocate its facilities in the right-of-way along Westpark Road. SBC did so and billed the county for its costs. Harris County refused to pay, and this suit followed. In the trial court, SBC asserted both a claim for reimbursement under Transportation Code section 251.102 and a claim for inverse condemnation under article I, sections 17 and 19 of the Texas Constitution. *See* TEX. CONST. art. I, §§ 17, 19; TEX. TRANSP. CODE § 251.102. The parties filed cross-motions for summary judgment, and the trial court denied Harris County's motion and granted SBC's. The court of appeals reversed, holding that Harris County was immune from suit on the statutory claim and that SBC had no vested property interest in the right-of-way for the purposes of article I, section 17 of the Texas Constitution. 263 S.W.3d 48, 52. We granted SBC's petition for review.[1] 51 Tex. Sup. Ct. J. 77 (Nov. 2, 2007).

II
SBC's Takings Claim[2]

SBC contends that it is entitled to compensation for its relocation expenses under article I, section 17 of the Texas Constitution, which provides that "[n]o person's property shall be taken,

[1] The State of Texas and GTE Southwest Incorporated d/b/a Verizon Southwest submitted amicus curiae briefs.

[2] As a rule, we decide constitutional questions only when we cannot resolve issues on nonconstitutional grounds. *In the Interest of B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003). Because there is some overlap between SBC's takings claim and Harris County's alleged immunity, and because SBC's waiver-of-immunity claim fails for the reasons discussed below, we address the issues in reverse order.

damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . ." TEX. CONST. art. I, § 17. Governmental immunity "does not shield the State from an action for compensation under the takings clause." *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001). To recover on an inverse condemnation claim, a property owner must establish that "(1) the State intentionally performed certain acts, (2) that resulted in a 'taking' of property, (3) for public use." *Id.* Although the first and third elements are present here, Harris County asserts, and the court of appeals held, that SBC does not have a vested property interest in the public right-of-way on which its facilities are located. We conclude that whatever interest SBC has, that interest did not include the right to require the county to pay for relocation of its facilities.

A
Common-Law Rule

The United States Supreme Court, in a case similar to this one, rejected a takings claim brought by a gas company forced to relocate its pipes to accommodate improvements to the city's drainage system.

> The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*.

New Orleans Gas Light Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453, 462 (1905).[3]

Thus, under the "long-established common law principle . . . a utility forced to relocate from a public right-of-way must do so at its own expense." *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 34 (1983). We have said that "[i]n the absence of assumption by the state of part of the expense, it is clear that [utility companies] could be required to remove at their own expense any installations owned by them and located in public rights of way whenever such relocation is made necessary by highway improvements." *State v. City of Austin*, 331 S.W.2d 737, 741 (Tex. 1960); *see also* 2-28 SANDRA M. STEVENSON, ANTIEAU ON LOCAL GOVERNMENT LAW, § 28.09[3] (2d ed. 2008) ("Under the traditional common law rule, and in the absence of an agreement or statute to the contrary, whenever state or local authorities make reasonable requests of a public utility to relocate, remove or alter its structures or facilities, the utility must bear the cost of doing so, even though the public utility may be operating pursuant to franchise from the local government.").

B
Utility Code Section 181.082

SBC argues that, notwithstanding this general rule, the statutory permission for it to "install a facility . . . in a manner that does not inconvenience the public in the use of the road, street, or water," TEX. UTIL. CODE § 181.082, grants it a property interest on which a takings claim may be based. While we have characterized a railroad's interest granted by a local franchise as an "easement" for taxation purposes, *Tex. & Pac. Ry. Co. v. City of El Paso*, 85 S.W.2d 245, 248 (Tex.

[3] *Damnum absque injuria*, or *damage sine injuria*, means a "[l]oss or harm that is incurred from something other than a wrongful act and occasions no legal remedy." BLACK'S LAW DICTIONARY 420-21 (8th ed. 2004).

1935), that does not answer whether SBC's interest, arising from section 181.082, gives rise to its compensable takings claim. According to SBC, this statute, originally enacted in 1874, granted telephone companies "[i]n effect, . . . a private easement." But, as a noted treatise recognizes:

> The authorization to maintain rails, etc., in a particular part of the highway is not an easement or any other estate or interest in the land so occupied. On the contrary, it is merely a license to share in the public easement, and consequently a corporation maintaining rails, pipes, and wires in a public highway is not entitled to compensation for an invasion under legislative authority of the portion of the highway occupied by its structures. Consequently, this license may not be arbitrarily revoked as long as the highway remains public, and the enjoyment thereof cannot be interfered with for purely private ends. ***Yet when the continued undisturbed existence of the licensed structure does interfere with some other public need, the disturbance or removal of the structures or an alteration of their location is not a taking or even a damaging of property***. The permission to use the highway for such structures has been granted upon an implied condition that the structures shall not interfere, either at the time that they are placed in position or thereafter, with any other public use to which the legislature sees fit to devote the way. When the condition takes effect, the privilege ceases to exist; it is not taken or damaged. To hold otherwise and to say that whenever, under the statutory permission, a gas pipe is laid in a public way the pipe cannot be disturbed, even to make such changes as are required by public travel, is to make what is merely a subordinate use paramount to the great important use for which the land is taken.

2-5 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 5.03[5][e] (3d ed. 2006) ("NICHOLS ON EMINENT DOMAIN") (emphasis added and citations omitted); *see also W. Union Tel. Co. v. Tarrant County*, 450 S.W.2d 763, 765-66 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.) (rejecting telegraph company's takings claim, despite the fact that lines had been installed forty-three years earlier pursuant to section 181.082's predecessor; right to use the streets was a "permissive right" not a "vested" one, and utility had to bear its own relocation costs).

We recognized as much in 1913, when we held that the limiting language in the grant to telephone companies was "qualified by this important language, 'in such manner as not to

incommode the public in the use of such road, streets and waters.'" *Brownwood v. Brown Tel. & Tel. Co.*, 157 S.W. 1163, 1165 (Tex. 1913). We concluded that "[t]he effect of the limiting clause is to declare the right of the public to be superior to the rights granted to the corporation." *Id.* "The main purposes of roads and streets are for travel and transportation, and while public utilities may use such roads and streets for the laying of their telegraph, telephone and water lines, and for other purposes, such uses are subservient to the main uses and purposes of such roads and streets." *City of San Antonio v. Bexar Metro. Water Dist.*, 309 S.W.2d 491, 492 (Tex. Civ. App.—San Antonio 1958, writ ref'd). When a telephone company installs its lines pursuant to the statutory grant, "there is an implied condition that the facilities shall not interfere with the public use, either at the time they are placed in position or thereafter." *City of Grand Prairie v. Am. Tel. & Tel. Co.,* 405 F.2d 1144, 1146 (5th Cir. 1969) (noting that rule requiring utilities to relocate at their own expense is "generally accepted as the prevailing view").

SBC asserts that telephone companies are different from other utilities, pointing to section 181.082's silence on relocation costs, and cites other statutes explicitly requiring utilities to pay relocation costs in certain situations. *See, e.g.,* TEX. UTIL. CODE §§ 181.025(b) (relocation of gas facility), 181.046(b) (relocation of electric lines). There are also statutes, however, mandating the converse. *See, e.g.*, TEX. TRANSP. CODE § 227.029(l) (providing that "the department, as part of the cost of the project, shall pay the cost of the relocation . . . of a public utility facility"); *id.* § 251.103 (providing that "a county may pay for relocation of a water line" under certain circumstances, provided the water district agrees to repay the funds within twenty years and with interest). Regardless, the statute's silence on relocation costs would mean that the common law rule applied, not that the county was responsible for relocation costs. Moreover, none of our cases supports the

distinction SBC proposes. If telephone companies were somehow different, we would not have said in *City of Austin*—a case in which Southwestern Bell Telephone Company was a respondent—that "[i]t is clear that respondents could be required to remove at their own expense any installations owned by them and located in public rights of way whenever such relocation is made necessary by highway improvements." *City of Austin*, 331 S.W.2d at 741.

The State, as amicus curiae, contends that Texas law has authorized telegraph and telephone companies to use public roads for 136 years, and never in that time has there been a single decision under section 181.082 (or its predecessors) concluding that such utilities have a right in the public roads that is compensable under the Texas Constitution. Southwestern Bell's contentions, according to the State, would create a "newly minted property right." Based on the authorities outlined above, we agree. Under the traditional common-law rule—a rule unaltered by section 181.082—SBC would be required to bear its own relocation costs.

C
Transportation Code Section 251.102

SBC contends, however, that this rule does not apply when another statute "pointedly requires" a governmental entity to pay relocation costs. That, SBC argues, is the case with section 251.102. We have held, however, that "if a statute creates a liability unknown to the common law, or deprives a person of a common law right, the statute will be strictly construed in the sense that it will not be extended beyond its plain meaning or applied to cases not clearly within its purview." *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969). This is one such case.

In its current form, section 251.102 provides that "[a] county shall *include* the cost of relocating or adjusting an *eligible* utility facility in the expense of right-of-way acquisition." TEX.

TRANSP. CODE § 251.102 (emphasis added). "Eligible" is undefined, and the Fifth Circuit noted its ambiguity in this context. *Centerpoint Energy Houston Elec. LLC v. Harris County Toll Road Auth.*, 436 F.3d 541, 545 (5th Cir. 2006), *cert. denied*, 548 U.S. 907 (2006) (noting that "we have examined the statute, as noted above, and find that the words 'eligible utility facility' remain ambiguous"). Originally enacted in 1963 as former article 6674n-3, the statute provided that "[i]n the acquisition of all highway rights-of-way by or for the Texas Highway Department, the cost of relocating or adjusting *utility facilities which cost may be eligible under the law* is hereby declared to be an expense and cost of right-of-way acquisition." Act of May 16, 1963, 58th Leg., R.S., ch. 240, § 1, 1963 Tex. Gen. Laws 654, 654 (emphasis added). The emergency provision of that Act stated that it was necessary "in order to clarify existing law as to the proper classification of costs incurred for the relocation or adjustment of utility facilities as a part of the acquisition of right-of-way." *Id.* § 4.

The statute was passed apparently in response to *Hardin County v. Trunkline Gas Co.*, 311 F.2d 882, 884 (5th Cir. 1963), in which the court held that a county "was not obligated, indeed could not legally obligate itself, to pay" costs incurred by a gas company forced to extend the casing enclosing its pipelines when the state widened the highways. The Fifth Circuit held that the gas company's claim was not "a legal claim," as the county was not authorized "to contract to improve, construct or reconstruct a State highway . . . [and was] expressly prohibited from expending county funds therefor." *Id.* at 883, 885. While the gas company's petition for writ of certiorari was pending, the Legislature passed what is now section 251.102. *Trunkline Gas Co. v. Hardin County*, 375 U.S. 8, 8 (1963) (granting certiorari and vacating judgment, noting that "it appear[s] that the State of Texas has passed a statute in connection with controversies of this kind since the petition for a writ

of certiorari was filed in this Court"). On remand, the Fifth Circuit held that the newly enacted statute did not change the result, because "[t]he Legislature cannot, by curative statute, appropriation, or otherwise, authorize payment under a contract made without authority of law." *Hardin County v. Trunkline Gas Co.*, 330 F.2d 789, 793 (5th Cir. 1964).

When the 68th Legislature adopted the County Road and Bridge Act (former Article 6702-1) in 1983, article 6674n-3 was the source law for section 4.303 of the new law, which stated that "[t]he county should include the cost of relocating or adjusting *eligible* utility facilities in the expense of right-of-way acquisition. (V.A.C.S. Art. 6674n-3.)." Act of May 20, 1983, 68th Leg., R.S., ch. 288, § 1, 1983 Tex. Gen. Laws 1431, 1489 (emphasis added). In 1995, section 4.303 was codified, without substantive change, as section 251.102 of the Texas Transportation Code. Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1159, 1871 (now codified at TEX. TRANSP. CODE § 251.102).

In one of only two decisions interpreting section 251.102,[4] the Fifth Circuit, in an *Erie*[5] guess about Texas law, held that "eligible utility facility" meant "eligible under the law," which equated to a statutory right to reimbursement that operated prospectively, dealt with a matter in which the public has a real and legitimate interest, and was not fraudulent, arbitrary or capricious, based on our decision in *City of Austin*. *Centerpoint*, 436 F.3d at 549-50. *City of Austin*, however, involved a different statute—and one in which "eligible" was clearly defined. *City of Austin*, 331 S.W.2d at 740. The relevant statute in that case (passed six years before what is now section 251.102) provided that utilities required to relocate as part of the improvement of highways established as part of the

[4] The second is the court of appeals' decision in this case. 263 S.W.3d 48.

[5] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

National System of Interstate and Defense Highways, would do so "at the cost and expense of the State . . . provided that such relocation was eligible for Federal participation." Act of May 23, 1957, 55th Leg., R.S., ch. 300, § 4A, 1957 Tex. Gen. Laws 724, 729, *repealed by* Acts 1995, 74th Leg., ch. 165, § 24(a), 1995 Tex. Gen. Laws 1031, 1970 (current version at TEX. TRANSP. CODE § 203.092 (a) (1)). The statute was passed

> for the purpose of securing the benefits of the Federal-Aid Highway Act of 1956, which authorize[d] the use of Federal funds to reimburse the state for the cost of relocating utility facilities in the same proportion as such funds are expended on a given project, with the proviso that Federal money shall not be used for that purpose when payment to the utility violates either state law or a legal contract between the utility and the state.

City of Austin, 331 S.W.2d at 740 (citing U.S.C. § 123).[6]

The utilities' (Southwestern Bell Telephone Company among them) eligibility for reimbursement was undisputed; the only issue we considered was whether the State's payment of relocation costs would be an unconstitutional donation for a private purpose. We concluded that it would not be and, in doing so, noted:

> In the absence of assumption by the state of part of the expense, it is clear that respondents could be required to remove at their own expense any installations owned by them and located in public rights of way whenever such relocation is made necessary by highway improvements. . . . While public utilities may use [roads and streets] for laying their lines, such use is subject to reasonable regulation by either the

[6] Texas was one of sixteen states to pass such a statute in response to the Federal-Aid Highway Act of 1956. The Act had originally been intended to reimburse utility relocation costs only in those states in which, by statute or practice, the common law rule had been altered. *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 39 (1983) ("The question of utility reimbursement was, thus, left to the laws of the individual States, with no congressional displacement of those laws."). Instead, sixteen states responded to the Act by passing legislation authorizing reimbursement of utility relocation costs whenever a project was eligible for federal reimbursement. *Id.* at 40 n.17. The Senate Public Works Committee expressed concern over this "drastic change in existing practices," noting that "'the use of Federal funds for reimbursement to the States for this purpose will increase substantially, thereby reducing the amount of Federal funds available for construction of highways.'" S. REP. NO. 1407, 85th Cong., 2d Sess., 28 (1958); *Norfolk Redevelopment*, 464 U.S. at 40.

> state, the county or the city, as the case may be. The utility may always be required, in the valid exercise of the police power by proper governmental authority, to remove or adjust its installations to meet the needs of the public for travel and transportation.
> . . .
> Compensation is not required to be made for damage or loss resulting from a valid exercise of the police power.

Id. at 741-43; *see also id.* at 746 (noting that "[n]o part of the expense will be paid by the state, of course, if the relocation is not eligible for Federal participation"). In concluding that the reimbursement of relocation costs was not an unconstitutional gift, we relied on three factors: the statute operated prospectively, dealt with a matter in which the public had a real and legitimate interest, and was not fraudulent, arbitrary, or capricious. *Id.* at 743.

In *CenterPoint*, the Fifth Circuit examined these three factors to conclude that the relocation costs were *eligible*, rather than *constitutional*—a rationale the court of appeals in this case then adopted. *CenterPoint*, 436 F.3d at 549-50; 263 S.W.3d at 58-60. Harris County asserts—and the State agrees—that the Fifth Circuit's interpretation is incorrect. Instead, Harris County argues, "eligible utility facility" in section 251.102 means that the project in question is eligible for federal participation or the utility has a compensable property interest in the land occupied by the utility, based on the current version of the statute we construed in *City of Austin* and the caselaw at the time section 251.102 was originally enacted. *See* TEX. TRANSP. CODE § 203.092 (a) (1) and (2) (providing that a "utility shall make a relocation . . . at the expense of this state if . . . relocation of the utility facility is required by improvement of a highway in this state established . . . as part of the National System of Interstate and Defense Highways and the relocation is *eligible* for federal participation" or "the utility has a compensable property interest in the land occupied by the facility to be relocated") (emphasis added); *City of Austin*, 331 S.W.2d at 746 (reimbursement required if

relocation was eligible for federal participation); *Magnolia Pipe Line Co. v. City of Tyler*, 348 S.W.2d 537, 543 (Tex. Civ. App.—Texarkana 1961, writ ref'd) (reimbursement required if utility had purchased easements from private owners).

Harris County's argument is plausible, if too narrow. Section 251.102 does not define what is "eligible"; it merely states that counties shall include relocation costs for such facilities. Other statutes clearly speak to the subject. As noted, relocation costs must be paid if the relocation "is eligible for federal participation," if "the utility has a compensable property interest in the land occupied by the facility to be relocated," or, under certain circumstances, if the project involves improvement of "a segment of the state highway system that was designated by the commission as a turnpike project or toll project before September 1, 2005." TEX. TRANSP. CODE § 203.092 (a) (1), (2), and (3). Yet another statute provides for discretionary reimbursement by the highway department if the commission finds that relocation is essential to the timely completion of the project, continuous utility service is essential to the public well-being, the utility's ability to operate would be adversely affected if it paid the relocation cost, and the utility and the department agree regarding appropriate safeguards, minimization of disruption, and choice of contractors. *Id*. § 203.0921. Still another provides that "a county may pay for relocating a water line" under certain circumstances, provided the water district agrees to repay the funds within twenty years and with interest. *Id*. § 251.103. Section 203.094, dealing with timely relocations, speaks to a utility that is "eligible for reimbursement under section 203.092 or that is eligible for reimbursement under applicable law and the policies of the department for the cost of relocating facilities." *Id.* § 203.094. Each of these statutes describes various scenarios under which utilities might be eligible for reimbursement of relocation costs.

These laws indicate that, when the Legislature has determined that the government should pay a utility's relocation costs, the statutes clearly delineate classes of relocations that are eligible for reimbursement. By contrast, section 251.102 contains no such definition. If the Legislature intended for counties to pay all utility relocation costs, it would have been a simple matter to so state. *See, e.g.,* TEX. TRANSP. CODE § 227.029(l) (providing that "the department, as part of the cost of the project, shall pay the cost of the relocation . . . of a public utility facility"); *id.* § 366.171 (stating that regional tollway authorities "shall pay the cost of relocation" of a "public utility facility"); *id.* § 370.170(h) (regional mobility authority "shall pay the cost of relocation" of a "public utility facility"). Instead, the statute provides only that the county "include" relocation cost in acquisition expenses, and only for those utilities that are "eligible." *Id.* § 251.102. SBC's relocation costs in this case are not clearly within the statute's purview, and SBC cites no other provision that would make it "eligible."[7] *Satterfield*, 448 S.W.2d at 459.

SBC asserts that Harris County ignores the "equities of requiring toll road users, rather than the general public, to pay the true costs of constructing a toll road." While requiring reimbursement of utility relocation costs for toll roads may be the better policy, that is a decision for the Legislature. Moreover, mandating reimbursement under section 251.102 would mean that all counties would have to reimburse all utility relocation costs for all acquisition projects, not just toll roads. Absent a clearer indication from the Legislature, we cannot conclude that this is what the statute requires.

D

[7] In light of our conclusion on this issue, we do not reach Harris County's argument that section 251.102 is inapplicable because the county did not "acquire" any property in connection with this construction project.

Ad Valorem Taxation

SBC also argues that if its facilities are property for purposes of ad valorem taxation, they are property for purposes of a takings claim. *See City of Fort Worth v. Sw. Bell Tel. Co.*, 80 F.2d 972, 975 (5th Cir. 1936) (concluding that "[i]f the right to maintain the company's poles, wires, and conduits . . . is property for purposes of protection, it is property for purposes of taxation"). The court of appeals, however, correctly noted that *City of Fort Worth* involved taxation, not inverse condemnation, and that the case "expressly recognized that the predecessor to section 181.082 at issue in that case reserved 'a supervision through the municipality as to the placing and alteration of the [utility's] fixtures.'" 263 S.W.3d at 68 n.13 (quoting *City of Fort Worth*, 80 F.2d at 976); *see also W. Union*, 450 S.W.2d at 766 (holding that telegraph company had to relocate at its own expense; authorities cited regarding ad valorem taxation were inapposite). Thus, while SBC has a property interest in its facilities, that interest is subject to the terms of the original grant. When, under a valid exercise of the police power, the facilities inconvenience the public, they must be moved at SBC's expense. While our answer might be different if SBC faced the complete removal of its facilities, rather than their relocation, that is not the case here. *See, e.g.,* 2-5 NICHOLS ON EMINENT DOMAIN § 5.03 ("Where the change requires not merely the relocation of the facilities, but the complete removal of the facilities from the right of way, compensation must be made."); *City of Louisville v. Cumberland Tel. & Tel. Co.*, 224 U.S. 649, 659 (1912) ("It is claimed that in consequence of these laws the street rights granted the Ohio Valley Telephone Company have been withdrawn, or at least made subject to municipal revocation.").

III
SBC's Statutory Claim

Many of the same reasons apply to bar SBC's direct claim under the statute. SBC contends that section 251.102 waives Harris County's governmental immunity and requires reimbursement of relocation costs. But as we have often noted, the Legislature is best positioned to waive or abrogate sovereign immunity "because this allows the Legislature to protect its policymaking function." *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002) (citations omitted) (collecting cases). Any such waiver must be clear and unambiguous. TEX. GOV'T CODE § 311.034 ("In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."); *Tooke v. City of Mexia*, 197 S.W.3d 325, 328-29 (Tex. 2006).

As outlined above, section 251.102 falls short of meeting these exacting demands. While we have on rare occasions found waiver of sovereign immunity absent "magic words," we have required clear indications of legislative intent to waive immunity under these circumstances:

> First, a statute that waives the State's immunity must do so beyond doubt, even though we do not insist that the statute be a model of "perfect clarity." For example, we have found waiver when the provision in question would be meaningless unless immunity were waived.
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> Second, when construing a statute that purportedly waives sovereign immunity, we generally resolve ambiguities by retaining immunity.
>
> . . . .
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> Finally, we are cognizant that, when waiving immunity by explicit language, the Legislature often enacts simultaneous measures to insulate public resources from the reach of judgment creditors. Therefore, when deciding whether the Legislature intended to waive sovereign immunity and permit monetary damages against the State, one factor to consider is whether the statute also provides an objective limitation on the State's potential liability.

Wichita Falls State Hospital v. Taylor, 106 S.W.3d 692, 697-98 (Tex. 2003) (citations omitted).

We recently confronted a similar issue in *Texas Department of Transportation v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004). That case involved Transportation Code section 203.058(a), which provides:

> If the acquisition of real property, property rights, or material by the department [of transportation] from a state agency under this subchapter will deprive the agency of a thing of value to the agency in the exercise of its functions, *adequate compensation* for the real property, property rights, or material *shall be made*.

TEX. TRANSP. CODE § 203.058(a) (emphasis added). We determined that section 203.058 did not waive governmental immunity. *Sunset Valley*, 146 S.W.3d at 642-43. As we observed, the statute's language did not clearly indicate the Legislature's intent to waive immunity, but instead merely required the Department of Transportation to make "adequate compensation" using certain accounting procedures. *Id.* at 642. (citations omitted). And while "the statute imposes a financial obligation on the State," this "does not in itself mean that the Legislature intended to create a private right of action, as evidenced by the fact that the statute expressly vests the power to determine adequate compensation in the General Land Office." *Id.* at 642-43. Further, the statute was not meaningless without a waiver of immunity because it "provide[d] a mechanism by which state agencies may ensure budgetary protection when property is transferred between them." *Id.* at 643.

SBC has not argued that section 251.102 contains "magic words," but rather that it requires reimbursement of utility relocation costs and thus necessarily waives immunity. But as discussed above, section 251.102 does not clearly require that SBC be reimbursed, nor, as the court of appeals correctly observed, is the statute meaningless absent a waiver of immunity:

> The statute merely states that a county, at the time it acquires a right-of-way to accommodate county road construction, must include the cost of relocating eligible

> utility facilities as part of its expense in acquiring the right-of-way. That is, the county must budget not only for the cost of acquiring the right-of-way, but it must also earmark funds to be paid to eligible utilities should they relocate their facilities to accommodate road construction. Section 251.102's requirement that funds be earmarked is a less apparent expression of a private right of action than that found lacking by the Texas Supreme Court in *Sunset Valley*. *Compare* TEX. TRANSP. CODE ANN. § 203.058(a) ("[A]dequate compensation for the real property . . . *shall be made*.") (emphasis added) *with id.* § 251.102 ("A county *shall include the cost* of relocating . . . an eligible utility facility in the expense of right-of-way acquisition.") (emphasis added).

263 S.W.3d at 63. The Legislature may require counties to earmark funds for a particular purpose without necessarily creating a private right of action, because, for example, it expects counties to comply, or because it considers the costs of litigation overly burdensome. *See, e.g., Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006). And, as explained more fully above in our "takings" analysis, when we compare those statutes that explicitly provide for relocation reimbursements, the Legislature regularly attaches specific criteria that are absent here. *See Wichita Falls State Hosp.*, 106 S.W.3d at 697-98.

SBC nevertheless contends that our precedent supports a reimbursement action like this one. In *City of Austin*, 331 S.W.2d at 742, we considered whether a statute requiring reimbursement of certain utility relocation costs was an unconstitutional gift or donation. SBC contends that we would not have reached the merits in that case if the State had been immune from suit. *City of Austin*, however, did not address the state's immunity from suit, as it was a declaratory judgment action filed *by* the state. *Id.* at 740. Moreover, although the Fifth Circuit's recent decision in *CenterPoint*, 436 F.3d 541, discussed reimbursement of utility relocation costs pursuant to the same statute at issue here, that case did not discuss immunity, as Harris County waived immunity from suit under that

court's "waiver-by-removal" rule. *See CenterPoint*, 436 F.3d at 543; *Meyers v. Tex.*, 410 F.3d 236, 256 (5th Cir. 2005).

Because section 251.102 does not clearly waive governmental immunity, and because Harris County has not otherwise waived its immunity from suit, SBC's statutory reimbursement claim is barred.

IV
Conclusion

We affirm the court of appeals' judgment. TEX. R. APP. P. 60.2 (a).

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: April 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0948

CITY OF PASADENA, TEXAS, PETITIONER,

v.

RICHARD SMITH, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued September 10, 2008

JUSTICE HECHT delivered the opinion of the Court.

The Fire Fighters and Police Officers Civil Service Act[1] limits the grounds for judicial review of a hearing examiner's decision in an appeal from a disciplinary suspension,[2] but as we observed in *City of Houston v. Clark*, if those limitations do not allow for meaningful review, they may violate constitutional restrictions on the delegation of government authority to a private person.[3] One ground is that the hearing officer exceeded his jurisdiction.[4] In this case we hold that the hearing examiner exceeded his jurisdiction in summarily reversing an officer's indefinite suspension and reinstating him with back pay and full benefits because the Act requires a hearing examiner to reach

[1] TEX. LOC. GOV'T CODE Chapter 143, §§ 143.001-.363.

[2] *Id.* §§ 143.057(j) ("A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion, or other unlawful means."), 143.1016(j) (same for cities with a population of 1.5 million or more).

[3] 197 S.W.3d 314, 324 (Tex. 2006) ("Of course, if the right of appeal provided by Section 143.1016(j) does not afford a city meaningful review of the merits of a decision, . . . delegation of grievance decisions to an independent hearing examiner may raise constitutional problems.") (citing *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen,* 952 S.W.2d 454, 472 (Tex. 1997)).

[4] *Supra* note 2.

a decision based on evidence. Accordingly, we reverse the judgment of the court of appeals[5] and remand the case to the district court for further proceedings.

City of Pasadena Police Chief M. A. Massey suspended officer Richard Smith indefinitely. The Act gave Smith two routes of appeal — either to the City's civil service commission[6] or to an independent third-party hearing examiner[7] — and he chose the latter, as civil service employees often do.[8] The parties selected a hearing examiner from a list provided by the American Arbitration Association.[9] When the hearing convened, counsel for the City announced ready, but counsel for Smith moved that the suspension be overturned and that Smith be reinstated without further ado because Chief Massey — the department head[10] on whose statement the suspension was based[11] — was not present. The City's counsel stated that he was prepared to prove the grounds for the suspension through Assistant Chief Rahr, who was present, but the hearing examiner agreed with

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[5] 263 S.W.3d 80 (Tex. App.–Houston [1st Dist.] 2006).

[6] TEX. LOC. GOV'T CODE §§ 143.010, 143.053.

[7] *Id*. § 143.057.

[8] *See Proctor v. Andrews*, 972 S.W.2d 729, 736 (Tex. 1998) ("It is likely a perception of bias in favor of the City, on the part of the Civil Service Commission, that prompts officers to request that their appeal be heard under section 143.057 [by an independent hearing examiner]."). Amicus curiae, the Texas State Association of Fire Fighters, confirms that fire fighters have a "strong desire . . . to appeal . . . to independent hearing examiners . . . rather than to civil service commissions whose members are appointed solely by the cities' chief executives." Brief of Texas State Association of Fire Fighters as Amicus Curiae Supporting Respondent at 2.

[9] TEX. LOC. GOV'T CODE § 143.057(d) ("If the appealing fire fighter or police officer chooses to appeal to a hearing examiner, the fire fighter or police officer and the department head, or their designees, shall first attempt to agree on the selection of an impartial hearing examiner. If the parties do not agree on the selection of a hearing examiner on or within 10 days after the date the appeal is filed, the director shall immediately request a list of seven qualified neutral arbitrators from the American Arbitration Association or the Federal Mediation and Conciliation Service, or their successors in function. The fire fighter or police officer and the department head, or their designees, may agree on one of the seven neutral arbitrators on the list. If they do not agree within five working days after the date they received the list, each party or the party's designee shall alternate striking a name from the list and the name remaining is the hearing examiner. The parties or their designees shall agree on a date for the hearing.").

[10] *Id.* § 143.003(2) ("'Department head' means the chief or head of a fire or police department or that person's equivalent, regardless of the name or title used.").

[11] *Id.* § 143.052(c) ("If the department head suspends a fire fighter or police officer, the department head shall, within 120 hours after the hour of suspension, file a written statement with the commission giving the reasons for the suspension. The department head shall immediately deliver a copy of the statement in person to the suspended fire fighter or police officer.").

Smith, concluding that "these charges should be dismissed". The hearing concluded in less than half an hour without any evidence being presented.

Later, in a written decision, the hearing examiner ruled that Smith should be reinstated, that he should be fully compensated for the time he had been suspended, and that all service credits and benefits should be restored. The written decision gave as the sole ground for the ruling: "As the Department Head failed to appear under Texas Local Government Code, Section 143.1015(2)(k)(4), at hearing on December 9, 2004, the Hearing Examiner upheld the appeal and dismissed the charges against Officer Smith." No such section exists. The hearing examiner apparently meant section 143.1015(k) of the Act, which states in part: "The director [of fire fighters' and police officers' civil service[12]] may not send the hearing examiner the department head's original written statement. The department head shall submit the written statement and charges to the hearing examiner at the hearing."[13] The hearing examiner also appears to have overlooked the fact that some of the Act's provisions, including section 143.1015, apply only to a city with a population of at least 1.5 million — viz, Houston.[14] The City of Pasadena, a Houston suburb, does not qualify.[15]

The City petitioned the district court for review. Smith filed a plea to the jurisdiction, arguing that the City's petition was untimely. The court sustained the plea, and the City appealed. Without addressing the timeliness of the appeal,[16] the court held that the district court had no

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[12] *Id.* § 143.003(3) ("'Director' means the director of fire fighters' and police officers' civil service.").

[13] *Id.* § 143.1015(k).

[14] *Id.* § 143.101(a) ("Except as otherwise provided, this subchapter [G, containing sections 143.101-.135, including 143.1015] applies only to a municipality with a population of 1.5 million or more."); (b) ("Except as otherwise provided, the provisions of Subchapters A-F apply to each municipality covered under this subchapter.") .

[15] According to the 2000 United States census, the population of the City of Pasadena was 141,674. *See* U. S. Census Bureau, "Pasadena city, Texas QuickLinks", http://quickfacts.census.gov/qfd/states/48/4856000lk.html, http://factfinder.census.gov/servlet/QTTable?_bm=y&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U&-_lang=en&-geo_id=16000US4856000.

[16] 263 S.W.3d 80, 85 n.6 (Tex. App.–Houston [1st Dist.] 2006).

jurisdiction over the case under section 143.057(j) of the Act.[17] We granted the City's petition for review.[18]

Section 143.057(j), which is not limited to cities over 1.5 million,[19] states in pertinent part: "A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion, or other unlawful means."[20] Because subsection 143.057(j) is identical to the provision we construed in *Clark*, section 143.1016(j), though that section applies only to Houston,[21] *Clark* applies to all civil service cities.[22]

Clark rejected the argument that only a fire fighter or police officer can appeal to the district court and held that a municipality may appeal as well, even though the statute is silent on the subject.[23] In reaching that conclusion, we were mindful that "interpreting Section 143.1016(j) to foreclose municipalities' appellate rights could well render the Legislature's delegation of authority to independent hearing examiners constitutionally suspect."[24] The potential problem was the nondelegation doctrine — the Texas Constitution's restrictions on the delegation of governmental

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[17] *Id*. at 85.

[18] 51 Tex. Sup. Ct. J. 866 (May 16, 2008) (granted on motion for rehearing); 51 Tex. Sup. Ct. J. 180 (Dec. 7, 2007) (prior disposition).

[19] *See supra* note 14; *compare* TEX. LOC. GOV'T CODE §§ 143.053(a) and .052(a) ("This section does not apply to a municipality with a population of 1.5 million or more."), *with* § 143.057.

[20] TEX. LOC. GOV'T CODE § 143.057(j).

[21] *Id.* § 143.101(a) (providing that subchapter G, which includes 143.1016, applies only to a municipality with a population of 1.5 million or more).

[22] 197 S.W.3d 314, 317 n.4 (Tex. 2006) ("Section 143.1016 was modeled on the language of Section 143.057. In particular, the language governing appeals of independent hearing examiner decisions in Sections 143.1016(c) and (j) exactly duplicates that of Sections 143.057(c) and (j). Therefore, our decision today is not limited to the City of Houston; it applies with equal force to all municipalities governed by Chapter 143 of the Local Government Code.").

[23] *Id*. at 318-320.

[24] *Id*. at 320.

power, especially to private persons, which we thoroughly explained in *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*.[25] There, we reiterated:

> The Texas Legislature may delegate its powers to agencies established to carry out legislative purposes, as long as it establishes reasonable standards to guide the entity to which the powers are delegated.
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> * * *
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> The separation of powers clause [TEX. CONST. art. II, § 1] requires that the standards of delegation be reasonably clear and hence acceptable as a standard of measurement.[26]

A delegation of power without such standards is an abdication of the authority to set government policy which the Constitution assigns to the legislative department. While legislative delegations of authority to other governmental entities can raise constitutional concerns,

> private delegations clearly raise even more troubling constitutional issues than their public counterparts. On a practical basis, the private delegate may have a personal or pecuniary interest which is inconsistent with or repugnant to the public interest to be served. More fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government. Thus, we believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.[27]

Applying eight factors,[28] we held that the delegation of power to the private entity in that case was unconstitutional.[29]

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[25] 952 S.W.2d 454 (Tex. 1997).

[26] *Id*. at 467 (citations and internal quotation marks omitted).

[27] *Id*. at 469.

[28] *Id*. at 472 ("1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government? 2. Are the persons affected by the private delegate's actions adequately represented in the decisionmaking process? 3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals? 4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function? 5. Is the private delegate empowered to define criminal acts or impose criminal sanctions? 6. Is the delegation narrow in duration, extent, and subject matter? 7. Does the private delegate possess special qualifications or training for the task delegated to it? 8. Has the Legislature provided sufficient standards to guide the private delegate in its work?").

[29] *Id*. at 471, 475.

We do not determine here whether this Act's delegation of authority to a hearing examiner violates the nondelegation doctrine; we consider only whether the court of appeals' construction of section 143.057(j) raises constitutional concerns. Thus, we do not address all eight factors listed in *Boll Weevil* but focus on the first one — whether the hearing examiner's "actions [are] subject to meaningful review by a state agency or other branch of state government"[30] — because it is directly implicated by the scope of review in section 143.057(j). The Act's use of independent hearing examiners provides a forum for resolving civil service disputes that is detached from city government, thus furthering the Act's purpose of "secur[ing] efficient fire and police departments composed of capable personnel who are free from political influence and who have permanent employment tenure as public servants."[31] In *Proctor v. Andrews*, we rejected the contention that the Act violates the nondelegation doctrine by failing to provide adequate standards for assuring that arbitrators are qualified and neutral.[32] Here, the State as amicus curiae argues that submission of civil service disputes to hearing examiners is simply a resort to arbitration and therefore raises no constitutional concerns.[33] But if the Act does not bind hearing examiners to definite standards for reaching decisions and instead gives them broad latitude in determining not only factual disputes but the applicable law, they become not merely independent arbiters but policy makers, which is a legislative function. This would raise nondelegation concerns, an issue noted but not addressed in *Proctor*.[34] It is one thing for a hearing examiner to determine whether conduct for which an officer

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[30] *Id*. at 472.

[31] TEX. LOC. GOV'T CODE § 143.001(a).

[32] 972 S.W.2d 729 (Tex. 1998).

[33] Brief of the State of Texas as Amicus Curiae in Support of Respondent at 1-2.

[34] 972 S.W. 2d at 735 ("The City does not contend that the Legislature impermissibly delegated authority to hear appeals to a private decisionmaker. While this broader delegation of authority was discussed in amici briefs submitted by the cities of Marshall, Amarillo, and Garland, and suggested at the oral argument of this case, it was not a part of the City's case either in the courts below or here.").

or fire fighter has been disciplined occurred as charged; it is quite another thing for a hearing examiner to decide whether conduct that did occur deserves discipline. If a city can invoke judicial review to require that a hearing examiner's ruling be made according to law, one concern of the nondelegation doctrine is satisfied. But as we observed in *Clark*, "if the right of appeal provided by Section 143.1016(j) does not afford a city meaningful review of the merits of a [hearing examiner's] decision, . . . delegation of grievance decisions to an independent hearing examiner may raise constitutional problems."[35]

Thus, in construing the scope of judicial review permitted by section 143.057(j), we must be mindful as in *Clark* that "[w]hen faced with multiple constructions of a statute, we must interpret the statutory language in a manner that renders it constitutional if it is possible to do so".[36] The City argues that the hearing examiner's summary ruling exceeded his jurisdiction within the meaning of section 143.057(j). The statute actually refers to an "arbitration panel" exceeding its jurisdiction, but the term includes a hearing examiner.[37] The reference to arbitration suggests the source for the statutory text. The predecessor to section 143.057(j) was first enacted in 1983.[38] The Texas General Arbitration Act, enacted in 1965, uses similar language in providing that a court can vacate an arbitration award "procured by corruption, fraud or other undue means" or where "[t]he arbitrators

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[35] *City of Houston v. Clark*, 197 S.W.3d 314, 324 (Tex. 2006).

[36] *Id.* at 320 (citing *Brady v. Fourteenth Court of Appeals,* 795 S.W.2d 712, 715 (Tex. 1990) ("[s]tatutes are given a construction consistent with constitutional requirements, when possible, because the legislature is presumed to have intended compliance with [the constitution]"), and TEX. GOV'T CODE § 311.021(1) ("In enacting a statute, it is presumed that . . . compliance with the constitutions of this state and the United States is intended . . . .")).

[37] *Id*. at 318 n.5 ("The Legislature's use of the phrase 'arbitration panel' is difficult to explain in the context of appeals to individual independent hearing examiners under Section 143.1016, since the hearing examiner, not an arbitration panel, provides a final decision. For purposes of this case, we presume Section 143.1016(j)'s reference to 'arbitration panel' includes an independent hearing examiner.").

[38] Act of May 30, 1983, 68th Leg., R.S., ch. 420, § 9, 1983 Tex. Gen. Laws 2246, 2267, formerly codified as TEX. REV. CIV. STAT. ANN. art. 1269m, § 16c(f).

exceeded their powers".[39] The Federal Arbitration Act, enacted in 1947, uses almost identical language.[40]

An arbitrator derives his power from the parties' agreement to submit to arbitration,[41] and because the law favors arbitration, and arbitration agreements are often quite broad, judicial review of an arbitration award is usually very narrow.[42] By contrast, an independent hearing examiner's jurisdiction is created by the Act and comes with significant constraints. The Act states that "[i]n each hearing conducted [on appeal from a promotional bypass or disciplinary action], the hearing examiner has the same duties and powers as the [civil service] commission".[43] The Act prescribes various deadlines, procedures, and limitations on the commission,[44] which apply equally to hearing examiners.[45] Importantly, the Act states: "The commission shall conduct the hearing fairly and impartially as prescribed by this chapter and shall render a just and fair decision. The commission may consider only the evidence submitted at the hearing."[46] This provision both confers and limits the power of a commission and a hearing examiner. It mandates that a decision be made on evidence submitted at the hearing.

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[39] Act of May 29, 1965, 59th Leg., R.S., ch. 689, § 1, 1965 Tex. Gen. Laws 1593, 1599, formerly TEX. REV. CIV. STAT. ANN. art. 237, § A(1), (3), now TEX. CIV. PRAC. & REM. CODE § 171.088(a)(1), (3)(A).

[40] 9 U.S.C. § 10(1), (4); Pub. L. No. 80-282, 61 Stat. 669 (1947).

[41] *Gulf Oil Corp. v. Guidry*, 327 S.W.2d 406, 408 (Tex. 1959) ("[T]he authority of arbitrators is derived from the arbitration agreement and is limited to a decision of the matters submitted therein either expressly or by necessary implication.").

[42] *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002) ("[W]e have long held that 'an award of arbitrators upon matters submitted to them is given the same effect as the judgment of a court of last resort. All reasonable presumptions are indulged in favor of the award, and none against it.'") (quoting *City of San Antonio v. McKenzie Constr. Co.*, 150 S.W.2d 989, 996 (Tex. 1941)).

[43] TEX. LOC. GOV'T CODE § 143.057(f).

[44] *See*, *e.g.*, *id.* §§ 143.010 and 143.051-.054.

[45] *Id*. § 143.057(f).

[46] *Id*. § 143.010(g).

The hearing examiner in this case violated that requirement. His ruling was based entirely on the absence of the department head, a witness the City did not expect to offer. The hearing examiner did not allow evidence to be presented. Nothing in the Act permitted him to rule as he did. Smith argues that the hearing examiner could reasonably have concluded that since section 143.1015(k) requires the presence of the department head at civil service appeal proceedings in Houston, the same rule should apply in other cities. But the Act does not empower a hearing examiner to make rules. He had no authority to impose on the City a requirement that the Act makes quite clear does *not* apply. Moreover, even when section 143.1015(k) does apply, it does not authorize rendition of a default judgment as an automatic penalty for noncompliance.[47] Smith argues that the hearing examiner can be faulted only for a simple mistake of law, but it clearly exceeds a hearing examiner's jurisdiction to refuse to hear evidence before deciding that a police officer was improperly disciplined, contrary to the express requirement of the Act.

Smith faults the City for not pointing out to the hearing examiner the inapplicability of section 143.1015(k), and for not requesting a continuance. Certainly, the City would have been better served had counsel done so. But the City's failure to object to an incorrect citation cannot expand the jurisdiction of a hearing examiner, any more than it could expand the jurisdiction of a trial court.

We agree with the court of appeals: "[a]sserting that a decision made by the hearing examiner is incorrect is not the same as asserting that the examiner did not have jurisdiction."[48] In borrowing language from the Texas Arbitration Act, the Act appears to intend a restrictive standard for judicial

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[47] *Cf.* § 143.052(f) ("If the department head does not specifically point out in the written statement the act or acts of the fire fighter or police officer that allegedly violated the civil service rules, the commission shall promptly reinstate the person."); *see also* § 143.1015(j) ("In any hearing relating to the appeal or review of an action of the department head that affects a fire fighter or police officer, the department head shall have the burden of proof. The department head is required to prove the allegations contained in the written statement, and the department head is restricted to the written statement and charges, which may not be amended.").

[48] 263 S.W.3d 80, 85 (Tex. App.–Houston [1st Dist.] 2006).

review. But the court of appeals failed to recognize that the Act imposes significant limits on hearing examiners' authority to determine disciplinary action disputes, and the nondelegation doctrine requires enforcement of those limits. Those limits restrict a hearing examiner's jurisdiction. It is difficult to distill from these statutory and constitutional constraints a simple, precise standard for determining whether a hearing examiner has exceeded his jurisdiction. Five courts of appeals have stated that it occurs when the ruling amounts to an abuse of authority.[49] Three of the five have added that "[a]n abuse of authority occurs when a decision is so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law."[50] None of these expressions accurately restates the restrictions on a hearing examiner's authority. Even incidental errors in applying the law may be considered clear and prejudicial, and almost any decision seems unreasonable to the loser. A hearing examiner may exceed his jurisdiction even if his decision is reasoned rather than arbitrary. And while a hearing examiner abuses his authority if he exceeds his jurisdiction, the former phrase does nothing to inform the latter. The most accurate test we can state is that a hearing examiner exceeds his jurisdiction when his acts are not authorized by the Act or are contrary to it, or when they invade the policy-setting realm protected by the nondelegation doctrine.

By that test, the hearing examiner in this case exceeded his jurisdiction, and therefore the City's appeal to the district court was authorized under section 143.057(j). The issue remains whether it was timely perfected. Since the Act does not expressly provide for an appeal by a city —

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[49] *See City of Weslaco v. Lucio*, 2008 Tex. App. LEXIS 9540, 2008 WL 5275244 (Tex. App.–Corpus Christi-Edinburg Dec. 22, 2008); *City of Waco v. Kelley*, 226 S.W.3d 672, 675 (Tex. App.–Waco 2007, pet. granted) (Supreme Court cause number 07-0485); *City of Laredo v. Leal*, 161 S.W.3d 558, 563 (Tex. App.–San Antonio 2004, pet. denied); *City of Garland v. Byrd*, 97 S.W.3d 601, 607 (Tex. App.–Dallas 2002, pet. denied); *Lindsey v. Fireman's & Policeman's Civil Serv. Comm'n*, 980 S.W.2d 233, 236-237 (Tex. App.–Houston [14th Dist.] 1998, pet. denied); *Nuchia v. Tippy*, 973 S.W.2d 782, 786 (Tex. App.–Tyler 1998, no pet.). *But see City of Houston v. Clark*, 252 S.W.3d 561, 567 (Tex. App.–Houston [14th Dist.] 2008, no pet.) ("the district court and [court of appeal] lack jurisdiction to review the merits of the hearing examiner's decision, including issues regarding whether the hearing examiner abused his discretion and ignored or misinterpreted controlling law"); *Bradford v. Pappillion*, 207 S.W.3d 841, 844 (Tex. App.–Houston [14th Dist.] 2006, no pet.) ("although there is overlap between the scope of the abuse of authority standard and the common meaning of the language used in section 143.1016(j), there is little, if any, basis to equate them").

[50] *City of Waco*, 226 S.W.3d at 675; *City of Laredo*, 161 S.W.3d at 563; *City of Garland*, 97 S.W.3d at 607.

we have construed it to do so to avoid constitutional problems — it understandably does not expressly set a deadline for a city's appeal. We have held that "[w]hen a statute lacks an express limitations period, courts look to analogous causes of action for which an express limitations period is available either by statute or by case law."[51] Here, the parties disagree as to whether a deadline for appeal is jurisdictional or in the nature of limitations, and we need not resolve that issue. In either event, the same rule applies: we look to a provision related to the right of appeal for a deadline. There are two possibilities in the Act. One is section 143.1016(j), applicable only to Houston, which provides that "[i]f the basis for the appeal of the hearing examiner's award is based on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction, the petition must be filed in district court within 10 days of the hearing examiner's decision."[52] The other is section 143.015(a), which applies to other cities:

> If a fire fighter or police officer is dissatisfied with any commission decision, the fire fighter or police officer may file a petition in district court asking that the decision be set aside. The petition must be filed within 10 days after the date the final commission decision:
>
> (1) is sent to the fire fighter or police officer by certified mail; or
>
> (2) is personally received by the fire fighter or police officer or by that person's designee.[53]

We think the latter is the more closely analogous provision in this case, so that the same deadline applies to all appellants other than in Houston, whether cities, officers, or fire fighters.

The undisputed facts are that the hearing examiner issued his ruling on March 31, 2005, that the decision was sent by regular mail to the City on April 7, that it was received April 11, and that the City filed its petition in the district court on April 20. Since the decision was not sent by certified

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[51] *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 518 (Tex. 1998).

[52] TEX. LOC. GOV'T CODE § 143.1016(j); see also § 143.101(a).

[53] *Id.* § 142.015(a).

mail, subsection (1) of section 143.015(a) does not apply. Under subsection (2), the City's petition, filed nine days after receipt, was timely.

Accordingly, we reverse the judgment of the court of appeals and remand the case to the district court for further proceedings consistent with this opinion.

Nathan L. Hecht
Justice

Opinion delivered: August 28, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0979

SONAT EXPLORATION COMPANY, PETITIONER,

v.

CUDD PRESSURE CONTROL, INC., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

Argued February 6, 2008

JUSTICE BRISTER delivered the opinion of the Court.

This case returns to us after we ordered that an insurer be allowed to argue on appeal a choice-of-law issue that its insured had waived.[1] The court of appeals sustained the insurer's point, finding that Louisiana law applied because it was the place the contract was performed and was impliedly chosen by the parties. While we disagree with those reasons, we agree with the court's ultimate conclusion that Louisiana law applies and that remand is required. Accordingly, we affirm.

I. Background

Sonat Exploration Company and Cudd Pressure Control, Inc. signed a Master Service Agreement in May 1998 to govern oilfield services Cudd was to perform for Sonat. The agreement

[1] *See In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718 (Tex. 2006).

contemplated operations in at least four places, and specified the law for three of them. It required each company to indemnify the other for claims brought by their respective employees. It also required on jobs in Louisiana that Cudd name Sonat as an additional insured on its insurance policies.

In October 1998, an explosion at one of Sonat's Louisiana wells killed seven workers, including four Cudd employees. When the survivors of those four sued Cudd and Sonat in Texas, Sonat demanded indemnity but Cudd refused it. Sonat also demanded coverage as an additional insured from Cudd's insurer, Lumbermens Mutual Casualty Company, and again was refused. Sonat filed an indemnity claim against Cudd in the survivors' suit, and a separate lawsuit asserting claims against Lumbermens as an additional insured and alternatively against Cudd for failing to name Sonat as an additional insured.

Sonat and Cudd jointly settled with one of the four Cudd employees, but could not agree on settlement amounts for the other three. Eventually Sonat alone paid about $28 million to settle those claims, for which it seeks indemnity from Cudd.

The trial court found the parties' indemnity agreement enforceable under Texas law, and after a jury found a reasonable settlement would have been $20,719,166.74, the trial court entered judgment in that amount for Sonat and against Cudd. Cudd filed a notice of appeal, and Lumbermens as its insurer posted $29 million as security.

II. The Choice-of-Law Appeals

Before filing its appellate brief, Cudd signed a Rule 11 agreement with Sonat waiving its argument that Louisiana law applied, in return for which Sonat agreed to nonsuit its separate contract

suit. When the court of appeals refused to allow Lumbermens to intervene to assert Louisiana law, we granted mandamus relief, noting that otherwise the Rule 11 agreement might allow Cudd to "foist[] liability for uninsured claims onto its insurer."[2]

On remand, the court of appeals agreed with Lumbermens' arguments and reversed the trial court's application of Texas law, and then remanded for unspecified further proceedings.[3] From that judgment, Sonat appeals claiming its indemnity was valid under Texas law; Lumbermens responds that it was invalid under Louisiana law; and Cudd conditionally appeals claiming it was invalid even under Texas law.

We need not decide which state's laws apply unless those laws conflict.[4] Under Texas law, oilfield indemnity clauses are valid if they are mutual and supported by liability insurance.[5] Under Louisiana law, such clauses are invalid if the party seeking indemnity was negligent or strictly liable.[6] The parties all agree, as do we, that these laws conflict.

Choosing the applicable law is obviously a question of law, but the contacts to be considered may raise a question of fact.[7] As the trial court made its decision here by summary judgment, we

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[2] *Id.* at 728.

[3] 202 S.W.3d 901.

[4] *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 672 (Tex. 2004).

[5] TEX. CIV. PRAC. & REM. CODE § 127.005; *Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344, 346 (Tex. 2000).

[6] *See* LA. REV. STAT. § 9:2780.

[7] *Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 204 (Tex. 2000).

construe all fact questions against the movant (Sonat),[8] and then review the trial court's legal decision de novo.[9]

Under Texas choice-of-law rules governing contracts (including oilfield indemnity clauses), we look to the Restatement (Second) of Conflict of Laws — specifically section 187 for contracts that contain an express choice of law, and section 188 for those that do not.[10] Accordingly, we begin our analysis with those sections.

III. Did the Parties Choose Louisiana Law?

The parties' Master Service Agreement contains a detailed choice-of-law provision, but none of it applies to this case. The provision states that the governing law will be: (1) maritime law for operations on navigable waters, and (2) Texas law for operations on land in Texas and New Mexico.[11] As the drilling site here was on land in Louisiana, neither circumstance applies.

Lumbermens argues the parties impliedly chose Louisiana law by two other provisions in the agreement that refer to work done in Louisiana: (1) a paragraph designating Sonat as a "statutory

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[8] *Id*. at 205.

[9] *See Texas Mun. Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184, 192 (Tex. 2008) (applying de novo review to summary judgment); *Texas Dept. of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002) ("We review legal questions de novo.").

[10] *Maxus Exploration Co. v. Moran Bros., Inc*., 817 S.W.2d 50, 53 (Tex. 1991); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 173 cmt. b (1971).

[11] Paragraph 24.7 of the Master Service Agreement states:

> This Agreement and the legal relations among the parties hereto shall be governed and construed in accordance with the general maritime law of the United States whenever any performance is contemplated in, on, or above navigable waters, whether onshore or offshore. As respects particular Work involving non-maritime operations in the State of New Mexico, the State of Texas or offshore of the State of Texas, the internal laws of the State of Texas, without regard to principles of conflicts of law, shall apply in the even that maritime law is held inapplicable.

employer" of Cudd's employees for Louisiana workers compensation coverage;[12] and (2) an attachment requiring Cudd to name Sonat as an additional insured for such work. The court of appeals held that because the latter provision is the "only effective way to obtain indemnity" in Louisiana, it should be treated as a choice by the parties to apply Louisiana law.[13] We disagree.

The Restatement recognizes that even if there is no explicit choice of law, use of legal terms or doctrines peculiar to one state "may provide persuasive evidence that the parties wished to have this law applied."[14] If this case concerned workers compensation, the specific reference to Louisiana's compensation law would undoubtedly require that law to apply.[15]

But the indemnity provisions at issue here make no reference to Louisiana law. To the contrary, they are printed in all capital letters, which appears to refer to Texas law (as it requires conspicuous notice[16]) rather than Louisiana law (as it voids indemnities whether conspicuous or not).

Nor can we surmise from references to Louisiana operations in two paragraphs that the parties intended Louisiana law to apply to all the rest. The Master Service Agreement is 21 pages long with 92 separately denominated paragraphs; had the parties intended to choose Louisiana law for all paragraphs rather than just one or two, it is odd they did not say so in some more general way.

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[12] Louisiana law shields a "statutory employer" from tort liability. *See* LA. REV. STAT. § 23:1061.

[13] 202 S.W.3d 901, 909–10.

[14] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. a (1971).

[15] *See Hughes Wood Prods., Inc. v. Wagner,* 18 S.W.3d 202, 205 (Tex. 2000).

[16] *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993) (stating that fair notice requirements applicable to indemnities include a conspicuousness requirement "that something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it") (quoting *Ling & Co. v. Trinity Sav. & Loan Ass'n*, 482 S.W.2d 841, 843 (Tex. 1972)).

Finally, if the additional-insured provision was an attempt to avoid the effect of Louisiana's indemnity law, that is no evidence the parties affirmatively chose to apply it. Provisions to *avoid* the effects of one state's laws may tell us something about the parties' expectations (a matter addressed below), but it can hardly be treated as an affirmative *election* of that law.

The objectives behind choice-of-law rules generally and the Restatement rules in particular "may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby."[17] But the parties must make that choice themselves. As the parties here failed to choose one law for all purposes in Louisiana, we must determine the applicable law on other grounds.

IV. What Law Applies in Multistate Contracts?

Restatement section 188 provides that "an issue in contract [is] determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties."[18] In making that decision, we take into account the contacts listed in section 188 and the principles listed in section 6.[19]

A. The Section 188 Contacts

Section 188 lists five contacts to be taken account: (a) the place of contracting, (b) the place of negotiation, (c) the place of performance, (d) the location of the subject matter, and (e) the

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[17] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1971).

[18] *Id.* § 188(1).

[19] *Id.* § 188(1)–(2); *see Maxus Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50, 53 (Tex. 1991).

domicile, place of incorporation, and place of business of the parties.[20] As will often be the case with multistate contracts, in this case those contacts point in few (or perhaps too many) directions.

The place of contracting is technically Texas, as the last signature was added there.[21] But neither the place of contracting nor the place of negotiation is significant when (as occurred here) the parties conduct both from offices in different states.[22] Nor is the location of the subject matter significant when the parties contemplate services in several different states.[23] Nor is the place of incorporation significant, as nothing suggests these two Delaware corporations ever contemplated oilfield work there.[24]

Cudd's place of business is arguably significant because oilfield indemnity statutes are intended to protect contractors from unfair bargaining.[25] But that place is itself unclear. The Master

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[20] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971).

[21] *Id.* § 188 cmt. e ("[T]he place of contracting is the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect . . . .").

[22] *Id.* ("Standing alone, the place of contracting is a relatively insignificant contact."); *id.* ("The place where the parties negotiate . . . is of less importance when there is no one single place of negotiation and agreement, as, for example, when the parties do not meet but rather conduct their negotiations from separate states by mail or telephone.").

[23] *Id.* ("When the contract deals with a specific physical thing, such as land or a chattel, or affords protection against a localized risk, such as the dishonesty of an employee in a fixed place of employment, the location of the thing or of the risk is significant.") (citation omitted).

[24] *Id.* ("At least with respect to most issues, a corporation's principal place of business is a more important contact than the place of incorporation, and this is particularly true in situations where the corporation does little, or no, business in the latter state.").

[25] *Id.* § 188 cmt. c ("So the state where a party to the contract is domiciled has an obvious interest in the application of its contract rule designed to protect that party against the unfair use of superior bargaining power."); *see also Roberts v. Energy Dev. Corp.*, 235 F.3d 935, 943 (5th Cir. 2000) (disregarding parties' choice of Texas law and applying Louisiana law to void indemnity as that was place of business of oilfield contractor); *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 177–78 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *cf. Maxus Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50, 57 (Tex. 1991) ("One can argue that the Texas Legislature's purpose in enacting chapter 127 is to protect Texas contractors who work on mineral wells and mines wherever they may

Service Agreement lists an Oklahoma address for Cudd. Cudd filed a February 2000 affidavit by its president swearing that its principal place of business was in Louisiana. Sonat found and filed a June 1999 affidavit from the same officer in a different lawsuit swearing that "nearly all of the higher level management decisions" are made in Georgia, that "the company generally advertises within the industry that its main office is located in Houston," and that "[m]ost of the department heads are located either in Houston (engineering) or Houma, Louisiana (accounting, payroll and risk management)." Suffice it to say that Cudd's place of business appears to be flexible.

This leaves only the place of performance. The court of appeals found this contact dispositive,[26] relying on our opinion in *Maxus Exploration Co. v. Moran Bros., Inc*.[27] In *Maxus*, we held that section 196 of the Restatement makes the place of performance of "paramount importance" with respect to service contracts.[28] We reserved in *Maxus* the question whether the place of performance is where the drilling or the suing takes place.[29]

But section 196 applies only to service contracts involving a single state; it does not apply to contracts like this one contemplating services in many states:

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be situated, but we think it more plausible that it had the more limited objective of protecting contractors who drill wells in Texas.") (emphasis omitted).

[26] 202 S.W.3d 901, 906, 909.

[27] 817 S.W.2d 50, 53 (Tex. 1991).

[28] *Id*.; *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196 cmt. c (1971).

[29] 817 S.W.2d at 54; *see Chesapeake*, 94 S.W.3d at 171-72 ("Nabors' claim in both cases is for liability and legal services incurred in Texas, not for drilling services performed in Louisiana. Considering only the particular issue in dispute, the place of performance of that obligation was in Texas."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971) ("The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, *with respect to that issue*, has the most significant relationship to the transaction and the parties . . . .") (emphasis added).

> The rule [of section 196] applies if the major portion of the services called for by the contract *is to be rendered in a single state and it is possible to identify this state at the time the contract is made*. It is necessary that the contract should state where the major portion of the services is to be rendered or that this place can be inferred either from the contract's terms or from the nature of the services involved or from other circumstances. For this reason, *the rule of this Section is unlikely to aid in the determination of the law . . . when the work called for by the contract can be done in any one of two or more states*.[30]

As no single state would have "loomed large" in the parties' minds when signing this agreement,[31] the contacts analysis suggests only that the law of several states might apply.

B. The Section 6 Principles

The Restatement lists seven non-exclusive factors to be considered in determining the applicable law.[32] But it deems one of them most significant in contract cases: "Protection of the justified expectations of the parties is the basic policy underlying the field of contracts."[33] Enforcing contracts according to their own terms satisfies the relevant policies of the forum,[34] enhances certainty, predictability, and uniformity of result, and facilitates commerce and relations with other

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[30] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196 cmt. a (1971) (emphasis added).

[31] *Id*. § 196 cmt. c ("Several factors serve to explain the importance attributed by the rule to the place where the contract requires that the services, or a major portion of the services, be rendered. The rendition of the services is the principal objective of the contract, and the place where the services, or a major portion of the services, are to be rendered will naturally loom large in the minds of the parties.").

[32] *Id*. § 6(2) ("[T]he factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.").

[33] *Id*. § 188 cmt. b; *see id*. § 6(2)(d)–(e).

[34] *Id*. § 188 cmt. b; *see id*. § 6(2)(e); *see also Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008) (noting state's "paramount" public policy that "contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by [c]ourts of justice").

states and nations.[35] Accordingly, the parties' expectations as stated in their contract should not be frustrated by applying a state law that would invalidate the contract, at least not unless those expectations are substantially outweighed by the interests of the state with the invalidating rule.[36]

As already noted, for work in Louisiana the parties expressly provided that Sonat would be covered (at its own expense) as an additional insured under Cudd's insurance policies. Why insert this special provision applicable only to Louisiana jobs? Additional-insured agreements are common and enforceable in other places too.[37] The only explanation is that the parties expected their cross-indemnities might not be enforceable there.

Sonat argues that the additional-insured provision was inserted simply to make sure indemnity occurred — that it was merely a belt-and-suspenders provision. But both belt and suspenders are unnecessary unless a person expects trouble with one of them. While we agree the parties expected Sonat to be indemnified one way or the other, including this provision solely for Louisiana jobs suggests they also expected trouble enforcing their indemnities in such cases.

Sonat points out that the Restatement urges courts to avoid applying a law that would invalidate the parties' contract, *even if the parties had specifically picked it*,[38] and argues that

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[35] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(a), (f) (1971); *Chesapeake*, 94 S.W.3d at 177.

[36] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. b (1971); *see DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990).

[37] *See, e.g.*, *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 670 (Tex. 2008).

[38] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1971) ("On occasion, the parties may choose a law that would declare the contract invalid. In such situations, the chosen law will not be applied by reason of the parties' choice. To do so would defeat the expectations of the parties which it is the purpose of the present rule to protect . . . . If the parties have chosen a law that would invalidate the contract, it can be assumed that they did so by mistake."); *id.* § 188 cmt. b ("Parties entering a contract will expect at the very least, subject perhaps to rare exceptions, that the provisions of the contract will be binding upon them.").

Louisiana law would invalidate the cross-indemnities here. But that is not entirely true; Louisana law would invalidate Sonat's indemnity only if Sonat was negligent or strictly liable,[39] an issue that has never been decided. Similarly, Texas law would partially invalidate these unlimited indemnities by limiting them to the agreed amount of insurance coverage.[40] Thus, we can avoid all invalidating rules only by avoiding both Texas and Louisiana law. No party suggests we go that far.

We do not hold today that Louisiana law should cover all indemnity disputes stemming from oilfield accidents there. When a contract involves oilfield work in many states, sophisticated parties should generally be free to designate the law that will govern their relationship and have that choice respected.[41] But the parties here chose no law for Louisiana jobs, and included an additional-insured provision that would have been superfluous had they expected their indemnities to be enforceable in such cases. Because contracts should be governed by the law the parties had in mind when the contract was made,[42] we hold in these circumstances that Louisiana law applies.

V. Did Cudd Waive Application of Louisiana Law?

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[39] *See* LA. REV. STAT. § 9:2780.

[40] TEX. CIV. PRAC. & REM. CODE § 127.005(b).

[41] *DeSantis*, 793 S.W.2d at 677; *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 180 (Tex. App.—Houston [14th Dist.] 2002, no pet.) ("Because these sophisticated parties drafted a contract to meet Texas law, and deemed it to apply, we believe they should have what they bargained for."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

[42] *DeSantis*, 793 S.W.2d at 677 ("[I]n every forum, a contract is governed by the law with a view to which it was made.") (quoting *Wayman v. Southard*, 23 U.S. 1, 48 (1825)); *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. b (1971).

Sonat argues that even if Louisiana law applies, Cudd should not benefit from such a holding because, in accordance with their Rule 11 agreement, Cudd never asserted that issue on appeal. In the unique circumstances here, we disagree.

It is of course true that an appellate court cannot reverse on a ground an appellant has never raised.[43] But while Cudd did not raise the choice-of-law issue, Lumbermens did so on its behalf. Lumbermens does not appear here on its own behalf, as it has neither sued nor been sued by anyone; instead, it stands in the shoes of its insured. As we noted in the earlier original proceeding, under the doctrine of virtual representation Lumbermens is not technically intervening as a separate party, but "is already deemed to be a party."[44] While insurer and insured are asserting different legal theories regarding choice of law, both still share the identity of interest created by their insurance contract.[45]

Moreover, we believe the result would be the same even if we treated Cudd and Lumbermens as separate parties on appeal. Generally, reversal in favor of a party that appealed does not require reversal in favor of another who did not.[46] But an exception applies when the rights of appealing and nonappealing parties "are so interwoven or dependent on each other as to require a reversal of the

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[43] TEX. R. APP. P. 53.2(f) ("If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the court of appeals."); *see, e.g.*, *Pat Baker Co., Inc. v. Wilson*, 971 S.W.2d 447, 450 (Tex. 1998); *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993).

[44] *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 722 (Tex. 2006).

[45] *Id.* at 724 ("That different legal theories may be asserted to defend those funds does not defeat the identity of interest between Lumbermens and Cudd that the insuring contract creates and the virtual-representation doctrine protects.").

[46] *Pat Baker Co.*, 971 S.W.2d at 450; *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 92 (Tex. 1973).

entire judgment."[47] For example, when only one government agency successfully appealed an expunction decision, we held the reversal must also apply to other agencies that failed to appeal, because leaving a criminal record at some agencies but not others would provide neither party "full and effective relief."[48]

The same is true here: if Cudd is still bound to the trial court judgment, so is Lumbermens as its liability insurer.[49] Sonat has not asserted a direct action in this case against Lumbermens;[50] but it can recover against Lumbermens if it can recover against Cudd.[51] The $29 million Lumbermens pledged to secure the trial court judgment during this appeal is payable to Sonat unless Lumbermens' successful appeal applies not just to itself but also to its insured.[52] The exception extending reversals to nonappealing parties has most often been applied when indemnity claims or other dependent claims are involved,[53] which is precisely the case here.

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[47] *Ex parte Elliot*, 815 S.W.2d 251, 251 (Tex. 1991); *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 166 (Tex. 1982).

[48] *Ex parte Elliot*, 815 S.W.2d at 252.

[49] *In re Lumbermens*, 184 S.W.3d at 723 ("Lumbermens contends the court of appeals abused its discretion in rejecting Lumbermens' intervention because, as Cudd's insurer and the party that posted the appellate security, Lumbermens is bound by the judgment in the case.").

[50] *See* TEX. R. CIV. P. 38(c) (prohibiting direct actions in tort against insurer); TEX. R. CIV. P. 51(b) (same).

[51] *Angus Chem. Co. v. IMC Fertilizer, Inc.*, 939 S.W.2d 138, 139 (Tex. 1997).

[52] *In re Lumbermens*, 184 S.W.3d at 725 ("Lumbermens has pledged $29 million to secure the judgment in Sonat's favor. Even if Lumbermens could eventually recoup the amount it has pledged through a potential coverage suit against Cudd, its obligation to pay the underlying judgment to Sonat is immediate and binding in the event Cudd's appeal is unsuccessful.").

[53] *See Pat Baker Co., Inc. v. Wilson*, 971 S.W.2d 447, 450 (Tex. 1998); *see, e.g.*, *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 447 (Tex. 1989) (holding indemnity claim between defendants had to be retried as it depended on outcome of negligence case against indemnitor); *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 166 (Tex. 1982) (same); *see also Torrington Co. v. Stutzman*, 46 S.W.3d 829, 844 (Tex. 2000) (holding

We understand Sonat's complaint that it is unfair to let Cudd escape the burden of its Rule 11 agreement while Sonat cannot. But as recognized before, Sonat and Cudd intended this agreement to shift all potential liability to Cudd's insurer.[54] In some circumstances, such agreements are against public policy and unenforceable.[55] While we have no occasion to question that agreement here, we think Sonat's complaint of unfairness is outweighed by the requirements that an insurer must act in good faith on behalf of its insured.

VI. Should We Remand or Render?

Finally, Cudd complains that the court of appeals should have rendered judgment against Sonat's indemnity claim rather than remanding for further proceedings. But as already noted, neither the trial court nor the jury found Sonat negligent or strictly liable, and without such a finding the plain terms of Louisiana's law do not appear to apply:

> Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is *caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee*, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.[56]

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defendant/indemnitor who would have to pay second defendant/indemnitee's judgment was entitled to appeal that judgment).

[54] *In re Lumbermens*, 184 S.W.3d at 728 ("[I]f Lumbermens is not permitted to intervene and the choice-of-law issue is meritorious, Cudd will have essentially foisted liability for uninsured claims onto its insurer.").

[55] *See State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 713 (Tex. 1996) (invalidating assignment of bad faith claims on public policy grounds when insured abandoned its natural position in order to take advantage of insurer); *see also GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 311 (Tex. 2006) (declining to adopt true-facts exception to eight-corners rule as record showed no evidence of collusive pleading).

[56] LA. REV. STAT. § 9:2780(B) (emphasis added).

We recognize that in 1988 the Fifth Circuit made an *Erie*-guess that a settlement (like Sonat's) precluded indemnity claims under Louisiana's oilfield indemnity law.[57] Since then, at least two Louisiana intermediate appellate courts have held otherwise.[58] The Fifth Circuit has stuck to its position under an internal rule that it must follow its own precedent until the state's highest court has ruled on the matter.[59] As we are not bound by that rule, we apply what appears to be the plain meaning of the statute and the rulings of Louisiana's own courts.

In the course of arguing that Texas law should apply, Sonat has argued that Louisiana law would void its indemnity. But it has never conceded negligence; to the contrary, its settlement documents specifically denied any liability. As we have rejected Sonat's conclusion that Louisiana law would inevitably void its indemnity, we decline to use that argument against it and hold that it waived any dispute regarding negligence.

Accordingly, although we disagree with the court of appeals' reasoning, we affirm its judgment reversing the application of Texas law and remanding to the trial court for further proceedings applying Louisiana law.

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Scott Brister
Justice

OPINION DELIVERED: November 21, 2008

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[57] *Tanksley v. Gulf Oil Corp.*, 848 F.2d 515, 518 (5th Cir. 1988).

[58] *Ridings v. Danos & Curole Marine Contractors, Inc.*, 723 So.2d 979, 983 (La. App. 4 Cir. 1998); *Phillips Petroleum Corp. v. Liberty Servs., Inc.*, 657 So.2d 405, 409 (La. App. 3 Cir. 1995).

[59] *Roberts v. Energy Dev. Corp.*, 235 F.3d 935, 944 (5th Cir. 2000).

IN THE SUPREME COURT OF TEXAS

NO. 06-0987

UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONER,

v.

LOUIS GOUDEAU, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued December 6, 2007

JUSTICE BRISTER delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE MEDINA, and JUSTICE WILLETT.

JUSTICE GREEN filed a dissenting opinion in which CHIEF JUSTICE JEFFERSON and JUSTICE JOHNSON joined.

One can imagine few more sympathetic litigants than Louis Goudeau, a "Good Samaritan" who stopped his car on a Houston freeway to help a stranded motorist. After leaving his car to approach the disabled one, Goudeau was severely injured when a third driver smashed into both cars and pinned him between them and a retaining wall.

There is no question Goudeau can recover from the driver who caused this accident — he already has. But that driver had only $20,000 in insurance. The question instead is whether Goudeau can recover under his employer's underinsured motorist policy, which applies only if

Goudeau was "occupying" his car at the time of the accident. The court of appeals found a fact question on that issue, even though Goudeau had exited his car, closed the door, and walked around the front toward the retaining wall when the accident occurred.

It is natural to sympathize with a litigant who has suffered harm caused by someone who cannot pay the consequences. But if sympathy were a rule of contract construction, there would soon be no law of contracts left. Under the insurance policy here, Goudeau was not "occupying" his car at the time of the accident, so he cannot recover under this policy.

I. The Background

Goudeau worked for Advantage BMW, and was driving one of its cars in the course of his employment. He stopped on the right shoulder of the Sam Houston Tollway to help another driver who had collided with the freeway's retaining wall. After getting out of his car and walking around the front toward the retaining wall, a car driven by Alex Rodriguez slammed into both parked cars, pinning Goudeau against the retaining wall and crushing his pelvis.

Advantage BMW had two policies with United States Fidelity & Guaranty Company ("USF&G"): a workers compensation policy, and an auto policy with uninsured/underinsured coverage of $1 million. USF&G paid more than $100,000 in benefits to Goudeau and his medical providers under the compensation policy, but denied benefits under the underinsured-motorist policy.

A year after Goudeau filed suit against Rodriguez, the latter tendered his policy limits of $20,000. Goudeau then amended to sue USF&G for breach of the underinsured-motorist policy. USF&G answered using one law firm, and a few days later intervened using a different law firm to

assert its $100,000 statutory subrogation claim against the money Goudeau recovered in the suit.[1]

The trial court granted summary judgment against Goudeau on his underinsured claim. The court of appeals reversed and remanded for trial, finding a fact issue as to whether Goudeau was "occupying" his vehicle.[2]

II. The Policy Question

The underinsured policy here covered certain designated Advantage BMW employees, as well as any others "occupying" an Advantage vehicle during a collision. Goudeau was not designated in the policy, so there is no coverage unless he was "occupying" a covered car when the collision occurred. The standard-form policy defined "occupying" as "in, upon, getting in, on, out or off."

Goudeau concedes he was not "in" his car when the accident occurred, nor was he in the process of "getting in, on, out, or off" of it. He asserts coverage only on the ground that he was "occupying" the car by being "upon" it when he was injured.

Under the traditional canon of construction *noscitur a sociis* ("a word is known by the company it keeps"), each of the words used here must be construed in context.[3] In this context, a person sitting in the back of a pickup at the time of an accident might be "occupying" the vehicle by being "upon" it.

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[1] *See* TEX. LAB. CODE § 417.002. Goudeau raised no objection to USF&G's intervention in his pleadings or summary judgment response.

[2] 243 S.W.3d 1, 10. The portion of the court of appeals' judgment affirming summary judgment against Goudeau's former wife Tasha, *see id.* at 5-6, has not been appealed.

[3] *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 750 (Tex. 2006).

But a driver who has exited the car, closed the door, walked around the front, and then has the vehicle smashed into him cannot be said to be "occupying" the vehicle at the time of the collision, even if afterwards he ends up partly "upon" it. We cannot ignore the context by focusing solely on "upon" and ignoring "occupying." Construing "upon" to include the situation here would "ascrib[e] to one word a meaning so broad that it is inconsistent with its accompanying words."[4]

The court of appeals adopted a test requiring claimants to show only "a causal connection between the incident that caused the injury and the covered vehicle."[5] We have required such a causal connection when deciding whether an uninsured motorist claim "arises out of" the use of a motor vehicle,[6] but that is not the same question as whether a person was "occupying" a covered car. The court of appeals cited several cases denying coverage to non-occupants when a covered car had no causal connection to an accident,[7] but that does not imply the opposite: that if a covered car has a causal connection to an accident, then everyone injured must have been "occupying" the covered car. Bystanders, pedestrians, and occupants of other vehicles are not "occupying" a covered car merely because it was somehow involved.

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[4] *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

[5] 243 S.W.3d at 8.

[6] *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 156 (Tex. 1999).

[7] 243 S.W.3d at 8 (citing *McDonald v. So. County Mut. Ins. Co.*, 176 S.W.3d 464, 471 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *McKiddy v. Trinity Lloyd's Ins. Co.*, 155 S.W.3d 307, 309 (Tex. App.—Dallas 2004, pet. denied); *Ins. Co. of the State of Penn. v. Pearson*, No. 07-03-0340-CV, 2004 WL 2053285 at *1 (Tex. App.—Amarillo Sept. 7, 2004, no pet.); *Schulz v. State Farm Mut. Auto. Ins. Co.*, 930 S.W.2d 872, 875-76 (Tex. App.—Houston [1st Dist.] 1996, no pet.); *Fulton v. Tex. Farm Bureau Ins. Co.*, 773 S.W.2d 391, 393 (Tex. App.—Dallas 1989, writ denied)).

Neither party asks us to look to the law of other states on this question, and a brief review shows why. In deciding whether a person was "occupying" a covered vehicle under an uninsured/underinsured policy, the states have employed a multitude of surrogate tests, including:

- a four-pronged test;[8]
- a three-pronged test;[9]
- a position-of-safety test;[10]
- a severed-relationship test;[11]
- a chain-of-events test;[12]
- a substantial-nexus test;[13]

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[8] *See Gen. Accident Ins. Co. v. D'Alessandro*, 671 A.2d 1233, 1235 (R.I. 1996) (requiring (1) causal connection between injury and insured vehicle, (2) reasonably close geographic proximity to vehicle, (3) vehicle-orientation rather than highway-orientation or sidewalk-orientation, and (4) engagement in transaction essential to use of the vehicle); *Kentucky Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164, 168 (Ky. 1992) (same); *Utica Mut. Inc. v. Contrisciane*, 473 A.2d 1005, 1009 (Pa. 1984) (same).

[9] *See Butzberger v. Foster*, 89 P.3d 689, 696 (Wash. 2004) (rejecting fourth prong of four-prong test).

[10] *See Olsen v. Farm Bureau Ins. Co.*, 609 N.W.2d 664, 670 (Neb. 2000) (holding passenger was in the process of getting out of vehicle until he reached a position of safety away from the car); *Joins v. Bonner*, 504 N.E.2d 61, 63 (Ohio 1986) (same).

[11] *See Moherek v. Tucker*, 230 N.W.2d 148, 152 (Wis. 1975) (holding plaintiff "had not severed his relationship with the vehicle" while holding spare tire between cars so one could push the other without scratching their bumpers).

[12] *See Dawes v. First Ins. Co. of Hawai'i*, 883 P.2d 38, 53 (Haw. 1994) (finding coverage as occupancy if insured vehicle "started the chain of events" that resulted in injury).

[13] *See Torres v. Travelers Indem. Co.*, 793 A.2d 592, 593 (N.J. 2002) ("[I]n order to obtain UM coverage where occupancy is in issue, a plaintiff is required to establish a substantial nexus between the insured vehicle and the injury sustained.").

- a reasonable-relationship test;[14]
- a close-proximity test;[15]
- a vehicle-orientation test;[16]
- a close-proximity *or* vehicle-use test;[17]
- a close-proximity *and* vehicle-use test;[18] and last but not least,
- a plain-and-ordinary-meaning test.[19]

Under Texas law, we are required to construe insurance policies according to their plain language,[20] using "the ordinary, everyday meaning of the words to the general public."[21] While we

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[14] *See Genthner v. Progressive Cas. Ins. Co.*, 681 A.2d 479, 482 (Me. 1996) (holding attempt to apprehend hit-and-run driver was "directly and reasonably related to the operation and use of the insured vehicle"); *Sayers v. Safeco Ins. Co. of Am.*, 628 P.2d 659, 661 (Mont. 1981).

[15] *See Newman v. Erie Ins. Exch.*, 507 S.E.2d 348, 350 (Va. 1998) (holding child crossing street was not in close proximity to school bus and thus not "occupying" it).

[16] *See Miller v. Amica Mut. Ins. Co.*, 931 A.2d 1180, 1182-83 (N.H. 2007); *Allstate Ins. Co. v. Graham*, 750 P.2d 1105, 1106 (N.M. 1988) (holding claimant "was simply not engaged in a transaction oriented to the use of the [covered auto] at the time of the accident").

[17] *See Nat'l Union Fire Ins. Co. v. Fisher*, 692 A.2d 892, 896 (Del. 1997) ("[A] person is considered an occupant of the covered vehicle if he or she is either: (a) within a reasonable geographic perimeter of the vehicle or (b) engaged in a task related to the operation of the vehicle.").

[18] *See Simpson v. United States Fid. & Guar. Co.*, 562 N.W.2d 627, 629 (Iowa 1997) ("'Courts have examined the relationship between the vehicle and the claimant, both as to geographical proximity and the orientation of the claimant's activities, to decide whether a particular claimant was "occupying" the insured vehicle at the time of his or her injury'") (quoting *Tropf v. Am. Family Mut. Ins. Co.*, 558 N.W.2d 158, 160 (Iowa 1997)).

[19] *See Keefer v. Ferrell*, 655 S.E.2d 94, 99 (W.Va. 2007); *Allied Mut. Ins. Co. v. West. Nat'l Mut. Ins. Co.*, 552 N.W.2d 561, 563 (Minn. 1996); *Cook v. Aetna Ins. Co.*, 661 So.2d 1169, 1172-73 (Ala. 1995); *Marcilionis v. Farmers Ins. Co.*, 871 P.2d 470, 472-73 (Ore. 1994).

[20] *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007); *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 158 (Tex. 2003).

[21] *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746 (Tex. 2006).

strive for uniform construction when policy language is used in many other states (as is the case here),[22] the many different tests already in use render uniformity impossible. Accordingly, we adhere to the law of Texas (and some of our sister states) that the plain meaning of "occupying" as defined in this policy cannot be stretched to include Goudeau.

III. The Request for Admission

Alternatively, Goudeau argues (and the dissent agrees) that USF&G admitted coverage in response to a request for admission. But as the court of appeals correctly recognized, the carrier appeared in two different capacities, and a request sent to it in one capacity cannot be used against it in another.[23]

The plaintiffs requested that USF&G admit Goudeau was covered under the underinsured motorist policy. But they did not send the request to the lawyer representing USF&G on that policy; they sent it instead to the lawyer representing USF&G as intervenor under the worker's compensation policy. In the latter capacity, USF&G stood "in the shoes of the insured," asserting only claims that belonged to Goudeau.[24] By contrast, USF&G in its capacity defending the underinsured policy stood in the shoes of the underinsured motorist.[25] The plaintiffs already knew that intervenor USF&G asserted coverage and that defendant USF&G denied it, as that is what each of their pleadings said.

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[22] *Id*. at 752.

[23] 243 S.W.3d at 2.

[24] *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 774 (Tex. 2007).

[25] *Mid-Century Ins. Co. v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999); *Laurence v. State Farm Mut. Auto. Ins. Co.*, 984 S.W.2d 351, 353 (Tex. App.—Austin 1999, writ denied).

Rule 198 expressly provides that a response to a request for admission can only be used against "the party making the admission":

> Any admission made by a party under this rule may be used solely in the pending action and not in any other proceeding. A matter admitted under this rule is conclusively established *as to the party making the admission* unless the court permits the party to withdraw or amend the admission.[26]

The question here is how that rule applies when a party appears in two different capacities.

Although requests for admissions have been in use for more than 60 years, there appears to be only a single case directly answering this question. In *Krasa v. Derrico*, decided five years after requests for admission were first adopted,[27] the plaintiffs sent requests for admission to Mabel Krasa, which she failed to answer. The Fourth Court of Appeals held the deemed requests could support judgment against Krasa individually, but not against her as executor of her husband's estate, as the requests were not directed to her in that capacity.[28]

We think *Krasa* is correct. We have repeatedly held in other contexts that a party appears only in the capacity in which it is named. Thus:

- a suit against a government official in an official capacity is not a suit against the official individually;[29]
- a suit against a partnership is not binding on a partner who was served but not named in his individual capacity;[30]

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[26] TEX. R. CIV. P. 198.3 (emphasis added).

[27] 193 S.W.2d 891, 893 (Tex. Civ. App.—San Antonio 1946, no writ).

[28] *Id*. at 892–93.

[29] *Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007).

[30] *Kao Holdings, L.P. v. Young*, 261 S.W.3d 60, 65 (Tex. 2008).

- a suit is binding against a parent and a minor for whom they appear as next friend only if the parent was named in both capacities;[31] and
- a judgment cannot be entered against a trust when the trustee appeared solely in her individual capacity.[32]

Similarly, while a compulsory counterclaim must be brought against an "opposing party,"[33] the latter term does not include claims against the same party acting in a different capacity.[34]

We think this rule must be applied to an insurer who stands in different "shoes." Insurers issue many policies to people with many conflicting interests. A carrier may represent both parties in an auto accident, stand as both primary and excess insurer,[35] or defend an insured while at the same time denying coverage.[36] As a result, carriers must sometimes assert conflicting positions through different counsel. If they can be bound by an admission in one capacity that was sent to them in another, they can be made to forfeit every case regardless of the merits.

We agree of course with the dissent that no person may sue himself. But if that rule applies here, USF&G's intervention should be dismissed; deeming its admission binding on defendant USF&G has exactly the opposite result. Certainly Goudeau has never raised such an objection.

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[31] *Am. Gen. Fire and Cas. Co. v. Vandewater*, 907 S.W.2d 491, 492-93 (Tex. 1995); *Orange Grove Indep. Sch. Dist. v. Rivera*, 679 S.W.2d 482, 483 (Tex. 1984).

[32] *Werner v. Colwell*, 909 S.W.2d 866, 870 (Tex. 1995).

[33] TEX. R. CIV. P. 97(a).

[34] *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 207 (Tex. 1999).

[35] *See, e.g.*, *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 768 (Tex. 2007).

[36] *See Unauthorized Practice of Law Comm. v. Am. Home Assurance Co., Inc.*, 261 S.W.3d 24, 40 (Tex. 2008).

Even if he had, Texas law requires that the first money recovered in this suit go to USF&G as his compensation carrier.[37] Texas law also requires USF&G to provide underinsured coverage,[38] and pay Goudeau if he proves his case. Which of these statutes should USF&G have ignored to meet the dissent's hypothetical objection?

It is true that USF&G may have had other ways to avoid this situation. Perhaps it could have intervened in Goudeau's name,[39] thus removing any confusion about who was admitting what. Perhaps it could have brought its subrogation suit separately, in which case its responses in one suit could not be used against it in the other.[40] Or perhaps it could have qualified its response,[41] denying UM coverage but alternatively seeking reimbursement if coverage existed. But these alternatives do not change the rule: a party appearing in one capacity cannot be bound by an admission sent to it in another, because admissions are binding only against "the party making the admission."[42]

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[37] *See* TEX. LAB. CODE §417.002; *Texas Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 33 (Tex. 2008).

[38] *See* TEX. INS. CODE § 1952.101(b).

[39] TEX. LAB. CODE § 417.001(b) ("[T]he insurance carrier is subrogated to the rights of the injured employee and may enforce the liability of the third party in the name of the injured employee or the legal beneficiary.").

[40] *See* TEX. R. CIV. P. 198.3 ("Any admission made by a party under this rule may be used solely in the pending action and not in any other proceeding.").

[41] TEX. R. CIV. P. 198.2(b) ("The responding party may qualify an answer, or deny a request in part, only when good faith requires.").

[42] TEX. R. CIV. P. 198.3.

Requests for admission are a tool, not a trapdoor.[43] Goudeau's attorneys knew perfectly well that defendant USF&G was denying underinsured coverage. Accordingly, they are not entitled to use a response against it when they sent it to the law firm representing it in a different capacity.

IV. The Evidentiary Objection

Goudeau also objected to the summary judgment on the ground that USF&G's evidence was not authenticated. The trial court overruled the objection, and the court of appeals did not reach the issue.[44]

Contrary to Goudeau's objection, the underinsured policy (which showed the policy language) was authenticated by a USF&G records custodian.[45] Similarly, the accident report from the Department of Public Safety (which showed the relative positions of Goudeau and the cars at the time of the accident) was authenticated by its records custodian.[46] As these documents provide all that is necessary to decide the policy construction issue here, the trial court did not err in overruling Goudeau's objections.

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[43] *Wheeler v. Green*, 157 S.W.3d 439, 443 (Tex. 2005).

[44] 243 S.W.3d at 10.

[45] *See* TEX. R. EVID. 902(10).

[46] *See* TEX. R. EVID. 902(4).

V. The Conclusion

Accordingly, we reverse that part of the court of appeals' judgment concerning Goudeau's underinsured motorist claim, and render judgment that he take nothing on that claim.

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Scott Brister
Justice

OPINION DELIVERED: December 19, 2008

IN THE SUPREME COURT OF TEXAS

NO. 06-0987

UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONER,

V.

LOUIS GOUDEAU, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued December 6, 2007

JUSTICE GREEN, joined by CHIEF JUSTICE JEFFERSON and JUSTICE JOHNSON, dissenting.

Because I would not reach the issue of whether Louis Goudeau was occupying the vehicle when the accident occurred, I dissent. In the trial court, the insurer admitted to the claimant that he was insured under the policy. That admission binds the insurer even in an unusual case like this where the insurer made the admission while purporting to act not as defendant, but as intervenor. Because such an admission relieves the claimant's burden of proving insured status, and prevents the insurer from arguing otherwise, I would hold that the insurer's motion for summary judgment should have been denied.

I

United States Fidelity and Guaranty Company (USF&G) provided Advantage Motor, Inc.'s commercial auto insurance policy, which included underinsured motorist coverage for Advantage's automobiles and persons "occupying a covered auto," and also served as Advantage's workers' compensation insurer, which paid Goudeau more than $100,000 under the workers' compensation policy's indemnity provisions. After Goudeau and his wife filed lawsuits against Alex Rodriguez and USF&G, USF&G answered and denied that Goudeau was an insured under the auto policy. Then, through separate counsel, USF&G intervened as the Goudeaus' subrogee[1] to assert claims for reimbursement with respect to any amount recovered from Rodriguez or defendant USF&G. After intervention, the Goudeaus served intervenor USF&G with requests for admissions. In its responses, intervenor USF&G admitted that "Louis Goudeau is an insured for the purposes of underinsured motorist benefits under USF&G Policy No. DRE3847700." The trial court later granted defendant USF&G's motion for partial summary judgment against the Goudeaus, rejecting their argument that one of the policy exclusions applied, but accepting their argument that the auto policy did not insure Goudeau in the first place because Goudeau, who was outside of the vehicle at the time of the collision, was not "occupying" a covered vehicle. The Goudeaus settled with Rodriguez for his policy's $20,000 limit, and the trial court entered an order apportioning the settlement between the Goudeaus and intervenor USF&G.

[1] *See* TEX. LAB. CODE § 417.001(b) ("If a benefit is claimed by an injured employee or a legal beneficiary of the employee, the insurance carrier is subrogated to the rights of the injured employee and may enforce the liability of the third party in the name of the injured employee or the legal beneficiary.").

The Goudeaus appealed, arguing that defendant USF&G's summary judgment evidence failed to prove that Goudeau was not "occupying" the covered vehicle, that defendant USF&G failed to properly authenticate its summary judgment evidence, and that intervenor USF&G's responses to the requests for admission defeated defendant USF&G's motion. Defendant USF&G reurged its insured-status argument, as well as the policy exclusion argument. With respect to Louis Goudeau, the court of appeals reversed, concluding that, "[v]iewing the evidence in the light most favorable to Louis, USF & G—Defendant did not establish conclusively that Louis was not occupying a covered vehicle." 243 S.W.3d at 9–10.[2]

II

Texas Rule of Civil Procedure 198 allows a party to request "that the other party admit the truth of any matter within the scope of discovery, including statements of opinion or of fact or of the application of law to fact." TEX. R. CIV. P. 198.1. Admissions produce two results: they relieve the requesting party's burden of proving the admitted matter and prevent the admitting party from disputing the same. *See Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989); *Mendoza v. Fid. & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980); *U.S. Fid. & Guar. Co. v. Carr*, 242 S.W.2d 224, 228–29 (Tex. Civ. App.—San Antonio 1951, writ ref'd). As intervenor, USF&G unequivocally admitted that the USF&G auto policy insured Goudeau. Because no effort was made

[2] The court of appeals affirmed the trial court's grant of summary judgment as to Tasha Goudeau, 243 S.W.3d at 5–6, and she does not appeal that decision.

to withdraw or limit that admission, Goudeau should prevail against the intervenor on this question of insured status.[3]

The operation of the relatively simple admissions rule is complicated by the fact that USF&G was named as *both* the intervenor and the defendant, and now the defendant is being charged with the intervenor's admission. Although the intervenor and defendant were represented by separate counsel, neither has ever attempted—either in the trial court or in these appellate proceedings—to clarify this oddity of identification. Defendant USF&G's motion for summary judgment noted that Goudeau had received benefits from "the Intervenor in the case, also United States Fidelity and Guaranty Company." Throughout the appellate proceedings, defendant USF&G did not dispute that the same company was litigating as both defendant and intervenor. USF&G's only argument is that the intervenor's admissions cannot bind the defendant because the intervenor is not the same party as the defendant. At trial, the Goudeaus did not formally challenge the propriety of USF&G's intervention,[4] but the Goudeaus did argue that the intervenor and the defendant are the same company, and that the admissions of USF&G while acting as intervenor bind USF&G while acting as defendant. I agree.

No person may sue himself. *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 430 (1949).

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[3] "[A] party relying upon an opponent's pleadings as judicial admissions of fact must protect the record by objecting to the introduction of controverting evidence and to the submission of any issue bearing on the facts admitted." *Marshall*, 767 S.W.2d at 700. The Goudeaus did just that in their reply to defendant USF&G's motion for summary judgment, arguing that USF&G was precluded from introducing evidence contrary to the admission, and that the admission, at minimum, created a material issue of fact.

[4] *See* TEX. R. CIV. P. 60 ("Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.").

> There is much argument with citation of many cases to establish the long-recognized general principle that no person may sue himself. Properly understood the general principle is sound, for courts only adjudicate justiciable controversies. They do not engage in the academic pastime of rendering judgments in favor of persons against themselves.

Id. This rule stems from the well-established standing requirement of concrete adversity. *See United States v. Nixon*, 418 U.S. 683, 692–97 (1974); *United States v. Fed. Mar. Comm'n*, 694 F.2d 793, 810 (D.C. Cir. 1982).[5] As a result, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." *Interstate Commerce Comm'n*, 377 U.S. at 430; *accord United States v. Providence Journal Co.*, 485 U.S. 693, 708 n.11 (1988); *Nixon*, 418 U.S. at 693. Although our admissions rule speaks in terms of each "party," *see* TEX. R. CIV. P. 198.1, our procedural rules as a whole are predicated on the assumption that a person can serve only as one party in each lawsuit. To hold otherwise would invite our courts to decide cases without the truly adverse litigants who are necessary to "sharpen[] the presentation of issues upon which the [C]ourt so largely depends for illumination." *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007). Moreover, such an interpretation would disrupt the rules' careful allotment of litigation procedures and stand as an obstacle to a "just, fair, equitable and impartial adjudication." TEX. R. CIV. P. 1.

For the same reason that courts must "look behind names" to establish justiciability, *Interstate Commerce Comm'n*, 377 U.S. at 430; *accord Providence Journal Co.*, 485 U.S. at 708 n.11; *Nixon*, 418 U.S. at 693, the trial court here should have looked behind the party designations

[5] Texas courts look to federal jurisprudence on issues of justiciability. *See Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 774 (Tex. 2005).

of "defendant" and "intervenor" when it applied the admissions rule. We have consistently applied our rules of procedure to discourage tactical gamesmanship, *see State v. Lowry*, 802 S.W.2d 669, 671 (Tex. 1991); *Gutierrez v. Dallas Indep. Sch. Dist.*, 729 S.W.2d 691, 693 (Tex. 1987), and our admissions rule is no exception, *see County of Dallas v. Wiland*, 216 S.W.3d 344, 355 n.46 (Tex. 2007). Our goal in barring parties from introducing proof that contradicts an earlier admission is fairness: "[T]he courts sense the fact that it would be as absurd, as it manifestly would be unjust, to allow a party to recover after he has clearly and unequivocally sworn himself out of court." *Carr*, 242 S.W.2d at 229 (quoting *Westbrook v. Landa*, 160 S.W.2d 232, 233 (Tex. Civ. App.—San Antonio 1942, no writ)) (italics and quotations omitted); *see also Mendoza*, 606 S.W.2d at 694.

The record here reflects just such a case. The pleadings of both the intervenor and the defendant are consistently attributed to USF&G, and there is no indication of any real separation between the USF&G that administers the auto policy and the USF&G that administers the workers' compensation policy. Although, as the Court points out, insurers may stand in different shoes or act in different capacities, there is no indication that USF&G in this case is anything but a single entity with the power to sue and be sued only in the name of USF&G. USF&G never made any attempt to distinguish the identity or capacity of USF&G as defendant from USF&G as intervenor, even after the Goudeaus specifically argued that the defendant and intervenor are the same company and that the admissions of one bind the other. As a result, the only conclusion to be had is that behind this intervenor and defendant lies only one person with one interest: USF&G.[6] Whatever dispute there

[6] If the record were unclear, summary judgment for a movant in USF&G's position would nonetheless be improper because the litigant's true identity is certainly a "material fact" under our summary judgment jurisprudence. *See Browning v. Prostok*, 165 S.W.3d 336, 344 (Tex. 2005) ("In a summary judgment motion brought under Texas Rule

is between these two USF&G factions lies entirely within USF&G, and is not deserving of individualized adjudication in our courts. The principles of fairness inherent in our rules would not be promoted by allowing USF&G to litigate on summary judgment a question that it had unequivocally admitted eleven months earlier, albeit under a different fictional label. Thus, the admission extracted by the Goudeaus should bind USF&G as both intervenor and defendant. Having admitted that Goudeau was insured under the auto policy, I would affirm the judgment of the court of appeals and hold that USF&G could not succeed on its motion for summary judgment. *See Marshall*, 767 S.W.2d at 700; *Mendoza*, 606 S.W.2d at 694; *Carr*, 242 S.W.2d at 228–29.

III

Because USF&G is bound by its admission of Louis Goudeau's insured status, I would not reach the issue of whether Goudeau was "occupying" the vehicle within the meaning of the USF&G policy. I therefore dissent from the Court's judgment.

_____
Paul W. Green
Justice

OPINION DELIVERED: December 19, 2008

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of Civil Procedure 166a(c), the moving party has the burden of showing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law."); *see also City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005) (instructing that, to review a trial court's grant of summary judgment, we "examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion").

IN THE SUPREME COURT OF TEXAS

NO. 06-1034

THE STATE OF TEXAS AND THE TEXAS DEPARTMENT OF TRANSPORTATION, PETITIONERS,

v.

GEORGE LUECK, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued November 12, 2008

JUSTICE GREEN delivered the opinion of the Court.

Under the Texas Whistleblower Act, sovereign immunity is waived when a public employee alleges a violation of Chapter 554 of the Government Code. TEX. GOV'T CODE § 554.0035. A violation under Chapter 554 occurs when a governmental entity retaliates against a public employee for making a good-faith report of a violation of law to an appropriate law enforcement authority. *Id.* § 554.002(a). George Lueck was fired from the Texas Department of Transportation (TxDOT) after he sent an e-mail to the director of the Transportation Planning and Programming Division, reporting what he believed to be violations of state and federal law. Lueck then sued the State of Texas and TxDOT under the Whistleblower Act, alleging that he "was fired because of his good faith reports

of TxDOT's violation of state and federal law." We hold that, because Lueck's e-mail report only warned of regulatory non-compliance, not a violation of law, and because an agency supervisor is not an appropriate law enforcement authority to whom a report should be made, Lueck's allegation affirmatively negates the court's subject-matter jurisdiction over the cause. The State's sovereign immunity is not waived, and thus, we reverse the court of appeals' judgment and dismiss the case for lack of subject-matter jurisdiction.

I

A 1995 Federal Highway Administration report concluded that Texas's system for collecting, analyzing, and reporting traffic data violated federal standards. In 1999, the State contracted with a private vendor, Cooper Consulting Company, to upgrade TxDOT's computers and develop software for a replacement system, called the Statewide Traffic Analysis and Reporting System ("STARS"). As the Assistant Director of TxDOT's Traffic Analysis Section, Lueck was responsible for the daily management of the STARS program. Three years into the implementation project, the state auditor began investigating a Cooper invoice that was left undisputed by TxDOT, charging the State $350,783. The charge was initially described by Cooper as both a contingency fee and a "Project Work Plan," but the vice president for Cooper later admitted that a "Project Work Plan" was worth no more than $75,000. TxDOT then requested a cost breakdown of the charge, which Cooper ultimately characterized as "payment smoothing."

Later, James Randall, the Director of the Transportation Planning and Programming Division at TxDOT, suspended all work on the STARS project, and advised Cooper that the State would no longer pay for work that was not previously approved by TxDOT. Cooper's lawyers then sent a

demand letter, notifying TxDOT that Cooper would terminate its contract if the state failed to pay the disputed charge within thirty days. A day after the letter was sent, Lueck sent Randall an e-mail entitled "STARS Contract." In the e-mail, Lueck informed Randall that the Traffic Division urged "an immediate positive response and resolution" of Cooper's demand letter. In numbered format, he outlined five reasons why he believed TxDOT should resolve the dispute with Cooper, rather than cancel the contract. The e-mail warned that without the STARS system, TxDOT "is not capable of handling this data and will, therefore, never be in compliance." Lueck recommended that Randall have the e-mail "readily available" when discussing the implications of the Cooper demand letter with the TxDOT Administration and Contract Services Division. Thereafter, TxDOT informed Cooper that it would not pay the payment smoothing charge and accepted termination of Cooper's contract. TxDOT then fired Lueck on the basis that Lueck's attempt to justify the $350,783 charge, despite his knowledge that the charge was only worth a fraction of that cost, evidenced his own negligence and lack of trustworthiness.

Lueck sued the State and TxDOT (collectively, TxDOT) under the Whistleblower Act, alleging that his e-mail to Randall constituted a report of a violation of law to an appropriate law enforcement authority because it reported that the Department would violate federal and state law if TxDOT did not resolve the dispute with Cooper. The e-mail report, which was attached to Lueck's pleadings, specifically warned that, without the STARS program, TxDOT's existing software was "not capable of handling th[e] data and will, therefore, never be in compliance." TxDOT filed a plea to the jurisdiction, claiming that its immunity was not waived because Lueck did not make a good-faith report of a violation of law to an appropriate law enforcement authority,

as required by section 554.002(a) of the Whistleblower Act. Lueck filed a second amended special exceptions and motion to dismiss the plea to the jurisdiction, arguing that his allegations, alone, satisfied the unambiguous language of the Act's immunity statute. *See* TEX. GOV'T CODE § 554.0035. In response, TxDOT argued that Lueck's pleadings affirmatively demonstrated that he did not allege a violation under the Act because the e-mail he sent did not report an actual violation of the law, and his supervisor to whom he sent the e-mail report was not a law enforcement authority. TxDOT claimed it was at least entitled to a hearing on its plea to the jurisdiction because the court must consider relevant evidence when necessary to resolve jurisdictional issues. The trial court granted Lueck's motion to dismiss TxDOT's plea to the jurisdiction, and TxDOT appealed. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (permitting appeal from interlocutory order that denies a plea to the jurisdiction by a governmental unit). The court of appeals affirmed, reasoning that "Lueck's pleadings affirmatively demonstrate the district court's jurisdiction to hear the case." 212 S.W.3d 630, 638. We disagree. A "violation under the Act" under section 554.0035 is not alleged if the pleadings affirmatively demonstrate that the plaintiff did not make good-faith report of a violation of law to an appropriate law enforcement authority. *See* TEX. GOV'T CODE § 554.002(a). Lueck's pleadings affirmatively negate the trial court's subject-matter jurisdiction because he did not report a violation of law, and his supervisor is not a "law enforcement authority." *Id.*

II

The State and other state agencies like TxDOT are immune from suit and liability in Texas unless the Legislature expressly waives sovereign immunity. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 641 (Tex. 2004); *see also* TEX. GOV'T CODE § 311.034 ("[A] statute shall

not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."). A statute waives immunity from suit, immunity from liability, or both. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W. 3d 217, 224 (Tex. 2004); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696–97 (Tex. 2003). Immunity from suit is a jurisdictional question of whether the State has expressly consented to suit. *Taylor*, 106 S.W.3d at 696. On the other hand, immunity from liability determines whether the State has accepted liability even after it has consented to suit. *Id*. In some statutes, immunity from suit and liability are co-extensive, whereby immunity from suit is waived to the extent of liability. *See*, *e.g.*, TEX. CIV. PRAC. & REM. CODE § 101.025(a); *Miranda*, 133 S.W. 3d at 224 ("The Tort Claims Act creates a unique statutory scheme in which the two immunities are co-extensive. . . .").

Sovereign immunity from suit is properly asserted when the State files a plea to the jurisdiction. *Miranda*, 133 S.W.3d at 225–26 (citing *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847)). In contrast, immunity from liability is an affirmative defense that cannot be raised by a plea to the jurisdiction. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). However, when the facts underlying the merits and subject-matter jurisdiction are intertwined, the State may assert sovereign immunity from suit by a plea to the jurisdiction, even when the trial court must consider evidence "necessary to resolve the jurisdictional issues raised." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000); s*ee also*, *e.g.*, *Miranda*, 133 S.W.3d at 223–24; *Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001). We have limited the use of a plea to the jurisdiction in these circumstances by holding that such a plea may only be used to address jurisdictional facts. *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004).

Lueck, therefore, argues that *Simons* compels dismissal of this appeal because TxDOT has not appealed jurisdictional facts, but rather, facts involving the TxDOT's liability under section 554.002(a), which Lueck claims cannot be asserted by a plea to the jurisdiction. Therefore, as a threshold matter, the first issue is whether the elements of section 554.002(a) constitute jurisdictional facts that can implicate the court's subject-matter jurisdiction.

III

The immunity provision in the Whistleblower Act states:

> A public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter. Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter.

TEX. GOV'T CODE § 554.0035. The standard for a "violation of this chapter" appears in section 554.002(a), which provides that the governmental entity "may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." *Id.* § 554.002(a). Lueck maintains that section 554.002(a) contains non-jurisdictional elements that speak to the underlying merits of the claim, and therefore, cannot be considered when determining jurisdiction. Lueck argues that requiring his pleadings, alone, to satisfy the elements of section 554.002(a) would unnecessarily compel him to prove up his case before the court assumed jurisdiction. The court of appeals agreed, and held that, while evidence pertaining to elements of section 554.002(a) "may negate [TxDOT's] liability under the

Whistleblower Act, it would not, even if true, affect the district court's subject-matter jurisdiction to hear the case." 212 S.W.3d at 637–38.

We agree with Lueck and the court of appeals that there are but two jurisdictional requirements under section 554.0035. For the government's immunity to be waived, the plaintiff must (1) be a public employee, and (2) allege a violation *of this chapter*. TEX. GOV'T CODE § 554.0035 (emphasis added). But it necessarily follows from this language that Lueck must actually allege a violation of the Act for there to be a waiver from suit. Therefore, the elements under section 554.002(a) must be considered in order to ascertain what constitutes a violation, and whether that violation has actually been alleged. We conclude that the elements of section 554.002(a) can be considered as jurisdictional facts, when it is necessary to resolve whether a plaintiff has alleged a violation under the Act.

Lueck argues that the elements of 554.002(a) can never be considered as jurisdictional facts because we are bound to follow the plain, unambiguous language of the immunity statute, which clearly indicates that the Legislature intended to impose only two jurisdictional requirements on Lueck: that he be a public employee and that he allege a violation under the Whistleblower Act. *Id*. § 554.0035; *see also State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) ("[W]hen possible, we discern [legislative intent] from the plain meaning of the words chosen."). However, the second jurisdictional requirement in section 554.0035 directs the inquiry to section 554.002(a) to determine if the plaintiff has actually alleged a violation, rather than merely referenced the chapter. To hold that elements of section 554.002(a) cannot be considered as part of this inquiry would obfuscate our previous decision in *Miller*, where we held that "[m]ere reference to the . . . Act does not establish

the state's consent to be sued and thus is not enough to confer jurisdiction on the trial court." 51 S.W.3d at 587. In *Miranda*, we also considered elements under the Texas Recreational Use statute to determine whether immunity was waived under the Tort Claims Act. 133 S.W.3d at 225; *see also* TEX. CIV. PRAC. & REM. CODE § 101.025(a). We see no reason to depart from these decisions when the elements of section 554.002(a) are equally relevant to the jurisdictional requirement that the plaintiff actually allege a violation of the Whistleblower Act. *Compare* TEX. GOV'T CODE § 554.0035, *with* TEX. CIV. PRAC. & REM. CODE § 101.025(a).

Lueck claims that *Miranda* and *Miller* are not controlling because the Texas Tort Claims Act imposes a limited waiver of immunity, whereby immunity from suit is only waived to the extent of liability. *See Miranda*, 133 S.W.3d at 224 ("The Tort Claims Act creates a unique statutory scheme in which the two immunities are co-extensive . . . ."). Likewise, the court of appeals declined to follow *Miranda*, finding that the immunities are co-extensive under the Tort Claims Act, but not under the Whistleblower Act. 212 S.W.3d at 637. Because of this distinction, the court of appeals found that the section 554.002(a) elements only resolve the extent of the TxDOT's liability, not the jurisdictional issue concerning the State's consent to suit. *Id*. ("[F]acts pertaining to whether the Department may be found liable under the Whistlebower Act are neither dispositive of, nor relevant to, our jurisdictional inquiry."). TxDOT, on the other hand, argues that *Miranda* and *Miller* are dispositive because the immunity statutes under the Whistleblower Act and Tort Claims Act are substantively identical. *Compare* TEX. GOV'T CODE § 554.0035, *with* TEX. CIV. PRAC. & REM. CODE § 101.025(a). We will consider immunity statutes one-by-one to determine whether immunity has been waived.

In *Wichita State Hospital v. Taylor*, we recognized that the first sentence of the Whistleblower Act waives sovereign immunity from suit. 106 S.W.3d at 697 n.6. Although we also recognized that the second sentence waives immunity from liability, *id*. at 697 n.5, this waiver simply limits judgments against the State to "the extent of liability for the relief allowed under this chapter for a violation of this chapter." TEX. GOV'T CODE § 554.0035. Since "[i]mmunity from liability protects the [S]tate from judgment even if the Legislature has expressly consented to the suit," *see Jones*, 8 S.W.3d at 638, this second sentence not only waives immunity from liability, but also confines the scope of the State's consent to suit that was established in the first sentence. Thus, like the Tort Claims Act, the Whistleblower Act imposes a limited waiver of immunity that allows consideration of the section 554.002(a) elements, to the extent necessary in determining whether the claim falls within the jurisdictional confines of section 554.0035.

Lueck also claims that we are precluded from considering the section 554.002(a) elements as jurisdictional facts under *Dubai Petroleum Company v. Kazi*. 12 S.W.3d 71, 76–77 (Tex. 2000) (holding that statutory prerequisites to suits against a non-governmental entity were not jurisdictional). When we applied *Dubai* to a case involving statutory prerequisites to suit against governmental entities, *see Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 358–59, 62 (Tex. 2004), the Legislature responded by passing a statute stating that, "[S]tatutory prerequisites to suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity." TEX. GOV'T CODE § 311.034. This case does not fall under section 311.034 of the Government Code because the elements of section 554.002(a) are not statutory prerequisites

to suit, but rather, elements of a statutory cause of action in a suit against a governmental entity.[1] The issue before us today is whether these elements of a statutory cause of action, like statutory prerequisites to suit, are requirements that can implicate the merits of the underlying claim, as well as the jurisdictional inquiry of sovereign immunity from suit as a threshold matter. We hold that the elements of section 554.002(a) can be considered to determine both jurisdiction and liability. For example, we have previously rendered take-nothing judgments against plaintiffs when they failed to prove elements of section 554.002(a). *See Montgomery County v. Park*, 246 S.W.3d 610, 612 (Tex. 2007) (holding plaintiff failed to prove that the County took "adverse personnel action" against plaintiff, as required by section 554.002(a)); *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 317 (Tex. 2002) (holding that no evidence supported a jury finding that the plaintiff could have good-faith belief that TxDOT was an appropriate law enforcement authority); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 146 (Tex. 1995) (holding that section 554.002(a) was not satisfied because "as a matter of law, the Whistleblower Act is not implicated merely by reports made to the press"). Lueck claims that, through these decisions, we implicitly recognized that elements in section 554.002(a) cannot be considered as jurisdictional facts because these cases were decided on the merits and not dismissed for lack of subject-matter jurisdiction. However, the issue of subject-

[1] Lueck also argues that *Igal v. Brightstar Information Technology Group, Inc.* is controlling because we held that elements of a statutory cause of action cannot be considered jurisdictional unless "the language of the provision [or] the statutory scheme indicates" that the Legislature intended to address jurisdiction. 250 S.W.3d 78, 84 (Tex. 2008). *Igal* involved the jurisdiction of an administrative agency, not subject-matter jurisdiction in a case where the State asserts a plea to the jurisdiction, claiming that its sovereign immunity is not waived. *See id.* at 81–82. However, even if *Igal* were to control statutes waiving the State's consent to suit, both the immunity provision, section 554.0035, and the statutory scheme of the Whistleblower Act indicate that the Legislature intended for section 554.002(a) to be considered as part of the jurisdictional inquiry because section 554.0035 references a "violation of the chapter," which is found in section 554.002(a).

matter jurisdiction was not before us in any of these cases; indeed, the State did not file a plea to the jurisdiction in *Needham* and *Bouillion*. *See Needham*, 82 S.W.3d at 317; *Bouillion*, 896 S.W.2d at 145. Likewise, in *Park*, the State filed both a plea to the jurisdiction and motion for summary judgment, then appealed the trial court's denial of the motion for summary judgment. 246 S.W.3d at 613. Similar to this case, we reversed the denial of a plea to the jurisdiction in *City of Waco v. Lopez*, holding that the plaintiff could not bring a valid claim under the Whistleblower Act because a claim under the Commission on Human Rights Act was plaintiff's "exclusive state statutory remedy." 259 S.W.3d 147, 156 (Tex. 2008). By reasoning that sovereign immunity was not waived because Lopez failed to plead the more specific elements under the Commission on Human Rights Act, we implicitly rejected the argument that simply alleging a violation under the Whistleblower Act is sufficient to confer subject-matter jurisdiction on the trial court in suits against governmental entities. *See id*.

Our holding does not mean that Lueck must prove his claim in order to satisfy the jurisdictional hurdle. Although the section 554.002(a) elements must be included within the pleadings so that the court can determine whether they sufficiently allege a violation under the Act to fall within the section 554.0035 waiver, we have urged that the burden of proof with respect to these jurisdictional facts "does not involve a significant inquiry into the substance of the claims." *Bland*, 34 S.W.3d at 554; *see also Miranda*, 133 S.W.3d at 235 ("[I]f a plea to the jurisdiction requires the trial court to wade deeply into the lawsuit's merits, it is not a valid plea.") (Jefferson, C.J., dissenting). Allowing a plaintiff's pleadings to stand on bare allegations, alone, without allowing the State to challenge plaintiff's compliance with the immunity statute, would practically

eliminate the use of pleas to the jurisdiction, which we have already approved as the proper "procedural vehicle to challenge subject matter jurisdiction in trial courts for over a century and a half." *See Miranda*, 133 S.W.3d at 232. The Legislature has also approved of their use by allowing for an appeal from an interlocutory order denying or granting a plea to the jurisdiction. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

Nor does our holding mean that the State must challenge the plaintiff's pleadings through the use of a plea to the jurisdiction. We have recognized that "[t]he absence of subject-matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for summary judgment." *Bland*, 34 SW.3d at 554. Lueck claims that the TxDOT should have objected to his pleadings through the use of special exceptions, and the court of appeals concluded that "a traditional or no-evidence motion for summary judgment is the proper avenue for raising [TxDOT's] concerns that its evidence would negate two essential elements of Lueck's [W]histleblower claim." 212 S.W.3d at 638 n.4. While both of these options are available, and certainly not objectionable, we have never held that the State is precluded from challenging pleadings in a plea to the jurisdiction when it could have done so via special exceptions or motions for summary judgment. Since we disapproved of this position in *Miranda*, 133 S.W.3d at 225–26 (citing *Hosner*, 1 Tex. at 769 (1847)), we decline to make an exception for the Whistleblower Act's immunity procedure. Because we have held that the 554.002(a) elements are jurisdictional when necessary to ascertain whether plaintiff has adequately alleged a violation of the chapter, we now turn to Lueck's pleadings to consider whether they sufficiently waive the TxDOT's immunity.

IV

"When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Miranda*, 133 S.W.3d at 226; *see also Lopez*, 259 S.W.3d at 150; *Taylor*, 106 S.W.3d at 696; *Miller*, 51 S.W.3d at 587 (quoting *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). "If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend." *Miranda*, 133 S.W.3d at 227. TxDOT argues that Lueck's pleadings do not affirmatively demonstrate jurisdiction because they are incurably defective.[2] In other words, TxDOT points to uncontroverted allegations within Lueck's pleadings, claiming that they affirmatively negate jurisdiction because the e-mail sent to Randall did not report a violation of law to an appropriate law enforcement authority. As for the report element, Lueck's pleadings affirmatively negate the existence of a reported violation. Lueck's fifth amended petition states that Lueck "believed and reported in good faith that if the Department did not pursue an immediate and positive resolution to Cooper's October 29, demand[,] the Department would violate federal and state law by failing to remedy non-compliance with the federal and state reporting requirements." This allegation merely recites Lueck's prediction of possible regulatory non-

[2] Lueck argues that the TxDOT waived the argument that his pleadings fail to affirmatively demonstrate jurisdiction because it was undisputed before the trial court and court of appeals that Lueck was a public employee and had alleged a violation of the Act. We disagree. In TxDOT's Reply Brief before the court of appeals, TxDOT argued that "Lueck has not alleged a violation of the Texas Whistleblower Act and has not waived the State Defendants' sovereign immunity under section 554.0035. . . ." TxDOT's plea to the jurisdiction before the trial court also stated that one of the problems with Lueck's allegations is that the jurisdictional facts show that Lueck did not make a good-faith report of a violation of law to an appropriate law enforcement authority. Since both of these arguments made below dispute the proper allegation of a violation, TxDOT did not waive its right to assert that the pleadings negated subject-matter jurisdiction.

compliance. Such a regulatory non-compliance of this kind does not equate to a violation of law under which a law enforcement authority regulates or enforces within the meaning of the Whistleblower Act. *See* TEX. GOV'T. CODE § 554.002(b). Further, Lueck attached the e-mail report to his pleadings, and the only discernable violation in the report itself states that TxDOT's current system for reporting traffic data "is not capable of handling this data and will, therefore, never be in compliance." This references the violation reported in the 1995 Federal Highway Administration report, which is only intended to call TxDOT's attention to a previous, publicly-known instance of regulatory non-compliance. At most, this reference to a previous violation of a federal standard expresses disagreement with remedial measures taken by TxDOT after it was already knowingly out of compliance. An internal policy recommendation of this kind is not a report of a violation of law that the Whistleblower Act was designed to protect.

Even if this e-mail did report a violation of law, Lueck's supervisor, Mr. Randall, is not an appropriate law enforcement authority to whom such a report should be made. As the head of a division within TxDOT, Randall could neither regulate nor enforce the law that Lueck alleged had been violated. *See* TEX. GOV'T CODE § 554.002(b)(1), (2) (providing that an appropriate law enforcement authority is "part of a state or local governmental entity . . . that the employee in good faith believes is authorized to: regulate under or enforce the law alleged to be violated in the report or; investigate or prosecute a violation of criminal law"); *Needham*, 82 S.W.3d at 320 (holding that TxDOT was not appropriate law enforcement authority to enforce laws related to driving while intoxicated, reasoning that "the particular law the public employee reported violated is critical to the

determination"). In fact, Lueck's e-mail report indicates that he knew Randall was not the proper authority within TxDOT to regulate the reported violations because he recommended that Randall have his e-mail "readily available" when discussing the implications of suspending the STARS program with other TxDOT divisions. *Cf. Needham*, 82 S.W.3d at 320–21 (holding that an employer's power to conduct internal investigative or disciplinary procedures does not satisfy standard for appropriate law enforcement authority under the Act). This conclusively establishes that Lueck could not have formed a good-faith belief that Randall was authorized to enforce such violations. *See id.* (holding that claim may fall under Whistleblower Act if employee formed a reasonable, good faith belief that report was made to an appropriate law enforcement authority, given employee's training and level of experience). Therefore, as a matter of law, Lueck's pleadings affirmatively demonstrate that he did not allege a violation under the Whistleblower Act.[3] For these reasons, we reverse the court of appeals' judgment and dismiss the cause for lack of subject-matter jurisdiction.

Paul W. Green
Justice

[3] TxDOT also argues that the court of appeals erred in affirming the trial court's denial of its plea to the jurisdiction because the trial court abused its discretion when it declined to consider the relevant jurisdictional evidence that TxDOT intended to present at its hearing on the plea to the jurisdiction. TxDOT claimed that this evidence proved that Lueck did not allege a violation under the Act. *See Bland*, 34 S.W.3d at 554 (holding that the trial court must consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised). Because we have held that Lueck's pleadings affirmatively negate the trial court's jurisdiction as a matter of law, we need not consider whether the trial court should have considered the TxDOT's evidence at a hearing on its plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 227 ("When the consideration of a trial court's subject matter jurisdiction requires the examination of evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case. . . .").

OPINION DELIVERED: June 26, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-1071

STATE FARM LLOYDS, PETITIONER,

v.

BECKY ANN JOHNSON, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued January 15, 2008

JUSTICE BRISTER delivered the opinion of the Court.

Appraisal clauses have appeared in most property insurance policies in Texas for many years. Although they rarely detail the scope of appraisal, there has rarely been any litigation about it. The parties here agree that the scope of appraisal includes damage questions and excludes liability questions, but they disagree which is involved in this dispute about hail damage to a homeowner's roof. Because an appraisal has yet to take place, we agree with the insured that the record does not establish that it will exceed the permissible scope of appraisal. Accordingly, we affirm the court of appeals' judgment in favor of the insured.

I. Background

A hailstorm moved through Plano, Texas in April of 2003, damaging the roof of Becky Ann Johnson's home. She filed a claim under her homeowners insurance policy with State Farm Lloyds.

State Farm's inspector concluded that hail had damaged only the ridgeline of her roof, and estimated repair costs at $499.50 (less than the policy's $1,477 deductible). By contrast, Johnson's roofing contractor concluded the entire roof needed to be replaced at a cost of more than $13,000.[1]

To settle this difference, Johnson demanded appraisal of the "amount of loss" under the following provision in her standard-form policy:

> **Appraisal**. If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, disinterested appraiser. Each shall notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire . . . . The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss.

State Farm refused to participate in an appraisal, asserting that the parties' dispute concerned causation and not "amount of loss." Johnson filed suit seeking only a declaratory judgment compelling appraisal. On cross-motions for summary judgment, the trial court agreed with State Farm that no appraisal was warranted. The court of appeals reversed, holding that appraisal was required.[2] We granted State Farm's petition to decide whether the dispute here fell within the scope of this appraisal clause.[3]

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[1] The estimate in the record lists $13,428.19 as the "Roof Total," but also lists a "Total Contract Price" of only $6,476.65. We use the larger number as that is the figure both parties quote in their briefs.

[2] 204 S.W.3d 897. As this suit sought nothing except appraisal, the judgments of both the trial court (denying it) and the court of appeals (compelling it) are final judgments within our appellate jurisdiction. *See* TEX. GOV'T CODE § 22.001(a).

[3] The Texas Windstorm Insurance Association and the Property Casualty Insurers Association of America submitted amicus curiae briefs supporting parts of State Farm's petition for review.

While trial courts have some discretion as to the timing of an appraisal, they have no discretion to ignore a valid appraisal clause entirely.[4] Accordingly, we review the entire record to decide whether either party was entitled to summary judgment as a matter of law.[5]

II. A Brief History of Appraisal Clauses

Insurance appraisal clauses have been around for a long time. In 1888 in *Scottish Union & National Insurance Co. v. Clancy*, this Court enforced an appraisal clause much like the one used here.[6] It would be going too far to say the Court approved of such clauses, but we unequivocally found them enforceable:

> However injudicious it may be for parties to bind themselves by such agreement, it seems to be well settled that, having done so, they cannot disregard it . . . . In the absence of fraud, accident, or mistake, the parties having agreed that the amount of loss shall be determined in a particular way, we are constrained to hold that such stipulation is valid . . . .[7]

Today, appraisal clauses "are uniformly included in most forms of property insurance policies."[8] "Virtually every property insurance policy for both homeowners and corporations contains a provision specifying 'appraisal' as a means of resolving disputes about the 'amount of

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[4] *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex. 2002).

[5] *See Canyon Reg'l Water Auth. v. Guadalupe-Blanco River Auth.*, 258 S.W.3d 613, 616 (Tex. 2008); *Texas Mun. Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184, 192 (Tex. 2007).

[6] 8 S.W. 630, 631 (Tex. 1888) (providing for three appraisers and that "the award of any two, in writing, shall be binding and conclusive as to the amount of such loss or damage").

[7] *Id*.

[8] Johnny C. Parker, *Understanding the Insurance Policy Appraisal Clause: A Four-Step Program*, 37 U. TOL. L. REV. 931, 931 (2006).

loss' for a covered claim."[9] An appraisal clause like the one used here "appears in almost every homeowners, automobile, and property policy in Texas."[10]

Although the history of such clauses is both deep and wide, they have required this Court's attention only five times since *Scottish Union*: in 1892,[11] 1897,[12] 1919,[13] 1965,[14] and 2002.[15] All of these cases concerned waiver or enforceability of the appraisal clause itself; we have never resolved a dispute about the scope of appraisal, or the meaning of "amount of loss." Accordingly, in addressing this issue for the first time we keep in mind that appraisals have apparently resolved such matters for many years without our aid.

III. The Scope of Appraisal: Damages vs. Liability

In *Scottish Union*, we referred to the scope of appraisal in the course of distinguishing it from arbitration:

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[9] Timothy P. Law & Jillian L. Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. 291, 292–93 (2006–07).

[10] Br. of Prop. Cas. Insurers Ass'n of Am. as Amicus Curiae Supporting Pet'rs at 8.

[11] *See Scottish Union & Nat'l Ins. Co. v. Clancy*, 18 S.W. 439, 441 (Tex. 1892) (holding insurer's attempt to adjust and settle claim did not waive its right to appraisal).

[12] *See Am. Cent. Ins. Co. v. Bass*, 38 S.W. 1119, 1120 (Tex. 1897) (holding insurer's denial of liability did not waive its right to appraisal).

[13] *See Del. Underwriters v. Brock*, 211 S.W. 779, 781 (Tex. 1919) (holding insurer's appointment of biased appraiser waived its right to appraisal).

[14] *See Glens Falls Ins. Co. v. Peters*, 386 S.W.2d 529, 532 (Tex. 1965) (holding appraisal required as building was not a total loss).

[15] *See In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 195 (Tex. 2002) (holding appraisal clause was not an unenforceable arbitration agreement).

> But here the [appraisal clause] does not divest the courts of jurisdiction, but only binds the parties to have the extent or amount of the loss determined in a particular way, leaving the question of liability for such loss to be determined, if necessary, by the courts.[16]

In 1897, we repeated this distinction between *damage* questions for appraisers and *liability* questions for the courts:

> It seems to be generally held that a stipulation that the question of liability shall be determined by arbitration is contrary to public policy and void, but it is otherwise, as we have seen, as to the ascertainment of the amount of the loss. There is neither repugnancy nor inconsistency in leaving the former question to the courts when the liability is disputed, and at the same time in providing that the amount of the recovery shall be settled by arbitration.[17]

While policies hostile to arbitration have largely been preempted,[18] limiting appraisal to damages and not liability is surely still correct.[19] Most appraisal clauses do not define the scope of appraisal in detail (as is the case here), but the ordinary meaning of the words serves that purpose.[20] The word "appraisal" itself generally means "[t]he determination of what constitutes a fair price; valuation; estimation of worth."[21] The policy directs the appraisers to decide the "amount of loss,"

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[16] 8 S.W. at 631.

[17] *Am. Cent.*, 38 S.W. at 1119.

[18] *See In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 484 (Tex. 2001) ("Congress passed the Federal Arbitration Act in 1925 to reverse the longstanding judicial hostility to arbitration agreements . . . .").

[19] *See In re Allstate*, 85 S.W.3d at 198 (citing *Scottish Union* for the proposition that appraisal "binds the parties to have the extent or amount of the loss determined in a particular way, leaving the question of liability for such loss to be determined, if necessary, by the courts").

[20] *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008) ("Policy terms are given their ordinary and commonly understood meaning unless the policy itself shows the parties intended a different, technical meaning.").

[21] BLACK'S LAW DICTIONARY 110 (8th ed. 2004).

not to construe the policy or decide whether the insurer should pay.[22] And the policy requires each party to select a "competent, disinterested appraiser," not a lawyer or insurance expert.[23]

The line between liability and damage questions may not always be clear, as discussed below. But while appraisal clauses might be drafted more precisely, the scarcity of suits on the subject suggests the 1888 test is still adequate: the scope of appraisal is damages, not liability.

IV. The Scope of Appraisal: Causation

State Farm argues that no appraisal is needed here because appraisers cannot decide causation issues. Texas courts have split on this question,[24] as have the few courts elsewhere to address it.[25]

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[22] *See* 15 COUCH ON INSURANCE § 210:42 ("As a general rule, the sole purpose of an appraisal is to determine the amount of damage. As a consequence, an appraisal clause does not permit appraisers to determine whether a loss was, in fact, total. However, the replacement cost of real property may be appraised, that is, estimated or evaluated.").

[23] *See* 15 COUCH ON INSURANCE § 213:44 ("An appraiser can make no legal determinations."); Br. of Tex. Windstorm Ins. Ass'n as Amicus Curiae Supporting Pet'rs at 8 ("In actual practice, appraisers and umpires are frequently unqualified to make complex liability determinations under an insurance policy. There is no requirement that they be licensed. Umpires are often lawyers or mediators with no particular experience or expertise in property insurance coverage or claims. Appraisers are often contractors who may be familiar with repair costs but are not qualified to make policy interpretations or to determine cause and origin of the damage being claimed. There is no explicit requirement that the appraisers and umpire inspect the property or read the policy, and many do not.").

[24] *Compare Lundstrom v. United Servs. Auto. Ass'n-CIC*, 192 S.W.3d 78, 89 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (rejecting claim that consideration of causation bars appraisal) *with Germania Farm Mut. Ins. Ass'n v. Williams*, No. 11-00-00393-CV, 2002 WL 32341841, at *3–4 (Tex. App.—Eastland May 23, 2002, no pet.) (citing *Wells* for proposition that appraisers cannot consider causation); *see also Salinas v. State Farm Lloyds*, 267 F.App'x. 381, 386 (5th Cir. 2008) (following *Wells* as Texas law); *Holt v. State Farm Lloyds*, No. CA 3:98-CV-1076-R, 1999 WL 261923, at *3 (N.D. Tex. April 21, 1999) (same).

[25] *Compare CIGNA Ins. Co. v. Didimoi Prop. Holdings, N.V.*, 110 F. Supp. 2d 259, 264 (D. Del. 2000) (holding causation was for appraisers), *Augenstein v. Ins. Co. of N. Am.*, 360 N.E.2d 320, 324 (Mass. 1977) (same), *and Am. Cent. Ins. Co. v. Dist. Ct., Ramsey County, Second Jud. Dist.*, 147 N.W. 242, 244 (Minn. 1914) (same), *with HHC Assocs. v. Assurance Co. of Am.*, 256 F. Supp. 2d 505, 511 (E.D. Va. 2003) (holding causation was question for court rather than appraisers), *Wausau Ins. Co. v. Herbert Halperin Distrib. Corp.*, 664 F. Supp. 987, 989 (D. Md. 1987) (same), *Rogers v. State Farm Fire & Cas. Co.*, 984 So. 2d 382, 392 (Ala. 2007) (same), *Munn v. Nat'l Fire Ins. Co.*, 115 So. 2d 54, 58 (Miss. 1959) (same), *and Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142, 153 (Tenn. Ct. App. 2001) (same); *see also Knapp v. Allstate Ins. Co.*, 134 F.3d 378, 1998 WL 23225, at *1 (9th Cir. 1998) (unpublished table mem.) (holding appraisers could discount appraisal for pre-existing wear-and-tear); *Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021, 1022 (Fla. 2002) (holding causation is for appraisers when insurer admits part of loss is covered and for

But the record here does not establish as a matter of law either that this dispute is about causation or that it is beyond the scope of appraisal.

A. Is this a causation dispute?

First, the record does not prove that the dispute here is about causation.

In its motion for summary judgment, State Farm asserted that "the only shingles on Johnson's roof that were actually damaged by hail were the shingles on the ridge of her roof." A dispute about how many shingles were damaged and needed replacing is surely a question for the appraisers. If the parties must agree on precisely which shingles have been damaged before there can be an appraisal, appraisals would hardly be necessary. What's more, either party could avoid appraisal by simply picking a few extras. The cost of replacing shingles (or anything else) is a function of both *price* and *number*; appraisers must factor in both shingle prices and shingle numbers to decide the "amount of loss." To the extent the parties disagree which shingles needed replacing, that dispute would fall within the scope of appraisal.

On appeal, State Farm emphasizes it is disputing not just which shingles were damaged, but which were damaged *by hail*. But nothing in the summary judgment record establishes Johnson's roof was damaged by anything else. In State Farm's denial letter, its summary judgment motion, and even its briefs in this Court, there is neither evidence nor even a hint about what else caused the damage. The trial court could not conclude this was a causation dispute just because State Farm claimed it was.

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court when insurer denies any coverage).

Nor does the record conclusively establish that the parties' dispute is solely about how much of the roof was damaged rather than how much needs to be replaced. Sometimes it may be unreasonable or even impossible to repair one part of a roof without replacing the whole.[26] The policy provides that State Farm will pay reasonable and necessary costs to "repair or replace" damaged property, and repair or replacement is an "amount of loss" question for the appraisers.[27] On this record, the trial court could not conclude as a matter of law that the parties' dispute was about causation rather than something else.

B. Are causation disputes a question of liability or damages?

Even if the parties' dispute involves causation, that does not prove whether it is a question of liability or damages.

Causation relates to both liability and damages because it is the connection between them. For example, the Texas Pattern Jury Charges place causation in both the broad-form liability questions,[28] and in the broad-form damage questions that limit damages to those "resulting" from

[26] *See, e.g.*, *Wausau Ins. Co.*, 664 F. Supp. at 987.

[27] *Gulf Ins. Co. v. Pappas*, 73 S.W.2d 145, 146–47 (Tex. Civ. App.—San Antonio 1934, writ ref'd).

[28] *See, e.g.*, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–GENERAL NEGLIGENCE PJC 4.1 (2008); STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–MALPRACTICE, PREMISES, PRODUCTS PJC 51.3, 51.7, 51.19, 61.5, 66.4, 66.5, 71.3–71.7 (2008); STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–BUSINESS, CONSUMER, INSURANCE, EMPLOYMENT PJC 102.1, 102.7, 102.8, 102.14 (2008).

a particular occurrence,[29] and exclude damages due to other causes.[30] In the abstract, it is hard to say whether causation is more a question of liability or damages.

But in actual cases, causation usually falls into one category or the other. Thus, when different causes are alleged for a single injury to property, causation is a liability question for the courts. For example, in *Wells v. American States Preferred Insurance Co.*, appraisers assessed foundation damage due to plumbing leaks (a covered peril) as "0" but damage due to settling (an excluded peril) as $22,875.94.[31] The Dallas Court of Appeals set aside the appraisal, holding appraisers could decide the amount of damage but not what caused it.[32] Appraisers can decide the cost of repairs in this context, but if they can also decide causation there would be no liability questions left for the courts.

By contrast, when different types of damage occur to different items of property, appraisers may have to decide the damage caused by each before the courts can decide liability. For example, in *Lundstrom v. United Services Automobile Ass'n*, the appraisers assessed $4,226.19 for damages due to water (a covered peril) but made no finding for damages due to mold (as to which coverage

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[29] *See, e.g.*, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–GENERAL NEGLIGENCE PJC 8.2–8.5, 8.11, 9.2–9.5, 11.3 (2008); STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–MALPRACTICE, PREMISES, PRODUCTS PJC 80.3–80.6, 80.13, 81.3–81.6, 83.4, 84.3–84.4 (2008); STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–BUSINESS, CONSUMER, INSURANCE, EMPLOYMENT PJC 110.2, 110.5, 110.8, 110.13, 110.14, 110.18–110.22, 110.26–110.28, 110.30 (2008).

[30] *See, e.g.*, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–GENERAL NEGLIGENCE PJC 8.7–8.9 (2008); STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–MALPRACTICE, PREMISES, PRODUCTS PJC 80.7–80.9 (2008); STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–BUSINESS, CONSUMER, INSURANCE, EMPLOYMENT PJC 110.7, 110.25 (2008).

[31] 919 S.W.2d 679, 685–86 (Tex. App.—Dallas 1996, writ denied).

[32] *Id*. at 685.

was disputed).[33] Rejecting the argument that appraisal is barred "whenever causation factors into the award," the court of appeals affirmed the water damage award, and rendered mold damage moot by finding no coverage.[34] In this context, courts can decide whether water or mold damage is covered, but if they can also decide the amount of damage caused by each, there would be no damage questions left for the appraisers.

The same is true when the causation question involves separating loss due to a covered event from a property's pre-existing condition. Wear and tear is excluded in most property policies (including this one) because it occurs in every case. If State Farm is correct that appraisers can never allocate damages between covered and excluded perils, then appraisals can never assess hail damage unless a roof is brand new.[35] That would render appraisal clauses largely inoperative, a construction we must avoid.[36]

This was the conclusion we reached in *Gulf Insurance Co. of Dallas v. Pappas*, a case in which a fire worsened pre-existing sags in the floors and roof of a building.[37] The parties hotly disputed how much the floors sagged before the fire, and whether the building's interior should be

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[33] 192 S.W.3d 78, 88 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

[34] *Id*. at 89, 95.

[35] *See, e.g.*, *CIGNA Ins. Co. v. Didimoi Prop. Holdings, N.V.*, 110 F. Supp. 2d 259, 263 (D. Del. 2000) (holding that if "amount of loss" does not include causation, "appraisal would be a useless exercise because it would not fix the amount of loss and either party could still contest damages").

[36] *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 748 (Tex. 2006) ("[I]t has again long been the rule that we must read all parts of a policy together, giving meaning to every sentence, clause, and word to avoid rendering any portion inoperative.").

[37] 73 S.W.2d 145, 146 (Tex. Civ. App.—San Antonio 1934, writ ref'd).

repaired or completely replaced to restore it to its previous condition.[38] The court of appeals held these issues were for the appraisers rather than the jury,[39] and by refusing the writ we adopted that opinion.[40] If appraisers cannot take pre-existing wear and tear into consideration in valuing the amount of loss, then we should have reversed it instead.

Indeed, appraisers must always consider causation, at least as an initial matter. An appraisal is for damages caused by a specific occurrence, not every repair a home might need. When asked to assess hail damage, appraisers look only at damage caused by hail; they do not consider leaky faucets or remodeling the kitchen. When asked to assess damage from a fender-bender, they include dents caused by the collision but not by something else. Any appraisal necessarily includes some causation element, because setting the "amount of loss" requires appraisers to decide between damages for which coverage is claimed from damages caused by everything else.

This of course does not mean appraisers can rewrite the policy. No matter what the appraisers say, State Farm does not have to pay for repairs due to wear and tear or any other excluded peril because those perils are excluded. But whether the appraisers have gone beyond the damage questions entrusted to them will depend on the nature of the damage, the possible causes, the parties' dispute, and the structure of the appraisal award (as discussed more fully below). State Farm cannot avoid appraisal at this point merely because there might be a causation question that exceeds the scope of appraisal.

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[38] *Id*. at 146–47

[39] *Id*.

[40] *See Fiess*, 202 S.W.3d at 749; *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 754 n.52 (Tex. 2006).

C. When should appraisals be reviewed?

Even if the appraisal here turns out to involve not just damage but liability questions, that does not mean appraisal should be prohibited as an initial matter.

This case comes to us in an unusual posture. At least a dozen Texas cases involve appraisals of hail damage, every one challenging an appraisal after it had taken place.[41] By contrast, this appraisal has yet to occur. That makes a big difference for several reasons.

First, appraisal is intended to take place before suit is filed; this Court and others have held it is a condition precedent to suit.[42] Appraisals require no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings. It would be a rare case in which appraisal could not be completed with less time and expense than it would take to file motions contesting it. Allowing litigation about the scope of appraisal before the appraisal takes place would mark a dramatic change in Texas insurance practice, and surely encourage much more of the same.

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[41] *See, e.g.*, *Citizens' Ins. Co. v. Schofield*, 293 S.W. 802, 805 (Tex. 1927) (adopting opinion of Commission that allowed claim by insurer for expenses incurred in pre-suit appraisal); *American Cent. Ins. Co. v. Bass*, 38 S.W. 1119, 1120 (Tex. 1897) (holding pre-suit appraisal had not been waived); *Gardner v. State Farm Lloyds*, 76 S.W.3d 140, 142 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (affirming pre-suit appraisal); *Germania Farm Mut. Ins. Ass'n v. Williams*, No. 11–00–00393–CV, 2002 WL 32341841, at *4 (Tex. App.—Eastland May 23, 2002, no pet.) (rejecting pre-suit appraisal); *Vanguard Underwriters Ins. Co. v. Smith*, 999 S.W.2d 448, 451 (Tex. App.—Amarillo 1999, no pet.) (abating suit for appraisal); *Toonen v. United Servs. Auto. Ass'n*, 935 S.W.2d 937, 940 (Tex. App.—San Antonio 1996, no writ) (affirming pre-suit appraisal); *Hennessey v. Vanguard Ins. Co*., 895 S.W.2d 794, 796 (Tex. App.—Amarillo 1995, writ denied) (involving pre-suit appraisal); *Barnes v. W. Alliance Ins. Co.*, 844 S.W.2d 264, 267 (Tex. App.—Fort Worth 1992, writ dism'd by agr.) (setting aside pre-suit appraisal); *Pyles v. United Servs. Auto. Ass'n*, 804 S.W.2d 163, 164 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (affirming pre-suit appraisal); *Gulf Ins. Co. v. Carroll*, 330 S.W.2d 227, 231 (Tex. Civ. App.—Waco 1959, no writ) (holding pre-suit appraisal had been waived); *U.S. Fid. & Guar. Co. v. Jordan*, 278 S.W.2d 569, 571 (Tex. Civ. App.—Amarillo 1955, writ dism'd) (holding insurer waived pre-suit appraisal); *Cont'l Fire & Cas. Ins. Corp. v. Surber*, 231 S.W.2d 750, 752 (Tex. Civ. App.—Fort Worth 1950, no writ) (involving pre-suit appraisal).

[42] *Scottish Union & Nat'l Ins. Co. v. Clancy*, 8 S.W. 630, 631–32 (Tex. 1888) (holding appraisal was condition precedent to litigation); *Am. Cent. Ins. Co. v. Terry*, 26 S.W.2d 162, 166 (Tex. Comm'n App. 1930, holding approved); *Vanguard Underwriters Ins. Co. v. Smith*, 999 S.W.2d 448, 450 (Tex. App.—Amarillo 1999, no pet.); *Providence Lloyds Ins. Co. v. Crystal City Indep. Sch. Dist.*, 877 S.W.2d 872, 878 (Tex. App.—San Antonio 1994, no writ).

Second, in most cases appraisal can be structured in a way that decides the amount of loss without deciding any liability questions. As already noted, when an indivisible injury to property may have several causes, appraisers can assess the amount of damage and leave causation up to the courts. When divisible losses are involved, appraisers can decide the cost to repair each without deciding who must pay for it.[43] When an insurer denies coverage, appraisers can still set the amount of loss in case the insurer turns out to be wrong.[44] And when the parties disagree whether there has been any loss at all, nothing prevents the appraisers from finding "$0" if that is how much damage they find.

Third, the scant precedent involving disputes about the scope of appraisal suggests that appraisals generally resolve such disputes. The final appraisal award here may substantiate State Farm's claim that only the ridgeline suffered hail damage, or reach some in-between figure that proves acceptable to all concerned. Litigating the scope of appraisal is wasteful and unnecessary if the appraisal itself can settle this controversy.

Finally, even if an appraisal award is flawed, that can be easily remedied by disregarding it later. Thus, when insureds objected to appraisal procedures that were allegedly "inaccurate, unreliable, and biased," we held in 2002 that the appraisal should go forward and the results could

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[43] *See, e.g.*, *Lundstrom v. United Servs. Auto. Ass'n-CIC*, 192 S.W.3d 78, 87–89 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (rejecting argument that appraisal is barred "whenever causation factors into the award," and affirming appraisal in which appraisers separated water damage from mold damage).

[44] *Am. Cent. Ins. Co. v. Bass*, 38 S.W. 1119, 1119–20 (Tex. 1897).

be challenged later if the insureds were dissatisfied.[45] If an appraisal is not an honest assessment of necessary repairs, that can be proved at trial and the award set aside.[46]

But in every property damage claim, someone must determine the "amount of loss," as that is what the insurer must pay. An appraisal clause "binds the parties to have the extent or amount of the loss determined in a particular way."[47] Like any other contractual provision, appraisal clauses should be enforced. There may be a few times when appraisal is so expensive and coverage is so unlikely that it is worth considering beforehand whether an appraisal is truly necessary.[48] But unless the "amount of loss" will never be needed (a difficult prediction when litigation has yet to begin), appraisals should generally go forward without preemptive intervention by the courts.

* * *

We do not decide today whether the appraisal conducted on remand will necessarily be binding. The summary judgment record does not, and probably cannot, answer that question until after the appraisal has taken place. But for the reasons stated above, we affirm the court of appeals'

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[45] *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex. 2002).

[46] *See Gulf Ins. v. Pappas*, 73 S.W.2d 145, 146–47 (Tex. Civ. App.—San Antonio 1934, writ ref'd).

[47] *In re Allstate*, 85 S.W.3d at 195 (quoting *Scottish Union & Nat'l Ins. Co. v. Clancy*, 8 S.W. 630, 631 (Tex. 1888)).

[48] *See, e.g.*, *Glens Falls Ins. Co. v. Peters*, 386 S.W.2d 529, 532 (Tex. 1965) (remanding for appraisal after parties agreed to try first whether building was a total loss).

order granting Johnson's motion for summary judgment to compel State Farm to participate in the appraisal process, and remanding the issue of her attorney's fees to the trial court for consideration.

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Scott Brister
Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

No. 07-0040

IN RE GLOBAL SANTE FE CORPORATION, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued January 16, 2008

JUSTICE WILLETT delivered the opinion of the Court.

In this original proceeding, GlobalSantaFe Corp. (GSF) asks this Court to direct the silica MDL pretrial court to vacate its order remanding this case to the trial court where it was originally filed. The pretrial court concluded that Chapter 90 of the Civil Practice and Remedies Code, applicable to certain silica-related cases and under which the case had been transferred to the pretrial court, was inoperative because it was preempted by the Jones Act, a federal maritime statute. We agree with GSF that the general procedural framework set out in Chapter 90 is not preempted, although we also hold that Chapter 90's minimal-impairment provision relating to silica claims is preempted. We conditionally grant mandamus relief.

I. Background

In May 2003, John Lopez sued GSF under the Jones Act, alleging injuries from exposure to asbestos and silica while employed by GSF aboard a vessel.[1] Lopez filed his Jones Act suit in state court, as allowed by federal law,[2] in the 55th district court of Harris County.

Two years later, Chapter 90 of the Civil Practice and Remedies Code became effective,[3] adopting unique procedures for personal-injury actions alleging injuries from silica and asbestos.[4] We focus here on the requirements relating to silica claims.[5]

Section 90.004 requires silica claimants to serve a detailed expert report on each defendant. Among other requirements, the report must be prepared by a physician who has specific qualifications,[6] and the physician (or other medical professional "employed by and under the direct supervision and control of the physician") must perform a physical examination of the claimant and take a detailed occupational, exposure, medical, and smoking history.[7]

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[1] The Jones Act provides a cause of action to seamen injured in the course of their employment. 46 U.S.C. § 30104.

[2] Under the "saving to suitors" clause of 28 U.S.C. § 1333(1), a Jones Act claim can be brought in state court. *See Engel v. Davenport*, 271 U.S. 33, 37 (1926); *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 428–29 (Tex. 1999).

[3] *See* Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 12, 2005 Tex. Gen. Laws 169, 182 (adopting September 1, 2005 effective date).

[4] TEX. CIV. PRAC. & REM. CODE §§ 90.001–90.012.

[5] Although Lopez alleged injuries from both asbestos and silica, GSF filed a notice of transfer to the silica MDL pretrial court, and this mandamus action concerns that court's decision to remand the case to the trial court where it was originally filed. We focus, therefore, on the Chapter 90 components relating to silica-related injuries.

[6] The report must be prepared "by a physician who is board certified in pulmonary medicine, internal medicine, oncology, pathology, or, with respect to a claim for silicosis, occupational medicine and whose license and certification were not on inactive status at the time the report was made." *Id.* § 90.004(a).

[7] *Id.* §§ 90.004(a)(1)–(2), (e).

The report must verify that the claimant suffers from one or more silica-related diseases based on recognized symptoms.[8] It must attach all medical evidence supporting the physician's opinion.[9] The report must also verify that the physician has made certain causation findings regarding silica exposure and the claimant's observed ailments.[10] The report must make these causation determinations depending on the type of silica-related disease asserted.[11]

If the claimant is asserting a claim for silicosis, the report must verify a minimal level of impairment under section 90.004(b)(2), requiring "at least Class 2 or higher impairment due to silicosis, according to the American Medical Association Guides to the Evaluation of Permanent Impairment . . . ."

Section 90.010(a) provides that "[t]he MDL rules apply to any action pending on the date this chapter becomes law in which the claimant alleges personal injury or death from exposure to asbestos or silica," subject to certain exceptions. Relevant MDL rules are set out in Rule 13 of the Texas Rules of Judicial Administration, created by this Court pursuant to legislative authority.[12] The 295th district court of Harris County is the MDL pretrial court for personal-injury suits alleging silica

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[8] *Id.* § 90.004(a)(3).

[9] *Id.* § 90.004(a)(4).

[10] *Id.* §§ 90.004(b)–(d).

[11] *Id.* For example, section 90.004(d) states, "If the claimant is asserting a claim for any disease other than silicosis and lung cancer alleged to be related to exposure to silica, the report required by Subsection (a) must also verify that the physician has diagnosed the exposed person with a disease other than silicosis or silica-related lung cancer and has concluded that the exposed person's disease is not more probably the result of causes other than silica exposure."

[12] *See* TEX. GOV'T CODE §§ 74.024, 74.163.

exposure.[13] Generally, the MDL pretrial court decides all pretrial matters and then remands the case to the trial court.[14]

Section 90.006(a) provides, for actions filed on or after the statute's September 1, 2005 effective date, the expert report must be served not later than thirty days after the defendant answers or otherwise appears. For actions filed after the effective date, the defendant may file a motion to dismiss if the claimant fails to file an expert report or files one that does not comply with section 90.003 (asbestos claims) or 90.004 (silica claims).[15]

For actions like this one filed before September 1, 2003, the MDL rules are inapplicable if the plaintiff files an expert report complying with the expert report requirements of Chapter 90.[16] The report is due within 90 days of Chapter 90's September 1, 2005 effective date.[17] If the plaintiff misses this deadline for filing a compliant report, the defendant may file a notice of transfer to the MDL pretrial court.[18] Section 90.010(b) provides:

> If the claimant fails to serve a report complying with Section 90.003 or 90.004 on or before the 90th day after the date this chapter becomes law under Subsection (a)(2),

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[13] *See In re Silica Prods. Liab. Litig.*, 166 S.W.3d 3 (Tex. M.D.L. Panel 2004) (granting motion to establish Silica MDL pretrial court); TEX. GOV'T CODE § 74.162 (authorizing judicial panel on multidistrict litigation to transfer cases to MDL pretrial court).

[14] *See* TEX. GOV'T CODE § 74.162; TEX. R. JUD. ADMIN. 13.6, 13.7, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. F app. (Vernon).

[15] TEX. CIV. PRAC. & REM. CODE § 90.007(a).

[16] *Id.* § 90.010(a)(2).

[17] *Id.* Section 90.010(a)(3) separately provides that the MDL rules do not apply to actions filed before September 1, 2003, if the claimant "has been diagnosed with malignant mesothelioma, other malignant asbestos-related cancer, or malignant silica-related cancer."

[18] *Id.* § 90.010(b).

> the defendant may file a notice of transfer to the MDL pretrial court. If the MDL pretrial court determines that the claimant served a report that complies with Section 90.003 or 90.004 on or before the 90th day after the date this chapter becomes law, the MDL pretrial court shall remand the action to the court in which the action was filed. If the MDL pretrial court determines that the report was not served on or before the 90th day after the date this chapter becomes law or that the report served does not comply with Section 90.003 or 90.004, the MDL pretrial court shall retain jurisdiction over the action pursuant to the MDL rules.

The notice of transfer automatically transfers the case without further court order,[19] subject to a motion to remand filed in the MDL court and a remand by that court if it determines that the plaintiff had filed a compliant report.[20] Absent a successful motion to remand, cases thus transferred to the MDL court remain in that court until the claimant serves a Chapter 90-compliant report.[21]

Contending that Lopez did not file a report complying with Chapter 90, GSF filed on December 2, 2005, a notice of transfer to the silica MDL pretrial court. Lopez responded, arguing Chapter 90 was preempted by the Jones Act and urging the MDL pretrial court to remand the case to the trial court. The MDL pretrial court agreed. GSF sought mandamus relief in the court of appeals, which also sided with Lopez by holding that "chapter 90 is preempted by federal law."[22] GSF now seeks mandamus relief in this Court directing the MDL pretrial court to vacate its remand order.

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[19] *See* TEX. R. JUD. ADMIN. 13.11(e).

[20] TEX. CIV. PRAC. & REM. CODE § 90.010(b).

[21] *Id.* § 90.010(d). Besides the provisions concerning expert reports and proceedings before an MDL court, Chapter 90 has other miscellaneous provisions. For example, section 90.009 provides, "Unless all parties agree otherwise, claims relating to more than one exposed person may not be joined for a single trial."

[22] ___ S.W.3d ___,___.

II. Discussion

A. The "Asbestos Litigation Crisis" Addressed by Chapter 90

The statute enacting Chapter 90 and other codified provisions begins with legislative findings concerning asbestos and silica litigation. The Legislature stressed the existence of an "asbestos litigation crisis,"[23] noting that Texas leads the nation in such suits.[24] It found that this problem is exacerbated by the filing of suit, sometimes to avoid limitations problems, before the claimant is suffering from any illness affecting his daily life.[25] The Legislature made further findings that this litigation has resulted in the bankruptcies of many companies, the loss of thousands of jobs, enormous litigation expenses, overcrowded dockets that hamper the ability of seriously ill claimants to seek redress, and the bleeding of company assets lost to a crush of claims by those "who are not functionally or physically impaired."[26] It warned of a similar crisis looming over silica-related actions, evidenced by a recent spike in such claims, and raising some of the same concerns applicable to the asbestos crisis.[27] The statute further provides:

> It is the purpose of this Act to protect the right of people with impairing asbestos-related and silica-related injuries to pursue their claims for compensation in a fair and efficient manner through the Texas court system, while at the same time preventing scarce judicial and litigant resources from being misdirected by the claims of

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[23] Act of May 16, 2005, 79th Leg., R.S., ch. 97, §§ 1(d),(f), 2005 Tex. Gen. Laws 169; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (also noting an "asbestos-litigation crisis" confronting the nation).

[24] Act of May 16, 2005, 79th Leg., R.S., ch 97, § 1(e), 2005 Tex. Gen. Laws 169.

[25] *Id.* § 1(f).

[26] *Id.* §§ 1(g)–(h), 2005 Tex. Gen. Laws 169–70.

[27] *Id.* §§ 1(*l*)–(m), 2005 Tex. Gen. Laws 170.

> individuals who have been exposed to asbestos or silica but have no functional or physical impairment from asbestos-related or silica-related disease.[28]

To address the Legislature's stated purposes and concerns, Chapter 90 includes three components on which we focus. First, by requiring detailed expert reports early in the litigation process, Chapter 90 endeavors to assure that claims are not brought and pursued unless they are supported by reliable expert evaluations of the claimant.[29]

Second, Chapter 90 attempts to consolidate silica and asbestos cases in a single MDL court for pretrial proceedings.[30] The obvious advantages of such consolidation include (1) the more efficient resolution of recurring issues by a court that acquires expertise in cases with related factual, procedural, and substantive legal issues; and (2) consistent rulings in such cases. The Legislature has authorized MDL transfers where they will serve the convenience of parties and witnesses and "promote the just and efficient conduct of the [consolidated] actions."[31] It has empowered the judicial panel on multidistrict litigation to transfer related cases to MDL courts for "consolidated or coordinated pretrial proceedings."[32] In creating the silica pretrial MDL action, the panel observed:

> One virtue of transferring related cases to a single pretrial judge is that issues, once raised, will be decided the same way in the future. A consistent and steady judicial hand at the helm should in fact promote agreements because lawyers will know where the court stands on recurring issues. As contested issues arise, the pretrial judge will make consistent rulings, which can then be reviewed by the appellate

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[28] *Id.* § 1(n).

[29] *See* TEX. CIV. PRAC. & REM. CODE §§ 90.003–90.004.

[30] *See id.* § 90.010.

[31] TEX. GOV'T CODE § 74.162.

[32] *Id.*

> courts as appropriate. This, we think, serves Rule 13's goal that our system give related cases consistent and efficient treatment.[33]

Third, Chapter 90 requires claimants in some cases to establish a minimal level of impairment before their cases can proceed.[34]

These procedures serve the stated legislative purpose of conserving judicial and litigant resources and directing those resources to persons most suffering from asbestos and silica injuries. Of these three Chapter 90 components, we conclude that only the third is preempted by the Jones Act; the other two are not preempted and should be followed in Jones Act cases.[35]

B. Mandamus Relief is Warranted

A writ of mandamus will issue only if the trial court committed a clear abuse of discretion for which the relator has no adequate remedy at law.[36] The adequacy of an appellate remedy must be determined by balancing the benefits of mandamus review against its detriments.[37] In evaluating benefits and detriments, we consider whether mandamus relief will safeguard "important substantive and procedural rights from impairment or loss."[38] In addition to impairment of rights, we consider

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[33] *In re Silica Prods. Liab. Litig.*, 166 S.W.3d 3, 6 (Tex. M.D.L. Panel 2004).

[34] *See* TEX. CIV. PRAC. & REM. CODE § 90.004(b)(2).

[35] Some causation provisions of Chapter 90 may also be preempted. *See infra* note 79 and accompanying text.

[36] *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding).

[37] *In re McAllen Med. Ctr.*, ___S.W.3d___,___(Tex. 2008) (orig. proceeding); *Prudential Ins. Co. of Am.*, 148 S.W.3d at 136.

[38] *Prudential Ins. Co. of Am.*, 148 S.W.3d at 136.

whether mandamus will "allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments."[39]

By remanding the case to the trial court, the MDL pretrial court in effect held that, at least as to Lopez, Chapter 90 in its entirety is preempted by the Jones Act. This is so because Chapter 90 prescribes, as a result of a plaintiff's failure to file an adequate section 90.004 report, the defendant's right to file a notice of transfer to the MDL pretrial court, as described above. That court then retains, dismisses, or remands the case back to the trial court depending on whether the report is filed.

The MDL pretrial court's conclusion that Chapter 90 was preempted by the Jones Act was erroneous and mandamus relief is appropriate to correct the error. As we recently held in *In re McAllen Medical Center*, another case concerning legislatively mandated expert reports, mandamus relief is available when the Legislature has enacted a statute to address findings "that traditional rules of litigation are creating an ongoing crisis," and "the purposes of the [enacted] statute would otherwise be defeated."[40] These precise grounds for mandamus relief are again presented. "Here, the Legislature has already balanced most of the relevant costs and benefits for us."[41]

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[39] *Id.*

[40] ___ S.W.3d at ___.

[41] *Id.* at ___.

C. Jones Act Preemption Principles

The Jones Act provides that "[a] seaman injured in the course of employment . . . may elect to bring a civil action at law . . . against the employer."[42] The Act has been described as "remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty."[43]

The preemption of state law by the Jones Act is a unique corner of federal preemption law that must be applied with recognition that Jones Act cases can be brought in federal or state court.[44] While state law must sometimes yield to the need for a uniform and harmonious system of federal maritime law, "this limitation still leaves the States a wide scope."[45] Congress could preempt the entire field of maritime law, but has instead left the states "with a considerable legislative and judicial competence in the maritime field."[46] Where Congress has acted in the admiralty area, "state regulation is permissible, absent a clear conflict with the federal law."[47]

Federal preemption in this context does not always lend itself to simple resolution. As the United States Supreme Court observed in one Jones Act case, "It would be idle to pretend that the

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[42] 46 U.S.C. § 30104.

[43] *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936).

[44] *See supra* note 2. We have noted that preemption cases arising under admiralty law typically do not even mention the more general line of preemption authority under the Supremacy Clause. *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 428 (Tex. 1999).

[45] *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 373 (1959).

[46] David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325, 327 (1995).

[47] *Askew v. Am. Waterways Operators*, 411 U.S. 325, 341 (1973).

line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence."[48]

The Court, however, has laid down some general principles. On the one hand, *substantive* rights created by Congress via the Jones Act must prevail over inconsistent state substantive law even where the suit is brought in state court.[49] On the other hand, it has held that state law characterized as *procedural* is not preempted.[50] The Court has also recognized that federal maritime law follows a "reverse *Erie*" doctrine of sorts, employing the use of substantive federal maritime law in state courts but recognizing that state procedural law can be followed.[51]

Our own cases have recognized this general proposition that a state court hearing a Jones Act case "must apply substantive federal maritime law but follow state procedure,"[52] and have acknowledged the "reverse *Erie*" nature of state court adjudication of Jones Act claims.[53] Unfortunately, a simple rule of Jones Act preemption—providing that such cases litigated in state

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[48] *Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994).

[49] *See Engel v. Davenport*, 271 U.S. 33, 39 (1926) (holding that the Jones Act statute of limitations is a "provision affecting the substantive right" created by the Jones Act and must prevail over inconsistent state statute of limitations).

[50] *Am. Dredging Co.*, 510 U.S. at 453 (characterizing the state doctrine of *forum non conveniens* as "procedural rather than substantive" and noting that "[u]niformity of process (beyond the rudimentary elements of procedural fairness) is assuredly not what the law of admiralty seeks to achieve, since it is supposed to apply in all the courts of the world").

[51] *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986) ("Stated another way, the 'savings to suitors' clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.").

[52] *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998).

[53] *Texaco Ref. & Mktg., Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61, 64 (Tex. 1991).

court follow federal substantive law and state procedural law—cannot be fashioned from the extant jurisprudence. For example, even as to substantive remedies, we have recognized that "state law remedies that do not conflict with federal law remedies are available to seamen."[54]

In *Southern Pacific Co. v. Jensen*,[55] the United States Supreme Court held that a state workers' compensation law was preempted by federal general maritime law. In an oft-recited standard, the Court held that a state-law remedy is preempted by federal maritime law if the state remedy "works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations."[56] Because the state law remedy in *Jensen* was "wholly unknown" to federal maritime common law, "incapable of enforcement by the ordinary processes of any court," and inconsistent with congressional policy to encourage investments in ships, as indicated by two federal statutes, the Court held that the state remedy was preempted by federal law.[57]

In *American Dredging Co. v. Miller*, the Court held in a Jones Act case that a Louisiana rule making inapplicable the doctrine of *forum non conveniens* in maritime cases was not preempted by federal maritime law.[58] Looking to the *Jensen* standard quoted above, the Court noted that the

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[54] *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 425 (Tex. 1999); *see also* Robertson, *supra* note 46, at 348 ("Anyone who began studying law after 1940 will have been brought up on two rather intimidating notions about drawing the substance-procedure distinction: it is done differently in different contexts, and in all contexts it is hard to do." (footnotes omitted)).

[55] 244 U.S. 205 (1917).

[56] *Id.* at 216.

[57] *Id.* at 218.

[58] 510 U.S. 443 (1994).

federal doctrine of *forum non conveniens* is a doctrine of general application and did not originate in admiralty; therefore, the Louisiana rule did not work material prejudice to a characteristic feature of general maritime law.[59] Although recognizing that the state rule produced some disuniformity, the Court rejected the argument that, under the *Jensen* standard, the rule interfered with the proper harmony and uniformity of federal maritime law.[60] The Court reasoned that the uniformity requirement is not absolute, especially on matters of procedure.[61] It noted that uniformity of process is not required by admiralty law, that the doctrine of *forum non conveniens* "is nothing more or less than a supervening venue provision," and that venue "goes to process rather than substantive rights—determining which among various competent courts will decide the case."[62] The Court also noted it had previously held that venue in Jones Act cases brought in state court should be decided under state law,[63] and that "[j]ust as state courts, in deciding admiralty cases, are not bound by the venue requirements set forth for federal courts in the United States Code, so also they are not bound by the federal common-law venue rule (so to speak) of *forum non conveniens*."[64]

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[59] *Id.* at 450.

[60] *Id.* at 450-53.

[61] *Id.* at 451.

[62] *Id.* at 453.

[63] *Id.* at 457 (discussing *Bainbridge v. Merch. & Miners Transp. Co.*, 287 U.S. 278 (1932)).

[64] *Id.* at 453.

D. Application of Preemption Principles to this Case

1. Non-Preempted Provisions

The requirements embedded in Chapter 90 to assure reliable expert confirmation of silica-related diseases are not preempted by the Jones Act. Nothing in the Jones Act exempts a seaman claiming a silica-related disease from establishing, through reliable medical proof, that he in fact suffers from such a disease. Federal cases, beginning with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[65] have in recent years established standards for the admission of expert testimony that focus on the trial court's role in determining the reliability of such testimony. Texas cases have developed similar standards that draw heavily from federal jurisprudence.[66] Both federal and state law require expert testimony "grounded 'in the methods and procedures of science.'"[67]

To the extent that Jones Act jurisprudence recognizes a special standard for proving causation,[68] federal cases have held that this causation standard does not exempt Jones Act cases

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[65] 509 U.S. 579 (1993).

[66] *See, e.g.*, *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 579 (Tex. 2006) (applying *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720–28 (Tex. 1998) (applying *Daubert* and *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997), and recognizing that relevancy and reliability requirements under *Daubert's* interpretation of Federal Rule of Evidence 702 are also applicable to Texas Rule of Evidence 702); *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 712 (Tex. 1997) (stating that reliability of expert testimony under Texas law "is determined by looking at numerous factors including those set forth in *Robinson* and *Daubert*"); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556–58 (Tex. 1996) (stating that "[w]e are persuaded by the reasoning in *Daubert*" and adopting standards for admission of expert testimony consistent with *Daubert*'s focus on relevance and a reliabile foundation).

[67] *Robinson*, 923 S.W.2d at 557 (quoting *Daubert*, 509 U.S. at 590).

[68] *See infra* note 79.

from the general rules for admission of expert testimony.[69] We see no basis for holding that Texas law generally governing the admission of expert testimony, which draws so heavily from federal law, is preempted by the Jones Act. This law does not clearly conflict with federal maritime law. Under *Miller* and *Jensen*, the jurisprudence requiring reliable expert testimony has developed in tandem in the federal and Texas courts, and is a body of law of general application; the use of these general standards does not work material prejudice to a characteristic feature of general maritime law. Nor do we see how the use of such standards, which apply to Jones Act cases proceeding in federal court, would interfere with the proper harmony and uniformity of federal maritime law.

Therefore, the provisions of Chapter 90 directed at assuring reliable expert confirmation of the existence of one of the medically recognized forms of silica-related illness are not preempted. Most of the expert-report requirements of section 90.004 can be so characterized. Section 90.004 tracks widely if not universally recognized criteria for reliably diagnosing the existence of silica-related illnesses by (1) conducting a physical examination by a trained professional that includes an appropriate occupational and exposure history under section 90.004(a)(1), (a)(2), and (e); (2) identifying a silica-related condition based on established radiographic methods and tests employed by medical science under section 90.004(a)(3) and (a)(4); and (3) ruling out other causes of the

[69] *See Wills v. Amerada Hess Corp.*, 379 F.3d 32, 47 (2d Cir. 2004) (holding that even though a Jones Act "plaintiff faces a relaxed burden of proof with regard to causation, the district court's admission of expert testimony is nonetheless governed by the strictures of [Evidence] Rule 702 and *Daubert*," and noting that the Sixth and Ninth Circuits have reached the same conclusion).

observed condition under sections 90.004(b) through (d).[70] The failure to establish these criteria is grounds for rejecting expert testimony under *Daubert*.[71]

As examples, the requirement of section 90.004(a)(1) that a board-certified physician conduct a detailed occupational and exposure history is directed at assuring—early in the litigation so as to conserve judicial and litigant resources—that the claim of silica-related injury is supported by medically reliable expert review. "In order to rule out the multitude of other causes of the radiographic findings, it is vitally important for a physician to take a thorough occupational/exposure history and medical history."[72] The requirement of section 90.004(a)(3)(A), that the expert observe bilateral nodular opacities categorized as p, q, or r primarily in the upper lungs, is a standardized method of medical science to identify chronic or classic silicosis and distinguishing it from

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[70] *See In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 622 (S.D. Tex. 2005) ("A diagnosis [of silicosis] requires (1) an adequate exposure to silica dust with an appropriate latency period, (2) radiographic evidence of silicosis, and (3) the absence of any good reason to believe that the radiographic findings are the result of some other condition . . . . [T]hese three criteria are universally accepted, as demonstrated by learned treatises and experts in the field.").

[71] *See id.* at 624–25:

> In the absence of an appropriate work/exposure history, there is no way for the diagnosing doctors to have known the potential intensities of respirable silica exposure, the duration of the exposure, information as to dosage . . . as well as information as to possible alternative causes of the radiographic findings . . . . Looking no further than the first criterion, virtually all of the diagnoses fail to satisfy the minimum, medically-acceptable criteria for the diagnosis of silicosis, and therefore, the testimony of the challenged doctors cannot be admissible under the standards set by Rule 702 and *Daubert*.

(footnote omitted). *See also Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 771–72 (Tex. 2007) ("[A]bsent any evidence of dose, the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed or whether those amounts were sufficient to cause asbestosis.").

[72] *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 593 (also noting that "it is imperative that the diagnosing physician take at least some portion of the histories").

asbestosis.[73] The requirements specifying a minimal latency period, such as section 90.004(b)(1)'s requirement that the report for a claimant alleging silicosis verify that "there has been a sufficient latency period for the applicable type of silicosis," are also intended to assure that the claimant is in fact suffering from a silica-related disease under established medical science.[74] The requirement that a qualified reader find a profusion grading of 1/0 or 1/1, found in section 90.004(a)(3)(A), assures that the reader has found at least some abnormality in the x-ray.[75] All of these requirements represent the Legislature's attempt to require a medically valid demonstration of silica-related disease as opposed to mere exposure to silica or some other substance or mere concern that a disease may develop in the future.

Nor are Chapter 90's provisions for consolidating silica-related cases in a single court for pretrial disposition preempted by the Jones Act. These provisions serve an important state purpose, recognized by the Legislature, of streamlining the resolution of silica cases in the state court system and thus conserving judicial and litigant resources. Moreover, as discussed above, Jones Act

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[73] *See id.* at 591–92 (noting that chronic or classic silicosis is characterized by small round nodules, primarily in the upper lungs, indicated by a p, q, or r rating under the International Labour Office (ILO) system standardizing the interpretation of chest x-rays, and that asbestosis is characterized by linear scarring primarily in the lower lungs, characterized by irregular opacities indicated by an s, t, or u rating in the ILO system); *see also id.* at 603 (noting that one testing company "managed to generate" 6,757 MDL silicosis plaintiffs, of which 4,031 had previously made asbestosis claims, and that "[t]he magnitude of this feat becomes evident when one considers that many pulmonologists, pathologists and B-readers go their entire careers without encountering a single patient with both silicosis and asbestosis"). Sections 90.003(a)(2)(C) and 90.003(c)(2), applicable to asbestos-related claims, therefore specify that asbestosis can be verified by an x-ray showing irregular opacities indicated by an s, t, or u rating, among other requirements.

[74] *See id.* at 569 ("Chronic or classic silicosis, the most common form, typically requires at least 15–20 years of moderate to low exposure of respirable silica.").

[75] *See id.* at 591 (explaining that 1/0 and 1/1 ILO designations indicate some abnormality, while a first number of "0" indicates no abnormality found, and first numbers greater than "1" indicate increasingly abnormal readings).

preemption principles recognize that Jones Act cases can be brought in federal or state courts and that adherence to precisely the same rules of procedure and practice are not required. Texas courts are not expected to abandon all their regular rules of practice and procedure and to adopt federal rules in a case simply because a Jones Act claim is alleged. On the contrary, maritime law recognizes a "reverse-*Erie*" principle that generally leaves state courts hearing maritime suits to their regular procedures. *American Dredging* recognized that matters of venue have long been the province of state law in Jones Act cases brought in state court. As with the doctrine of *forum non conveniens* analyzed in *American Dredging*, the transfer of silica-related Jones Act cases to the MDL pretrial court is a "supervening venue provision"[76] where state court procedures can be followed. The transfer of silica-related cases to an MDL court for consolidated pretrial proceedings does not work material prejudice to a characteristic feature of maritime law.

In short, the principles of Jones Act preemption are flexible enough to accommodate general Texas rules governing the admission of expert testimony, and also accommodate the Chapter 90 rules specific to expert testimony in cases involving silica-related injuries and the consolidation of silica cases in the MDL pretrial court for pretrial proceedings. These Texas rules and standards are not preempted.

2. Preemption of Minimal-Impairment Provision

The Jones Act imposes no requirement for a minimal threshold of physical injury, nor any limitation that only lung diseases that have progressed to a specified level of physical impairment

[76] *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994).

are covered.[77] GSF concedes that Chapter 90 cannot impose a requirement that the plaintiff suffer from a minimal level of physical impairment before he can obtain relief on his Jones Act claim. Accordingly, section 90.004(b)(2), providing that claimants alleging silicosis must have sustained "at least Class 2 or higher impairment" cannot be applied to Jones Act claims.[78] We further conclude that Chapter 90 must not be interpreted to impose a higher standard of proof for causation than the federal standard applicable to Jones Act cases.[79]

The preemption of section 90.004(b)(2) does not mean that the remaining expert-report requirements of Chapter 90 and its provisions for pretrial proceedings in the MDL pretrial court are preempted. We hold that these non-preempted provisions should be followed in all applicable suits alleging silica-related injuries and including a cause of action under the Jones Act. The MDL pretrial court therefore erred in remanding this case to the trial court.

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[77] We do not mean to suggest that the Jones Act dispenses entirely with a requirement of physical injury, only that we are unaware of a minimal level of physical impairment under the Act. *See Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 141, 159 (2003) (holding that in a case brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51–60, a plaintiff already suffering from asbestosis can recover emotional distress damages associated with fear of developing cancer, but a disease-free plaintiff merely exposed to asbestos cannot recover emotional distress damages); *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998) ("The Jones Act expressly incorporates FELA and the case law developing that statute.").

[78] We again note that we have not examined the provisions of Chapter 90 relating to asbestos-related claims, and express no opinion on whether any such provisions are preempted.

[79] *See Mar. Overseas Corp.*, 971 S.W.2d at 406 (stating that the Jones Act requires use of a relaxed causation standard, one that asks whether "employer negligence played any part, even the slightest, in producing the injury") (quoting *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 506 (1957)); *but see Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 172–77 (2007) (Souter, J., concurring) (concluding, in FELA case, that *Rogers* has been misinterpreted and did not alter the common-law causation standard, but instead merely rejected a sole causation requirement); *see also id.* at 178 (Ginsburg, J., concurring in the judgment) ("Today's opinion leaves in place precedent solidly establishing that the causation standard in FELA actions is more 'relaxed' than in tort litigation generally.").

III. Conclusion

We conditionally grant the writ of mandamus and direct the MDL pretrial court to vacate its remand order, and to conduct further proceedings in a manner consistent with this opinion.[80] We are confident the court will comply, and the writ will issue only if it does not.

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Don R. Willett
Justice

OPINION DELIVERED: December 5, 2008

[80] Lopez contends in the pending mandamus action, apparently for the first time, that he filed a physician report that complied with the non-preempted provisions of Chapter 90. GSF contends otherwise. The MDL pretrial court and the court of appeals did not consider this issue, and instead based their analysis on Lopez's argument that Chapter 90 was entirely inapplicable to Jones Act cases. We leave resolution of this issue to the MDL pretrial court.

IN THE SUPREME COURT OF TEXAS

NO. 07-0043

DYNEGY MIDSTREAM SERVICES, LIMITED PARTNERSHIP AND VERSADO GAS PROCESSORS, LLC, PETITIONERS,

v.

APACHE CORPORATION, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued September 9, 2008

JUSTICE WILLETT delivered the opinion of the Court.

In this gas-contract dispute, Apache Corporation seeks recovery for an allegedly large volume of "unaccounted-for" gas that disappeared between production at Apache's wellheads (where title to all gas transferred to the processor) and sale to customers at the processing facility (the tailgate). We hold that Apache's claim is contrary to the governing contract language, which focuses on gas sold, not gas delivered, thus avoiding disputes over how (and how much) gas failed to reach the point of sale. When calculating the proceeds due to Apache under these "percentage of proceeds" contracts, only one criterion matters: sales. Common throughout the natural-gas industry, these contracts unambiguously base payment on the amount of gas ultimately sold at the tailgate (not the

amount initially delivered at the wellhead), and Apache admits it was paid in full for "every molecule of gas" sold at the tailgate of the processing plants.

Our decision today, besides clarifying the contractual payment standard — one that rewards processors for minimizing leakage and maximizing the amount of gas actually sold — also addresses other claims. In sum, we affirm the court of appeals' judgment in part and reverse it in part, and remand to the trial court to render a judgment in conformity with this opinion.

I. Background

Though technical in nature, and part of a voluminous record, the relevant facts are neither complicated nor disputed. Apache owns gas wells in Texas and New Mexico. Apache and Versado Gas Processors, LLC are parties to eighteen gas-purchase contracts in issue. Under these contracts, gas is transported from Apache's wellheads through Versado's gathering system (pipelines and compressor stations) to Versado's three processing plants:[1] the Eunice, Monument, and Saunders plants. While en route some hydrocarbon liquids, known as field condensate, precipitate out of the gas and are removed by Versado. The processing plants employ compression, refrigeration, and other processes to remove water and other contaminants and to produce gas liquids. The end products are marketable hydrocarbon liquids and "dry gas," also known as "residue gas." Versado sells these products to third parties. The volume of residue gas sold is metered at the plant tailgate and then sent to purchasers via sales lines.

[1] Petitioner Dynegy Midstream Services, Limited Partnership is a co-owner of Versado. Because Versado has no employees, Dynegy operated the processing plants and performed the contracts.

Versado and amici curiae[2] categorize the gas-purchase contracts as "percentage of proceeds" contracts. The contracts are not identical, but all of them expressly provide that Versado is obliged to pay Apache a percentage of the "net proceeds" generated from the sale of "residue gas." Residue gas is not defined in three of the contracts. In all the others the term is defined as gas that has arrived at the processing plants or gas that is otherwise available for sale to third parties.[3] The contracts also entitle Apache to compensation for the hydrocarbon liquids extracted at the plants. All the contracts provide that title to the gas transfers to Versado at or near the wellhead. Five of the contracts additionally provide that Apache conveys to Versado "free of cost" all gas that is "flared, leaked, or otherwise lost" between production at the well and sale at the processing plant tailgate.[4]

Gas is metered at the wellhead and at the plant tailgate. There is no dispute that more gas enters the gathering system at Apache's wellheads than exits at Versado's tailgates, because (1) some gas is lost in transmission due to pipeline leaks, (2) some gas is used to fuel equipment at the plant

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[2] The Gas Processors Association and the Texas Pipeline Association.

[3] Two of the contracts define Residue Gas as "any gas connected to Buyer's plant gas gathering system which is sold before processing or which is discharged in the form of gas from the gas processing facility."

Five contracts define it (with some differences in capitalization) as "[g]as which is discharged in the form of gas from the Plant before or after processing or sold as fuel from Buyer's gathering system."

Five define it as "the quantity of Gas which remains after the Liquid Hydrocarbon Products are extracted, the acid gas and any other components are removed from the Gas to make the Residue Gas merchantable and after the allocated volumes of Plant fuel, field and Plant compressor fuel, Plant and field losses, and flare are deducted. It shall also mean Gas bypassed around the Plant."

Two define it as "the quantity of Gas remaining after the (a) extraction of Natural Gasoline and Additional Products, (b) plant fuel requirements, (c) plant and field losses, (d) field and plant compressor fuel, and (e) flare."

One defines it as "[t]hat portion of the gas remaining after the extraction of Products and deductions for fuel, flare and loss."

[4] These five contracts provide: "Seller hereby conveys to Buyer free of cost to Buyer, title to the Gas consumed as fuel in the operation of the Plant and Gathering System, and all Gas which is flared, leaked or otherwise lost in the operation of the Plant and Gathering System . . . ."

or along the pipeline route, and (3) gas must sometimes be flared or vented during repair or other routine or emergency operations. In addition, the volume of gas exiting the tailgate is smaller than the volume at the wellhead because natural gas liquids and impurities such as water vapor are condensed from the gas stream before the residue gas at the tailgate is sold to third parties.

After Apache conducted a routine audit, it concluded that Versado could not account for large quantities of gas and that Apache was entitled to compensation for this unaccounted-for gas. Apache sued Versado for breach of contract, and the parties also sought a declaratory judgment on whether Apache was entitled to payment for condensate collected at compressor booster stations that had once been processing plants. Apache also sued for violations of the New Mexico Unfair Practices Act (NMUPA).[5]

The trial court granted summary judgment for Versado on some claims, and the remaining claims went to trial. With regard to unaccounted-for gas, Apache argued that unaccounted-for gas is a separate category apart from plant and field losses and other categories of gas specified in the contracts. Apache based its proof in part on some of Versado's own internal accounting documents, which purported to account for fueled, flared, or leaked gas, as well as other documents referencing "unaccounted-for" gas, "unaccountables," and "lost and unaccounted-for" gas. Versado contends that unaccounted-for gas simply refers to gas that was used as fuel or lost through pipeline leaks or flaring, but regardless Versado is only obliged under the contracts to pay Apache a percentage of the

[5] N.M. Stat. §§ 57-12-1 to 57-12-24. Apache asserted other claims that are not relevant to this appeal, including claims that the defendants had engaged in sham inter-affiliate sales at artificially low prices, and had breached an obligation to market residue gas.

proceeds from the actual sales of residue gas to third parties. Since Versado indisputably complied with this obligation, it claims it is not liable to Apache as a matter of law.

The jury found that Versado failed to comply with its contractual obligation to pay Apache for unaccounted-for gas, and found damages of $1,508,674. The jury also found that Versado and Dynegy deceived Apache by engaging in an unfair or deceptive trade practice under the NMUPA, and that Apache's damages on this claim also resulted in damages of $1,508,674.

The trial court granted Versado's motion for judgment notwithstanding the verdict, and entered a judgment that Apache take nothing on its claims except the condensate claim. On this claim, the trial court rendered a declaratory judgment that Apache was entitled to its allocated share of condensate collected at the Eunice North and Eunice South booster stations, and awarded Apache $75,000 in attorney's fees.

The court of appeals reversed the trial court on the unaccounted-for gas claim, and entered a judgment for Apache of $1,508,674, consistent with the jury's verdict.[6] It concluded that the contracts unambiguously did not permit Versado to deduct unaccounted-for gas when calculating residue gas.[7] The court of appeals also reversed the trial court on the condensate claim, concluding that Apache was not entitled to payment for liquids condensing at the Eunice North and South booster stations.[8] The court did not reach the NMUPA claim, viewing the damages the jury awarded

[6] 214 S.W.3d 554, 561, 567.

[7] *Id.* at 560.

[8] *Id.* at 564, 567.

Apache under that claim as duplicative of damages awarded under the contract claim for unaccounted-for gas.[9]

II. Discussion

A. "Unaccounted-For" Gas Claim

Whether a contract is ambiguous is a legal question for the court.[10] "A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation."[11] We give contract terms their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning.[12] A contract is not ambiguous simply because the parties disagree over its meaning.[13] The court construes an unambiguous contract as a matter of law.[14]

Many contracts involving the transportation of goods apportion the risk of loss during transport. The Uniform Commercial Code, for example, provides that parties may allocate this risk as they please by express agreement,[15] and also has provisions for allocating risk of loss in the

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[9] *See id.* at 561 ("Because we have sustained Apache's second issue [regarding the unaccounted-for gas contract claim], we need not address Apache's first issue challenging the judgment on the New Mexico Unfair Practices Act . . . .").

[10] *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996).

[11] *Id.*

[12] *Id.*

[13] *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996).

[14] *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003).

[15] Tex. Bus. & Com. Code § 2.509(d). "The Code invites any lawyer who drafts a contract for the sale of goods to include a clause that specifically allocates the risk of loss between the buyer and the seller." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 5-1, at 332 (5th ed. 2006).

absence of an express agreement.[16] Indeed, some of the gas contracts here make reference to Versado's obligation as buyer to pay Apache a percentage of the "net proceeds f.o.b. the Plant tailgate." Generally, the Uniform Commercial Code recognizes that when parties specify "F.O.B. the place of destination," the risk of loss during transport is on the seller.[17]

Under these contracts, Versado sold gas that reached the tailgate after processing, and Apache received a percentage of the net proceeds derived from the sale of that gas. Both parties suffered from losses occurring during the transportation of gas from the wellhead to the plant tailgate. The contracts did not expressly require Versado to meet specified efficiency targets with respect to leakage, flaring, or Versado's use of gas as fuel. Nor did the contracts require Versado to pay Apache for losses that exceeded specified thresholds or losses that could not be categorized.

The parties were free to apportion the risk of pipeline losses or other losses as they wished. Here, the contracts unambiguously provided that title to the gas was conveyed to Versado at the wellhead and Apache's payment for the gas it sold Versado was limited to a percentage of the proceeds from actual sales of residue gas at the tailgate.[18] Apache points to no proof that Versado

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[16] *See* TEX. BUS. & COM. CODE §§ 2.319, .503, .504, .509, .510.

[17] *See id.* §§ 2.319(a)(2), 2.509(a)(2), 2.509(c). "[W]hen the contract reads 'F.O.B. *buyer's* place of business,' both [§ 2-509(a)(2) and § 2-319(a)(2)] make it clear that the risk does not pass to the buyer until the goods are tendered to the buyer at the place of destination." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 5-2, at 339 (5th ed. 2006). We do not suggest that these provisions of the Uniform Commercial Code actually govern this dispute, but refer to them only to illustrate the use of the term "f.o.b" in another context. Here the issue is complicated by the fact that the buyer, Versado, owned the entire gathering system and took title to the gas at or near the wellhead under the express terms of the contracts.

[18] Apache argues that the risk of loss for unaccounted-for gas falls on Versado under section 2.509(c) of the Uniform Commercial Code, TEX. BUS & COM. CODE § 2.509(c), which states:

> In any case not within Subsection (a) or (b), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

intentionally converted gas and sold it to third parties without accounting to Apache for such sales,[19] or evidence that Versado committed an accounting error or mathematical miscalculation. There was no evidence at trial that Versado ever sold unaccounted-for gas, or that Versado failed to pay Apache its share of the proceeds received from any sales of residue gas. An Apache audit manager conceded at trial that "there is no evidence to support that anything happened to this gas, the gas that you're describing as unaccounted for except that it was either flared or used as fuel or lost." He further agreed that "there's no evidence that any unaccounted for gas went out the tailgate" and that Apache was paid for "every molecule of gas" that "went out the tailgate." The volume of gas sold at the tailgate was measured by pay meters owned by third parties, and Apache has never challenged the meters' accuracy.

Apache sought recovery for sales that never occurred, but the agreements did not require Versado to pay Apache for gas unless it reached the tailgate and was sold to third parties. There is no provision in these contracts for "unaccounted-for gas." Nor did they impose liability on Versado for gas that was lost and indisputably unavailable for sale at the tailgate, but for which Versado could not establish the precise reason for the loss. Under these contracts, Versado was not contractually liable for lost gas whenever it could not definitively explain a metering discrepancy between the wellhead and the tailgate.

Assuming that the contracts are subject to the Code, *see El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 313 (Tex. 1999), as noted above section 2.509(d) provides that "[t]he provisions of this section are subject to contrary agreement of the parties," and here the parties made express provision to the contrary.

[19] Nor do we consider the legal consequences that would follow in tort or contract for such an intentional theft of gas by the buyer under these contracts.

Moreover, while the court of appeals described the gas contracts as "unambiguous as a matter of law,"[20] it then relied in part on expert testimony regarding the "standard practice in the industry" for paying sellers under gas-purchase agreements.[21] According to Apache's expert, industry practice requires that unaccountable gas losses not exceed two percent, a percentage exceeded in this case.[22] Experts have a proper (if confined) role in litigation, but it is not to supply parol evidence to vary or contradict the terms of unambiguous contracts.[23] The parties could have agreed that Versado would pay Apache for losses exceeding a contractually specified threshold, but as noted above, the contracts do not contain such terms. The court of appeals also mentioned Versado's internally generated documents that made reference to unaccounted-for gas.[24] This evidence might be relevant to show mathematical miscalculations or other accounting errors, but again, there was no proof that these losses were anything other than gas that leaked, was flared, or was used as fuel. This extrinsic

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[20] 214 S.W.3d at 560.

[21] *Id.* at 561.

[22] Apache also presented evidence that Versado's own goal was to limit gas losses to two percent.

[23] *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) ("Only where a contract is first determined to be ambiguous may the courts . . . admit extraneous evidence to determine the true meaning of the instrument."); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) ("If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law."); *Miller v. Gray*, 149 S.W.2d 582, 583 (Tex. 1941) ("[E]vidence of custom is admissible only to explain an ambiguous contract or to add to it an element not in contravention of its terms; but such evidence is never admissible to contradict the plain unambiguous covenants and agreements expressed in the contract itself.")

[24] 214 S.W.3d at 561. As noted above, several of these exhibits made reference to "unaccounted-for" gas, "unaccountables," and "lost and unaccounted-for" gas. For example, several exhibits plotted, by month, "unaccountables" as a percentage of production at the wellhead.

evidence cannot alter the meaning of an unambiguous contract that based payment on one criterion only: actual sales of residue gas at the tailgate.

Because the contracts unambiguously do not impose an obligation on Versado to compensate Apache for "unaccounted-for" gas that was not sold at the plant tailgate, contract damages[25] for gas lost between the wellhead and the tailgate are not recoverable. Apache's breach-of-contract claim fails as a matter of law.

B. NMUPA Claim

Apache asserts by conditional cross-petition that if its contract claim for unaccounted-for gas fails, it can recover under the New Mexico Unfair Practices Act (NMUPA). The court of appeals did not reach this issue because it held for Apache on its contract claim. Having rejected the contract claim, we address the NMUPA claim.

The jury charge included questions covering the NMUPA claim. Specifically, the jury was asked whether the defendants deceived Apache by an unfair or deceptive trade practice, whether the deception was willful, and whether Apache suffered damages proximately caused by defendants' deception. The jury answered "yes" to these questions and found damages of $1,508,674, the same damages it found on the contract claim for unaccounted-for gas.

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[25] We note that Apache did not pursue at trial a common-law tort recovery for these losses, although it alleged a negligence cause of action against Dynegy. We do not consider whether a negligence or other tort theory would be valid on these facts. The unaccounted-for gas claim was tried as a contract claim against Versado. As to liability, the jury was asked whether Versado failed "to comply with each of the Contracts by failing to pay Apache for unaccounted-for gas," and as to damages, the jury was asked to assess contract damages equal to the difference "between the amount Apache was entitled to be paid for unaccounted-for gas under the Contracts, and the amount that was actually paid by Versado for unaccounted-for gas."

The New Mexico Act covers unfair or deceptive trade practices defined to include "a false or misleading . . . representation of any kind knowingly made in connection with the sale . . . of goods or services . . . by a person in the regular course of his trade or commerce, which may, tends to or does deceive or mislead any person . . . ."[26] Apache's theory of liability under the NMUPA is that Versado sent it inaccurate settlement statements for gas sold at the plant tailgates, more specifically, that the statements failed to provide sufficient information regarding unaccounted-for gas.[27] However, Versado had no obligation to pay Apache for gas that leaked, was flared, or was used to fuel equipment. Assuming that New Mexico law applies,[28] and assuming that Versado and Dynegy made misrepresentations falling under the NMUPA,[29] there was no evidence that these misrepresentations caused damages to Apache.

Recovery of actual damages under the NMUPA requires proof of actual causation — a cause "which contributes to the loss and without which the loss would not have occurred."[30] The alleged

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[26] N.M. Stat. § 57-12-2(D).

[27] For example, Apache's opening brief as cross-petitioner contends that the settlement statements "lacked enough information to determine how much gas was unaccounted for" and "were so misleading that Apache could not determine that any gas was unaccounted-for;" that "even Dynegy's own measurement consultant was unable to calculate the amount of unaccounted-for gas from one of its own settlement statements;" that Versado's and Dynegy's "failure to disclose the amounts being used as fuel, being flared, and being leaked prevented Apache from realizing that the defendants were not paying for huge amounts of this unaccounted-for gas;" and that their "statements tended to deceive Apache by hiding the vast amounts of unaccounted-for gas."

[28] Apache claims that New Mexico law applies because the processing plants are in New Mexico.

[29] *But see Santa Fe Custom Shutters & Doors, Inc. v. Home Depot U.S.A., Inc.*, 113 P.3d 347, 352–53 (N.M. Ct. App. 2005) (holding that seller of goods or services cannot sue under the NMUPA).

[30] The New Mexico Supreme Court has promulgated uniform civil jury instructions. As Apache points out, and as reflected in the jury charge, Uniform Jury Instruction 13-1709 provides: "A cause of a loss is a factor which contributes to the loss and without which the loss would not have occurred. It need not be the only cause." The Committee Commentary to this Rule states that it applies to the Unfair Practices Act. *See also* N.M. Stat. § 57-12-10(B) (setting out NMUPA cause of action and providing for recovery of "actual damages" to "[a]ny person who suffers any

misrepresentations and nondisclosures all relate to Versado's alleged failure to pay for unaccounted-for gas, but as explained above, Versado had no obligation to pay Apache for unaccounted-for gas that was never sold. Versado was only obligated to pay Apache for actual sales of residue gas, and there was no evidence that Versado failed to pay Apache its contractually mandated percentage of such sales. Indeed, Apache admits it was paid for "every molecule of gas" actually sold.[31]

C. Condensate Claim

As described above, the gathering system includes numerous compressor stations. These stations help move gas from the wells to the processing plants. Liquid field condensate drops out of the gas stream because of changes in pressure and temperature, and must be removed from the gathering system to prevent blockage.

In 2000, Versado modernized its gathering system to make it more efficient, by consolidating its three Eunice plants into a single processing plant. The North and South Eunice plants were converted to compressor stations, two of about a dozen compressor stations along the gathering system that helped move gas to the three remaining processing plants. After the conversion, the gas at the North and South Eunice compressor stations proceeded to the Middle Eunice plant for processing. The Versado gathering system retained two other processing plants, the Monument and Saunders plants. Versado pays Apache for condensate produced at the three plants.

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loss of money or property . . . as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act").

[31] Apache did not establish that better accounting by Versado would have resulted in additional sales of gas, on which payment obligations to Apache would have accrued under the contracts.

Because field condensate removed from the North and South Eunice stations had for some period been trucked and commingled with condensate produced at the Middle Eunice processing plant, Versado paid Apache for all the commingled condensate.[32] Versado sought a declaratory judgment that it "does not have an obligation to pay Apache for field condensate, including condensate that falls out in field compressor stations that used to be gas processing plants." The parties tried this issue to the court, which rendered a declaratory judgment holding that, as to the eleven contracts in issue, Versado must pay Apache its allocated share of all field condensate collected at the North and South Eunice stations. The court of appeals disagreed, reasoning that under the contracts' plain language, Versado had no such obligation.[33] Reading each contract as a whole and harmonizing the various relevant provisions,[34] we agree with the court of appeals. The only plausible construction of the contracts is that Versado is not required to compensate Apache for liquids that fall out of the gas stream at the North and South Eunice compressor stations.

According to trial testimony, liquids that condense at compressor stations are not marketable without further processing at a plant because they contain impurities such as water, hydrogen sulfide, and carbon dioxide. Some of the contracts in issue do not define "plant," but six of them define the

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[32] Versado pursued at trial a counterclaim for unjust enrichment, seeking recovery of prior payments Versado had made to Apache for condensate recovered from the North and South Eunice compressor stations, but the jury rejected this claim for a refund. The court of appeals likewise rejected this claim, reasoning, under the "voluntary-payment rule," that Apache did not wrongfully retain money from Versado because Versado had voluntarily made the payments. 214 S.W.3d at 564–65 (citing *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 768 (Tex. 2005)).

[33] 214 S.W.3d at 564.

[34] *See Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) ("[T]o ascertain the true intentions of the parties as expressed in the instrument . . . courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.") (emphasis omitted).

term as a facility where gas is processed.[35] Unlike plants, the compressor stations do not treat the liquids; the liquids merely collect at the station. Plants employ several stages or processes that include refrigeration or huge compressors to deliberately make liquids. The compressor stations are necessary to move gas to a plant, where the gas and liquids can be treated and sold to third parties. Compression at the plant is achieved through multi-stage compression and at higher pressure than compression at the North and South Eunice stations.

The contracts cannot be read to require Versado to compensate Apache for liquids that condense at the two compressor stations. First, all the contracts provide that title to the gas transfers to Versado at or near the Apache wellheads. Therefore, absent some more specific provision to the contrary, Versado owns any liquids that condense from the gas stream downstream of the wellheads, at the compressor stations or anywhere else.

Second, all of the contracts in issue provide that Versado is only obliged to pay Apache for liquids "saved and sold" at the "plant" or, in one contract, to pay Apache for "Products" defined as liquids "extracted through Plant processing." As explained above, the compressor stations are not plants. Further, gas liquids were not "saved and sold" at the compressor stations.

Third, ten of the eleven contracts expressly provide that any liquids exiting the gas stream en route to the final processing plants belong to Versado.[36] These provisions, requiring Versado to

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[35] Five of the contracts define "Plant" as "the facilities used by Buyer to process gas." One contract defines "Plant" as "Gas processing facilities in which Gas is processed."

[36] Five of the contracts provide (with minor variations in wording):

> DRIP. The Buyer shall keep reasonably clear of obstruction all its pipelines through which said gas is being delivered and shall own all liquids collected in such lines.

keep the gathering system reasonably clear of obstructions, are consistent with trial evidence that liquids leaving the gas stream prior to reaching the final processing plant are, to some extent, a nuisance because they can obstruct gas flow or unduly raise pressure. These provisions are also consistent with the provisions that Versado takes title to all the gas at the wellhead, and the provisions that Versado is only compelled to pay Apache for liquids produced at the processing plants at the other end of Versado's gathering systems. Of the six contracts that define "Plant," they all define it as facilities where the gas is processed, as opposed to the gathering system, separately defined in all these contracts as the pipelines and equipment used to deliver gas to the plant.[37] None of these contracts specify that condensate precipitating at compressor stations is treated differently from condensate precipitating at any other point in the gathering system.

Apache emphasizes that the North and South Eunice compressor stations used to be processing plants, but this fact does not alter our construction of the contracts. Other plants were converted to compressor stations, and Apache does not argue that they too must be treated as plants. Nor does Apache argue it should be paid for field condensate produced at compressor stations that have always been compressor stations. The North and South Eunice stations compress the gas to the same pressure as other compressor stations. Nothing in the contracts prohibits the conversion of

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Five of the contracts provide:

> DRIP, CONDENSATE AND SCRUBBER OIL. Buyer shall keep its Gas Gathering System reasonably clear of obstruction and shall own all drip, condensate and scrubber oil collected in such Gas Gathering System prior to the first stage of compression within the Plant.

[37] Five contracts define "Gas Gathering System" as "the facilities and equipment used by Buyer to gather gas." One contract defines "Gathering System" as "the lines and equipment necessary to gather Gas from the delivery point(s) and deliver it to Buyer's Plant."

processing plants into compressor stations as part of a gathering-system upgrade that reduced emissions, increased the overall efficiency of the system, and in fact benefitted producers as well as Versado.[38]

Apache argues that the contracts expressly state that their purpose is to extract liquid hydrocarbons. For example, five of the contracts state that the gas is being sold "for the principle [sic] purpose of extracting therefrom such Liquid Hydrocarbon Products as may be extracted at the Plant." These provisions, however, are unhelpful in determining whether a compressor station is a "plant." They do not contradict the contract provisions described above that make clear Versado (1) is only obliged to pay for liquids "saved and sold" at the plant, (2) owns all the gas after it leaves the wellhead, and (3) owns any liquids that fall out of the gas in the gathering system. These contracts expressly distinguish the "Plant" from the "Gas Gathering System." Further, these contracts only oblige Versado to pay Apache for "Liquid Hydrocarbon Products," a defined term that expressly excludes "drip, condensate or scrubber oil collected prior to the first stage of compression within the Plant." Hence, unless the liquids are collected "within the Plant," as opposed to the gathering system that includes compressor stations necessary to move the gas to the processing plant, Versado is not obliged to pay Apache for the liquids.

In sum, construing each contract as a whole and examining the relevant provisions of each, we agree with the court of appeals that none of the contracts required Versado to compensate Apache

[38] According to one Dynegy witness, the consolidation effort "decreased the amount of fuel consumption for the producers" and "increased the amount of ethane production for the producers and to some degree probably a couple of percent of propane."

for field condensate that fell out of the gas stream at the Eunice North and South compressor stations.

III. Conclusion

The proper payment-measuring point under the contracts is the amount of gas sold at the processor's tailgate, not the amount delivered at the producer's wellhead. That is, a "percentage of proceeds" contract measures payment solely as a percentage of proceeds from actual sales. As Apache concedes it was fully paid for all gas actually sold, it is not entitled to recover on either its contract claim for unaccounted-for gas or its New Mexico statutory claim. Also, Versado is entitled to a declaratory judgment that it owes no additional payments for condensate collected at and resulting from the operation of the Eunice North and South compressor stations. Accordingly, we affirm the court of appeals' judgment in part and reverse it in part. We remand the cause to the trial court to render a new judgment consistent with this opinion.[39]

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Don. R. Willett
Justice

OPINION DELIVERED: August 28, 2009

[39] The trial court should consider whether attorney's fees should be awarded in its modified judgment, and determine the amount of such fees, if any.

IN THE SUPREME COURT OF TEXAS

NO. 07-0055

IN RE GULF EXPLORATION, LLC, ET AL., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued January 17, 2008

JUSTICE BRISTER delivered the opinion of the Court.

In *In re Palacios*, we held that mandamus relief was generally unavailable for orders compelling arbitration.[1] But we stopped short of saying it was never available, and noted the Fifth Circuit's suggestion (which was not actually applied) in *Apache Bohai Corp. v. Texaco China* that mandamus review might be available if an applicant could show "clearly and indisputably that the district court did not have the discretion to stay the proceedings pending arbitration."[2]

As with any "narrow" provision for appellate review, numerous disappointed litigants have claimed the *Apache Bohai* "exception" applies to them.[3] But reviewing all arbitration orders to see

[1] 221 S.W.3d 564, 565 (Tex. 2006).

[2] *Id.* (quoting *Apache Bohai Corp., LDC v. Texaco China, B.V.*, 330 F.3d 307, 310-11 (5th Cir. 2003)).

[3] *See, e.g.*, *In re Han Nara Enters., L.P.*, No. 11-08-00147-CV, 2008 WL 2933522 (Tex. App.—Eastland July 31, 2008, orig. proceeding [mand. denied]); *In re Cannon*, No. 05-07-00955-CV, 2007 WL 2447264 (Tex. App.—Dallas Aug. 30, 2007, orig. proceeding) (mem. op) (denying relief); *In re Wolff*, 231 S.W.3d 466 (Tex. App.—Dallas 2007, orig. proceeding) (applying exception and requiring de novo review of arbitration order); *In re AmeriCredit Fin. Servs., Inc.*, No. 05-07-00241-CV, 2007 WL 2005020 (Tex. App.—Dallas July 12, 2007, orig. proceeding [mand. pending])

if they comply with an exception "would inevitably frustrate Congress's intent to move the parties . . . out of court and into arbitration as quickly and easily as possible."[4] We granted oral argument to address more specifically when mandamus relief is available in connection with orders compelling arbitration. Finding it is unavailable here, we conditionally grant the writ.

I. Background

In this oil and gas suit, several working interest owners sued their operator, Great Western Drilling, when it drilled two successful wells for its own account nearby. They claim an opportunity to participate in those wells because Great Western had said it would protect their interests and had used confidential data they paid for.

The parties' joint operating agreements contain the following arbitration clause:

> Any dispute, controversy or claim arising out of or relating to this Agreement or the breach or validity thereof ("Dispute") shall be referred to and finally settled by final and binding arbitration in Houston, Harris County, Texas . . . . The parties agree to use the Commercial Arbitration Rules of the American Arbitration Association and, to the maximum extent possible, the Federal Arbitration Act . . . .

(mem. op.) (denying relief); *In re ETBS, Inc.*, No. 05-07-00562-CV, 2007 WL 1978323 (Tex. App.—Dallas July 10, 2007, orig. proceeding) (mem. op.) (denying relief); *In re Cutler-Gallaway Servs., Inc.*, No. 04-07-00216-CV, 2007 WL 1481999 (Tex. App.—San Antonio May 23, 2007, orig. proceeding) (mem. op.) (denying relief); *Glenn J. Deadman, P.C. v. SBC*, No. 04-06-00646-CV, 2007 WL 1200108 (Tex. App.—San Antonio Apr. 25, 2007, orig. proceeding) (mem. op.) (denying relief); *In re Premont Indep. Sch. Dist.*, 225 S.W.3d 329 (Tex. App.—San Antonio 2007, orig. proceeding [mand. pending]) (applying exception and reversing arbitration order); *In re Ivins*, No. 09-06-249-CV, 2006 WL 2075192 (Tex. App.—Beaumont July 27, 2006, orig. proceeding) (mem. op.) (denying relief); *In re Emmons*, No. 14-06-01063-CV, 2006 WL 4114314 (Tex. App.—Houston [14th Dist.] Mar. 13, 2006, orig. proceeding) (mem. op.) (denying relief).

[4] *Perry Homes v. Cull*, 258 S.W.3d 580, 587 (Tex. 2008) (quoting *Preston v. Ferrer*, ___ U.S. ___, ___ (2008)); *see also Lloyd v. Hovensa, LLC.*, 369 F.3d 263, 270 (3d Cir. 2004) (holding that purpose of stay pending arbitration "is twofold: it relieves the party entitled to arbitrate of the burden of continuing to litigate the issue while the arbitration process is on-going, and it entitles that party to proceed immediately to arbitration without the delay that would be occasioned by an appeal of the District Court's order to arbitrate").

When the working interest owners demanded arbitration, Great Western filed this suit seeking a declaration that it owed the working interest owners neither arbitration nor anything on the underlying claim. The working interest owners moved to compel arbitration and stay litigation, which the trial court granted.

Great Western sought mandamus relief in the court of appeals. That court recognized mandamus review was generally unavailable after *Palacios*, but found Great Western had satisfied *Apache Bohai* by showing the trial court had "clearly and indisputably" abused its discretion by compelling arbitration, so it conditionally granted mandamus relief.[5] The working interest owners seek relief from that order in this Court.

II. Dismiss Instead Of Stay?

In *Green Tree Financial Corp. v. Randolph*, the United States Supreme Court observed that the FAA "generally permits immediate appeal of orders hostile to arbitration . . . but bars appeal of interlocutory orders favorable to arbitration."[6] Yet the FAA also allows appeal from "a final decision with respect to an arbitration."[7] Construing the two together, the Supreme Court held there can be no immediate appeal of an order compelling arbitration if it *stays* the underlying case, but there can be an appeal if the underlying case is *dismissed*.[8]

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[5] 211 S.W.3d 828, 835, 843 (citing *In re Palacios*, 221 S.W.3d 564, 565 (Tex. 2006) and *Apache Bohai Corp., LDC v. Texaco China, B.V.*, 330 F.3d 307, 310-11 (5th Cir. 2003)).

[6] 531 U.S. 79, 86 (2000).

[7] 9 U.S.C. § 16(a)(3).

[8] *Green Tree*, 531 U.S. at 86-87.

This appears to be the majority rule among the states as well. A few states have specific provisions for appealing orders compelling arbitration.[9] But most states (including Texas) have adopted the Uniform Arbitration Act, which like the FAA authorizes immediate appeal only from orders denying arbitration.[10] Nevertheless, a few Uniform Act states review all orders compelling arbitration,[11] and a few review none;[12] but most Uniform Act states follow *Green Tree* in allowing review if the order dismisses the case but not if it stays it.[13]

We too have adopted this rule: "Courts may review an order compelling arbitration if the order also dismisses the underlying litigation so it is final rather than interlocutory."[14] Thus, the order compelling arbitration in *Childers v. Advanced Foundation Repair* was immediately reviewable because the judgment stated that it was "final, disposes of all parties and all claims in this

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[9] *See* ALA. R. APP. P. 4(d) (allowing immediate appeal from order granting or denying arbitration); FLA. R. APP. P. 9.130(a)(3)(C)(iv) (same); OHIO REV. CODE § 2711.02 (same).

[10] *See* UNIF. ARBITRATION ACT § 28(a) (2000); *Chambers v. O'Quinn*, 242 S.W.3d 30, 31 (Tex. 2007).

[11] *See Douglass v. Pflueger Hawaii, Inc.*, 135 P.3d 129, 131 n.1 (Haw. 2006); *Salsitz v. Kreiss*, 761 N.E.2d 724, 730 (Ill. 2001); *Sommers v. Sommers*, 898 N.E.2d 1234, 1236 (Ind. Ct. App. 2008); *Harris v. Bridgford*, 835 A.2d 253, 257 n.7 (Md. 2003); *Wein v. Morris*, 944 A.2d 642, 651 (N.J. 2008); *Okla. Oncology & Hematology P.C. v. US Oncology, Inc.*, 160 P.3d 936, 943 (Okla. 2007).

[12] *See Cardiff Equities, Inc. v. Super. Ct.*, 83 Cal. Rptr. 3d 699, 709 (Cal. Ct. App. 2008); *Creamer v. Bishop*, 902 A.2d 838, 839 (Me. 2006); *Braden v. JF Enters., LLC*, 274 S.W.3d 564, 565 (Mo. Ct. App. 2008); *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 586 S.E.2d 581, 584 (S.C. 2003).

[13] *See Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 161 P.3d 1253, 1258 (Ariz. Ct. App. 2007); *Lane v. Urgitus*, 145 P.3d 672, 682 (Colo. 2006); *Dan Wiebold Ford, Inc. v. Universal Computer Consulting Holding, Inc.*, 127 P.3d 138, 141 (Id. 2005); *Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 547 n.2 (Ky. 2008); *Commonwealth v. Philip Morris Inc.*, 864 N.E.2d 505, 511 (Mass. 2007); *Banks v. City Fin. Co.*, 825 So. 2d 642, 647-48 (Miss. 2002); *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 746 N.W.2d 672, 678 (Neb. 2008); *Edward Family Ltd. v. Brown*, 140 P.3d 525, 529 (N.M. Ct. App. 2006); *Ass'n of Unit Owners of Bridgeview Condos. v. Dunning*, 69 P.3d 788, 801 (Or. Ct. App. 2003); *Powell v. Cannon*, 179 P.3d 799, 806–7 (Utah 2008); *Scherer v. Schuler Custom Homes Constr., Inc.*, 98 P.3d 159, 162 (Wyo. 2004).

[14] *Perry Homes v. Cull*, 258 S.W.3d 580, 586 n.13 (Tex. 2008).

case, is appealable, and disposes of this case in the entirety."[15] This is consistent with general Texas law that an order is final and appealable only if "it actually disposes of every pending claim and party or [ ] it clearly and unequivocally states that it finally disposes of all claims and all parties."[16]

At first blush, this rule appears to leave appellate review entirely at the discretion of the trial judge: stay the case and postpone review, or dismiss the case and allow it immediately. But in state courts this discretion is usually limited. Arbitrability is often the only issue in federal court because nondiverse parties may prevent removal of the underlying case from state court;[17] in such cases, even a stay order will be considered final if the federal action is effectively over.[18] But in the state courts, disputes about arbitrability and the merits must usually proceed in a single court under the rules of dominant jurisdiction.[19]

Accordingly, a stay is generally the only appropriate order for a state court with jurisdiction of all issues. Indeed, the Texas Arbitration Act states that "[a]n order compelling arbitration *must*

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[15] 193 S.W.3d 897, 898 (Tex. 2006); *see also Chambers v. O'Quinn*, 242 S.W.3d 30, 32 (Tex. 2007) (holding denial of mandamus challenging arbitration order did not bar appeal of that order after arbitration was completed).

[16] *Lehmann v. Har-Con Corp*., 39 S.W.3d 191, 205 (Tex. 2001).

[17] *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 7 n.4 (1983) (noting federal action to compel arbitration excluded nondiverse party who prevented removal of underlying state action); *Omni Hotels Mgmt. Corp. v. Bayer*, 235 F.App'x 208, 210 (5th Cir. 2007) (same); *Brown v. Pac. Life Ins. Co*., 462 F.3d 384, 390, 394 (5th Cir. 2006) (same); *CitiFinancial Corp. v. Harrison*, 453 F.3d 245, 248 (5th Cir. 2006) (same).

[18] *See Moses H. Cone*, 460 U.S. at 10 ("[A]rbitrability was the only substantive issue present in the federal suit. Hence, a stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; . . . [so] this stay order amounts to a dismissal of the suit."); *Omni Hotels*, 235 F.App'x at 211; *Brown*, 462 F.3d at 391; *CitiFinancial Corp. v. Harrison*, 453 F.3d at 249–50.

[19] *See Perry v. Del Rio*, 66 S.W.3d 239, 252 (Tex. 2001) ("As a rule, when cases involving the same subject matter are brought in different courts, the court with the first-filed case has dominant jurisdiction and should proceed, and the other cases should abate.").

include a stay" of the underlying litigation.[20] During arbitration, a court order may be needed to replace an arbitrator,[21] compel attendance of witnesses,[22] or direct arbitrators to proceed promptly;[23] after arbitration, a court order is needed to confirm, modify, or vacate the arbitration award.[24] Consequently, dismissal would usually be inappropriate because the trial court cannot dispose of all claims and all parties until arbitration is completed.[25]

It is in this context that one must read *Apache Bohai* — not as an all-purpose test for mandamus review, but as a test for reviewing whether the trial court should have dismissed rather than stayed the underlying case.[26] *Palacios* may have created some confusion on this issue, because after quoting *Apache Bohai* it went on to analyze whether the case was arbitrable rather than whether it should have been stayed. Accordingly, we clarify today that this "exception" applies not to the question whether an order compelling arbitration was correct, but to the question whether the case should have been dismissed rather than stayed.

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[20] TEX. CIV. PRAC. & REM. CODE § 171.021(c) (emphasis added).

[21] *See* 9 U.S.C. § 5; TEX. CIV. PRAC. & REM. CODE § 171.041(b).

[22] *See* 9 U.S.C. § 7; TEX. CIV. PRAC. & REM. CODE § 171.086(b).

[23] *See* TEX. CIV. PRAC. & REM. CODE § 171.044(c).

[24] *See* 9 U.S.C. §§ 9-13; TEX. CIV. PRAC. & REM. CODE §§ 171.087-.092.

[25] *See Lehmann v. Har-Con Corp*., 39 S.W.3d 191, 206 (Tex. 2001).

[26] *Apache Bohai Corp., LDC v. Texaco China, B.V.*, 330 F.3d 307, 310 (5th Cir. 2003) ("In the alternative, Apache Bohai seeks a writ of mandamus directing the district court to vacate its order [granting a stay] and enter an appealable final judgment.").

Here, the trial court stayed this case pending arbitration, so there is no final judgment. Great Western does not argue otherwise, or assert that the trial court erred in staying rather than dismissing this case. Accordingly, *Apache Bohai* does not apply.

III. Mandamus Instead Of Interlocutory Appeal?

Even when an order is not reviewable by interlocutory appeal, that does not always preclude review by mandamus.[27] In 1994, we authorized general mandamus review of orders either compelling or denying arbitration under the FAA.[28] But in *Palacios* we limited such review to orders denying arbitration, so that federal and state procedures would remain consistent after *Green Tree*.[29] We left open the question whether mandamus review of orders compelling arbitration should be entirely precluded, an issue we now address.[30]

To be entitled to mandamus, "a petitioner must show that the trial court clearly abused its discretion and that the relator has no adequate remedy by appeal."[31] In the context of orders compelling arbitration, even if a petitioner can meet the first requirement, mandamus is generally unavailable because it can rarely meet the second.

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[27] *Deloitte & Touche, LLP v. Fourteenth Ct. App.*, 951 S.W.2d 394, 396 (Tex. 1997) ("[O]ur mandamus jurisdiction is not dependent on appellate jurisdiction.").

[28] *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994).

[29] *Palacios*, 221 S.W.3d at 565.

[30] *Id*.

[31] *In re McAllen Med. Ctr., Inc*., 275 S.W.3d 458, 462 (Tex. 2008); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992).

If a trial court compels arbitration when the parties have not agreed to it, that error can unquestionably be reviewed by final appeal. In *Perry Homes v. Cull*, we rejected the argument that an order compelling arbitration must be reviewed before arbitration, noting that for many years this Court has reviewed such orders after arbitration in the final appeal.[32] Both federal and Texas statutes provide for vacating an arbitration award by final appeal if the arbitrators exceeded their powers.[33] If appeal is an adequate remedy for an order compelling arbitration, mandamus must be denied.

There is no definitive list of when an appeal will be "adequate," as it depends on a careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding.[34] But in balancing these matters, "our place in a government of separated powers requires us to consider also the priorities of the other branches of Texas government."[35] Legislative acts encouraging or discouraging interlocutory review must weigh heavily in the balance of benefits and detriments.[36] Here, as both the federal and state arbitration acts pointedly exclude immediate review of orders compelling arbitration, any balancing must tilt strongly against mandamus review.[37]

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[32] 258 S.W.3d 580, 586 & n.9 (Tex. 2008).

[33] *See* 9 U.S.C. § 10(a)(4); TEX. CIV. PRAC. & REM. CODE § 171.088(a)(3)(A).

[34] *In re Prudential*, 148 S.W.3d at 136.

[35] *In re McAllen Med. Ctr.*, 275 S.W.3d at 461.

[36] *Id.*; *In re Watkins*, ___ S.W.3d ___, ___ (Tex. 2009).

[37] *See Watkins,* ___ S.W.3d at ___ ("Legislative findings balancing the costs and benefits of interlocutory review must work both ways: having treated them with respect when they encourage interlocutory review, we must treat them with the same respect when they discourage it."); *In re McAllen Med. Ctr.*, 275 S.W.3d at 466–67.

Of course, if an order compelling arbitration is wrong, the parties may waste time and money in arbitration. But standing alone, delay and expense generally do not render a final appeal inadequate.[38] That is especially true here because arbitration clauses are usually contractual and cover contractual claims. A party that prevails on a contractual claim can recover its fees and expenses,[39] even if they were incurred in collateral proceedings like arbitration.[40]

The "adequacy" of an appeal may be a closer question when the legislature has weighed in on both sides of the balance. For example, we recently reviewed an order compelling arbitration in *In re Poly-America*, and granted mandamus relief regarding a waiver of statutory remedies, because it threatened to undermine the legislative workers compensation system as a whole.[41] By contrast, we denied mandamus relief as to other provisions because interference with the statute was no more than speculative.[42]

The problem in *Poly-America* was that granting mandamus risked frustrating one statutory imperative, while denying it risked frustrating another. In those rare cases when legislative mandates conflict, mandamus "may be essential to preserve important substantive and procedural rights from impairment or loss, [and] allow the appellate courts to give needed and helpful direction to the law

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[38] *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008); *In re Prudential*, 148 S.W.3d at 136; *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992).

[39] *See* TEX. CIV. PRAC. & REM. CODE § 38.001-.006.

[40] *See, e.g.*, *Gill Sav. Ass'n v. Chair King, Inc.*, 797 S.W.2d 31, 32 (Tex. 1990) (holding reasonable fee in contract action included fees incurred in related bankruptcy proceeding).

[41] 262 S.W.3d 337, 352 (Tex. 2008).

[42] *Id.* at 357-59.

that would otherwise prove elusive in appeals from final judgments."[43] But such conflicts are few, so the balance will generally tilt toward reviewing orders compelling arbitration only on final appeal.

We recognize that any rule short of completely barring mandamus review runs the risk of delaying some arbitrations after a trial court has compelled them. Mandamus proceedings take time, even when relief is denied. But our rules allow an appellate court to deny mandamus relief without waiting for a response, and without handing down an opinion.[44] Summary denials do little to assist trial judges or explain matters to the parties, but they are especially appropriate in this context due to the legislative preference for moving cases to arbitration quickly.

In this case, there are no counterbalancing legislative mandates. This arbitration agreement placed no limits on Great Western's constitutional or statutory rights, other than the right to a jury trial that it expressly waived by agreeing to arbitration in the first place. The court of appeals believed this dispute was outside the scope of arbitration because the disputed wells were outside the parties' area of mutual interest, and thus not within the scope of the arbitration clause.[45] But even assuming that is correct (an issue we do not reach), Great Western has not shown that its appellate remedy following arbitration is inadequate. Because it did not, the court of appeals erred in reviewing this order anyway.

For the reasons stated above, we conditionally grant the petition for writ of mandamus. We direct the court of appeals to vacate its judgment and order the trial court to reinstate the order

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[43] *In re Prudential Ins. Co.*, 148 S.W.3d 124, 136 (Tex. 2004).

[44] *See* TEX. R. APP. P. 52.4, 52.8.

[45] 211 S.W.3d at 843.

compelling arbitration. We are confident the court of appeals will comply, and our writ will issue only if it does not.

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Scott Brister
Justice

OPINION DELIVERED: April 17, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0195

IN RE GENERAL ELECTRIC COMPANY, ET AL., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued November 14, 2007

JUSTICE JOHNSON delivered the opinion of the Court.

JUSTICE O'NEILL did not participate in the decision.

Although Austin Richards never lived or worked in Texas, he sued numerous defendants in Dallas County as a result of alleged exposure to asbestos at his jobsite in Maine. He alleged that he developed mesothelioma as a result of the exposure and that the defendants were liable to him because they produced or were involved in furnishing the asbestos. Several defendants moved for dismissal on the basis of forum non conveniens. The trial court denied the motions. At issue in this mandamus proceeding is whether the trial court abused its discretion by denying the defendants' motions to dismiss. We conclude that it did and conditionally grant mandamus relief.

I. Background

Aside from a period of military service, Austin Richards lived in Maine his entire life. He worked in Maine for over thirty years as a mason handling pipe-covering insulation. In December

2005, he was diagnosed with mesothelioma. Richards[1] and his wife (collectively "Richards") filed suit in Dallas County against General Electric and over twenty other companies, three of which are headquartered in Texas. Richards alleged that the defendants mined, processed, manufactured, sold, or distributed asbestos which caused or contributed to his disease. The case was transferred to the asbestos multi-district litigation court in Harris County. *See* TEX. R. JUD. ADMIN. 13.

Seven defendants moved for dismissal of Richards's suit based on forum non conveniens. *See* TEX. CIV. PRAC. & REM. CODE § 71.051. They argued that the suit had no connection to Texas and that Maine was an adequate alternative forum for the case. Richards responded that the trial court should deny the motions to dismiss because the defendants had not met their burden of proof regarding the section 71.051 factors. He especially emphasized that the defendants had not proved the existence of an adequate alternative forum in which the claim could be tried. Richards asserted that if his case were dismissed and he refiled in Maine, the case would be vulnerable to removal to federal court and if removed, it would be transferred to the federal Multi-District Litigation Court No. 875 (MDL 875) for pretrial proceedings. *See In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 422-24 (J.P.M.L. 1991). Richards further argued that cases transferred to MDL 875 do not get tried and "virtually nothing happens to them at all." Richards urged that he was seriously ill from his disease and that if the Texas trial court declined to exercise jurisdiction, MDL 875 would not be adequate because he would not survive long enough to have his case tried.

[1] During oral argument, Richards's attorney advised the Court that Richards had died. *See* TEX. R. APP. P. 7.1(a)(1); TEX. R. CIV. P. 151.

At the hearing on the motion to dismiss, the judge asked whether the defendants would agree that they would not attempt to remove the case to federal court if he granted the motion to dismiss. Several defendants, including General Electric, did not agree to waive their removal rights. The judge sent a letter to the parties indicating that he would deny the motion to dismiss and expressing concern that if he granted the motion and the case were refiled in Maine, it would be removed to federal court and transferred to MDL 875 where it would "sit . . . for several years." The judge wrote that his ruling on the motion might have been different if the defendants had waived their right of removal.

The defendants filed a motion to reconsider. They asserted that even if their motions to dismiss were granted and Richards refiled his case in Maine, removal to federal court was speculative, the criticisms of MDL 875 were unfounded as recent activity there refuted any argument that it did not provide an adequate remedy, and the court's ruling should not depend on the defendants' waiver of their removal rights. After another hearing, the trial court granted the motion to reconsider, set aside the letter in which he stated the grounds for his previous ruling, and denied the motion to dismiss without stating a reason.

Three defendants—General Electric, Warren Pumps, and Ingersoll-Rand (defendants)—seek mandamus relief directing the trial court to grant their motions to dismiss. They argue that on this record, the statutory forum non conveniens factors require dismissal.

II. Discussion

A. Availability of Mandamus Review

After the parties submitted briefs in this case, we held that an adequate remedy by appeal does not exist when a motion to dismiss for forum non conveniens is erroneously denied. *See In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 679 (Tex. 2007). Accordingly, mandamus relief is available in this case, if warranted. *Id.*

B. Forum Non Conveniens

1. General

The defendants claim that the trial court had no discretion but to apply the factors found in the forum non conveniens statute and dismiss Richards's claim because those factors weigh in favor of a forum other than Texas. Richards argues that even considering the statutory factors, the trial court had discretion to determine whether a forum non conveniens dismissal would serve the interest of justice, which in this case it would not.

We review a trial court's decision about whether to dismiss a case on forum non conveniens grounds for an abuse of discretion. A court abuses its discretion if its decision is arbitrary, unreasonable, or without reference to guiding principles. *In re Pirelli*, 247 S.W.3d at 676.

The applicable forum non conveniens statute provides:

> If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action. In determining whether to grant a motion to stay or dismiss an action under the doctrine of forum non conveniens, the court shall consider whether:

> (1) an alternate forum exists in which the claim or action may be tried;
>
> (2) the alternate forum provides an adequate remedy;
>
> (3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
>
> (4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;
>
> (5) the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state; and
>
> (6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.

TEX. CIV. PRAC. & REM. CODE § 71.051(b).

Prior to 2003, section 71.051 provided that a case brought by a United States resident "may" be stayed or dismissed under the doctrine of forum non conveniens. *See* Act of May 27, 1997, 75th Leg., R.S., ch. 424, § 1, 1997 Tex. Gen. Laws 1680. In 2003, the Legislature amended the statute. Among other changes, the amended statute provided that a trial court "shall" dismiss a claim or action if the court found that in the interest of justice and for the convenience of the parties a claim or action would be more properly heard in a forum outside Texas. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 3.04, 2003 Tex. Gen. Laws 847, 854. Before the 2005 amendments the statute also provided that when determining whether to dismiss an action based on forum non conveniens, a trial court "may" consider the factors specified in section 71.051(b). *Id.* In 2005, the Legislature amended the statute to its current form. Act of May 30, 2005, 79th Leg., R.S., ch. 248, § 1, 2005

Tex. Gen. Laws 448. It now provides that when determining whether to dismiss an action based on forum non conveniens, a trial court "shall" consider the factors specified in section 71.051(b).

The defendants claim that the amended statute takes away much of a trial court's discretion in regard to forum non conveniens motions by requiring the court to weigh the statutory factors and decline to exercise jurisdiction if the factors weigh in favor of granting the motion. Richards claims, however, that the Legislature has always provided trial courts discretion to deny forum non conveniens motions, and the statute does not remove that discretion. Instead, the statute merely requires that dismissals serve the interests of justice—an inherently discretionary standard.

Use of the word "shall" in a statute imposes a duty. TEX. GOV'T CODE § 311.016(2). We agree with defendants that by using the word "shall" in regard to a trial court's consideration of the factors listed in section 71.051(b), the Legislature has essentially defined the terms "interest of justice" and "convenience of the parties" as they are used in section 71.051(b). TEX. CIV. PRAC. & REM. CODE § 71.051(b). The Legislature also, by use of the word "shall," requires dismissal of the claim or action if the statutory factors weigh in favor of the claim or action being more properly heard in a forum outside Texas. *See In re Pirelli*, 247 S.W.3d at 675 n.3 (noting that with the 2003 amendment, the Legislature now mandates dismissal if the trial court finds that the case would be more properly heard in another forum).

Richards asserts that the defendants, as movants, had the burden to prove that each factor weighed in favor of dismissal and urges that they failed to meet the burden. We disagree. Prior to 2003, the statute provided that a trial court could stay or dismiss a claim under the forum non conveniens statute "if the party seeking to stay or dismiss proves" the enumerated factors "by a

preponderance of the evidence." Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 3.04, 2003 Tex. Gen. Laws 847, 854. However, the statute was amended to provide only that a trial court "shall consider" the factors. TEX. CIV. PRAC. & REM. CODE § 71.051(b). The statute does not mandate that a movant prove each factor or that each factor must weigh in favor of dismissal to require a motion to be granted. *Compare Hart v. Kozik*, 242 S.W.3d 102, 111 (Tex. App.—Eastland 2007, no pet.) (concluding that Family Code Section 152.207(b), which contains a list of factors that a trial court "shall consider" when determining whether a forum is inconvenient, does not require the trial court to make a finding as to each factor, and the trial court did not abuse its discretion by dismissing the case even in the absence of evidence on a factor). In construing statutes we presume that each word in the statute was put there for a purpose and that each word not in the statute was omitted for a purpose. *See Mauzy v. Legislative Redistricting Bd.*, 471 S.W.2d 570, 573 (Tex. 1971). The statute does not contain language placing the burden of proof on a particular party in regard to the factors, as was the situation with the prior version. Nor does the statute require that a party prove each factor of section 71.051(b). The statute simply requires the trial court to consider the factors, and it must do so to the extent the factors apply. To the extent evidence is necessary to support the positions of the parties, the trial court must base its findings and decision on the weight of the evidence, and certainly is entitled to take into account the presence or absence of evidence as to some issue or position of a party.

With the foregoing in mind, we turn to the enumerated factors to determine whether the trial court abused its discretion in failing to grant the motions to dismiss.

2. Section 71.051(b)(1) and (2)—Adequate Alternate Forum

The first two factors in section 71.051(b) are: (1) whether an alternate forum exists where the claim may be tried, and (2) whether the alternate forum provides an adequate remedy. The defendants assert that Maine, where Richards lived and was allegedly exposed to asbestos, is such an alternate forum. Richards does not dispute that Maine state courts are an alternate forum or that those courts provide an adequate remedy. He urges in his brief that had defendants agreed not to remove the case to federal court, the Texas case would have been dismissed and the case would have been tried in Maine. But he contends the defendants have not proved the availability of an alternate forum where the claims may be *tried*. He takes that position because none of the defendants in this case maintain a principal place of business or are incorporated in Maine. Therefore, his case would be vulnerable to removal to federal court on diversity jurisdiction grounds. *See* 28 U.S.C. 1332 (a)(1). He claims that once removed to federal court, his case would almost certainly be transferred to MDL 875, and it is widely accepted that cases transferred to MDL 875 do not get tried. For support, he quotes from an opinion of the federal district court in Maine: "If these claims return to state court, they will proceed to resolution. If they remain in federal court, they will encounter significant delay upon their transfer [to MDL 875] where no asbestos trials or discovery takes place in deference to global settlement efforts." *In re Maine Asbestos Cases*, 44 F. Supp. 2d 368, 374 (D. Me. 1999). He also quotes from *Madden v. Able Supply Co.*, 205 F. Supp. 2d 695, 702 (S.D. Tex. 2002): "There are thousands of asbestos cases pending in [MDL 875] and, if history be any indicator, Plaintiff's claims . . . will not be heard for many years." Richards also points to data from the Judicial Panel on Multidistrict Litigation indicating that as of August 10, 2000, 32,892 cases

were pending in MDL 875 and only 199 cases had been remanded in the preceeding year. He claimed in the trial court, and continues to claim in this Court, that because of the situation in MDL 875, dismissal would not work *justice*, but would work *injustice*. Richards argued that a transfer to MDL 875 would work an injustice because he would have no chance at a trial before his death and that because claims languish in MDL 875, it is not an alternate forum in which the claim may be *tried* as required by section 71.051(b)(1).[2]

The defendants claim that because the state courts of Maine comprise an adequate alternate forum and remedy, Richards's arguments about MDL 875 are irrelevant. Section 71.051(b), they posit, does not allow the trial court to deny their motions based on speculation about what might happen procedurally in another venue, nor does it allow the trial court to speculate about whether the case would be refiled in Maine or some other alternate forum. Even though their position is that the status of MDL 875 is irrelevant, they also counter Richards's claims as to that court with more recent documents showing that progress is being made in regard to moving asbestos cases through the federal pretrial process.

Ordinarily, an alternate forum is shown if the defendant is "amenable to process" in the other jurisdiction. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981). There may be circumstances where an alternate forum is not adequate because the remedies it offers are so unsatisfactory that they really comprise no remedy at all. *Id.* But, comparative analyses of procedures and substantive law in different forums should be given little weight in forum non

[2] Even though Richards passed away before oral argument, we address his arguments as they were presented to the trial court because we must examine the facts, record, and arguments before the trial court to determine if the trial judge abused his discretion.

conveniens analysis because such analyses pose significant practical problems. *Id.* at 251. Comparison of the "rights, remedies, and procedures" available in each forum would require complex exercises in comparative law that the forum non conveniens doctrine is designed to help courts avoid. *Id.* Therefore, a comparative analysis of the procedures, rights, and remedies available in Texas, Maine, and federal courts should only be given weight if Maine (and a potential transfer to MDL 875) would in substance provide no remedy at all.

The disadvantages Richards perceives in MDL 875 proceedings are ones of comparative speed to disposition of his case. His objection is based on comparative analysis of procedural processes and times to trial. That is the type of exercise that is disfavored when forum non conveniens motions are considered. Delay in disposition of a case might happen in any jurisdiction depending on docket congestion, statutes, and procedures mandating preferential settings for certain types of cases, fiscal conditions of the judiciary, and numerous other possible conditions and events. The many known and unknown matters affecting pretrial events and trial settings are necessarily speculative and are reasons comparative analyses have been termed "complex" and should be avoided in forum non conveniens consideration. *See Piper Aircraft Co.*, 454 U.S. at 251.

Furthermore, even if Richards's case is dismissed in Texas, filed in Maine, and transferred to MDL 875 for pretrial proceedings, Richards will not be deprived of all remedies for purposes of forum non conveniens analysis. *See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 848-49 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir. 1987) (rejecting plaintiffs' claims that a suit should not be dismissed on forum non conveniens grounds because the alternate forum had problems of delay and backlog, and lacked the wherewithal to deal effectively and

expeditiously with the suit). Though Richards (and others) may be critical of the methods used and time taken to dispose of pretrial matters in the federal asbestos MDL scheme, the scheme is designed to resolve asbestos cases, not deprive injured parties of a remedy. The federal Constitution guarantees Richards the right to a jury trial and due process, and the Maine and federal courts are bound to afford those rights to Richards. U.S. CONST. amend. VII, amend XIV, § 1. We believe, therefore, that Maine, and even MDL 875, come within the Legislature's intent that the alternate forum be one "in which the claim or action may be tried." TEX. CIV. PRAC. & REM. CODE § 71.051(b).

We conclude that on balance, the factors set out in sections 71.051(b)(1) and (2) weigh strongly, if not conclusively, in favor of Richards's action being heard in a forum outside Texas.

3. Section 71.051(b)(3)—Substantial Injustice to Defendants by Litigating in Texas

The defendants point to private interest considerations in support of their assertion that litigating this case in Texas will work a substantial injustice to them. *See* TEX. CIV. PRAC. & REM. CODE § 71.051(b)(3). They also point to the increased costs of traveling to Maine to depose witnesses for trial in Texas. Richards argues that the defendants' claims in this regard are conclusory allegations which are insufficient to support dismissal. He also claims that regardless of the forum, expert witnesses in asbestos cases reside all over the country and attorneys must routinely travel to take depositions.

While some travel in this case will almost certainly occur regardless of the forum in which the case is ultimately litigated, that aspect does not override the fact that the evidence and witnesses relevant to the issue of Richards's asbestos exposure and his damages are outside the subpoena

power of Texas courts. TEX. R. CIV. P. 176.3. At the hearing on the defendants' motions to dismiss, Richards agreed that if the trial court denied the motions but it later became clear to the defendants that trial in Texas would be impossible due to the unavailability of witnesses and evidence, Richards would not object to motions to dismiss on the basis of timeliness, even if they were filed shortly before trial. But requiring parties to litigate a case such as this in Texas until it becomes clear[3] that it is "impossible" to defend the case due to unavailability of evidence and fact witnesses because they are beyond the reach of compulsory process is a waste of private and public resources. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) ("Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their case on deposition, is to create a condition not satisfactory to court, jury or most litigants."). Further, while Richards argues that defendants have not identified any specific witness or evidence they are unable to obtain, such a showing is not necessary. *See Reyno*, 454 U.S. at 258 (noting that requiring detail and extensive investigation regarding witnesses beyond the reach of compulsory process would defeat the purpose of a forum non conveniens motion).

We conclude that the section 71.051(b)(3) factor—whether maintaining the action in Texas would work a substantial injustice to defendants—weighs strongly in favor of the claim being more properly heard in a forum outside Texas.

[3] Of course, what is clear to one party to a lawsuit is not always clear to the opposing party.

4. Section 71.051(b)(4)—Jurisdiction Over all Defendants

Richards claims the evidence did not show that all the defendants in this case are subject to the jurisdiction of Maine courts, or have consented to jurisdiction in Maine. *See* TEX. CIV PRAC. & REM CODE § 71.051(b)(4). The defendants that filed motions to dismiss stipulated to jurisdiction in Maine, agreed to submit to jurisdiction there, or admitted they were subject to jurisdiction under the Maine long-arm statute. Further, the defendants argue that under the Maine long-arm statute, courts in Maine will have jurisdiction over all defendants *properly* joined as parties.

Maine courts have jurisdiction over any person as to a cause of action arising from "[d]oing or causing a tortious act to be done, or causing the consequences of a tortious act to occur within this State." 14 ME. REV. STAT. § 704-A(2)(B). Richards claims that this statute only allows an assumption that all defendants are subject to jurisdiction in Maine and that dismissal of a case based on a mere assumption would itself be an abuse of discretion. But there is no dispute that the exposure and injuries alleged by Richards occurred in Maine. Richards has not identified any defendant over which Maine courts would not have jurisdiction under the Maine long-arm statute. And this Court has recognized that the possibility an alternate forum may not accept jurisdiction does not overcome other factors weighing in favor of dismissal, particularly when a court may condition its dismissal order on the acceptance of jurisdiction by the alternate forum. *In re Pirelli*, 247 S.W.3d at 677-78; *see* TEX. CIV. PRAC. & REM CODE § 71.051(c) (allowing a court to set terms and conditions for dismissal of a claim based on forum non conveniens).

Richards cites *Tullis v. Georgia-Pacific Corp.*, 45 S.W.3d 118 (Tex. App.—Fort Worth 2000, no pet.), for his assertion that the defendants were required to prove Maine courts have jurisdiction

over all the defendants rather than assume that jurisdiction would exist. In *Tullis*, the Texas trial court dismissed a suit arising out of an automobile accident in Tennessee on forum non conveniens grounds. *Id.* at 119-20. The court of appeals reversed. It noted that the defendant truck owner failed to produce any evidence that the truck driver, who had been a Tennessee resident at the time of the accident, was "amenable to service and subject to jurisdiction," and that the trial court's finding of fact that the truck driver "is a resident of Tennessee" was incorrect as the driver had not been located and there was no evidence regarding his current residence. *Id.* at 131. In this case, there is no defendant who has disappeared, and as noted previously, Richards does not claim that any defendant is not amenable to service in Maine. Further, there was no mention in *Tullis* of a Tennessee long-arm statute, as there has been here. Finally, the *Tullis* court also considered evidence related to the other 71.051(b) factors and its decision to reverse the dismissal of the case did not rest solely on the lack of evidence regarding amenability to service and jurisdiction. *Id.* at 132-33.

The Maine long-arm statute is plain and speaks for itself. This record presents no reason to do what typically is not done in forum non conveniens analyses—perform a comprehensive comparative consideration of Maine jurisprudence in regard to each party to Richards's suit. Requiring Texas trial courts and appellate courts to engage in such exercises would slow down and complicate forum non conveniens hearings and decisions to the point that they could become major detriments to disposition of cases. This record presents no reason, for purposes of forum non conveniens analysis, to consider Maine's long-arm statute further than its plain words. The section 71.051(b)(4) factor—whether the alternate forum can exercise jurisdiction over all defendants

properly joined to the plaintiff's claim—weighs in favor of the claim being more properly heard in a forum outside Texas.

5. Section 71.051(b)(5)—Public and Private Interest

Richards contends the defendants did not demonstrate that the balance of public and private interests weigh in favor of a Maine forum. Generally, the public interest factors to be considered are administrative difficulties related to court congestion, burdening the people of a community with jury duty when they have no relation to the litigation, local interest in having localized controversies decided at home, and trying a case in the forum that is at home with the law that governs the case. *See Gulf Oil*, 330 U.S. at 508-09. The private interest considerations generally are considered to be the ease of access to proof, the availability and cost of compulsory process, the possibility of viewing the premises, if appropriate, and other practical problems that make trial easy, expeditious, and inexpensive. *Id.* at 508; *see In re Pirelli*, 247 S.W.3d at 676.

As to the public interest factors, the parties do not disagree that Maine law will apply in this case. Maine undoubtedly has an interest in ensuring that its citizens are not exposed to hazardous materials in the workplace. Absent some overriding consideration, the citizens of Texas should not be burdened with jury duty in a complex asbestos exposure case that has no relationship to Texas. In this case, most evidence and fact witnesses are admittedly located in Maine. Richards's treating physicians, co-worker witnesses, and family members are there. The paper mill where Richards was allegedly exposed to asbestos is in Maine. Compulsory process is unavailable to require attendance at a Dallas County trial by witnesses approximately two thousand miles away. *See* TEX. R. CIV. P. 176.3. Richards says that he has already provided or will provide copies of his medical records to

the defendants. But a promise to produce some or even most evidence does not cure the logistical problems created by lack of effective compulsory process for trial. *See Gulf Oil*, 330 U.S. at 508. Richards also asserts the defendants' claim that there is no compulsory process for witnesses who reside in Maine is an insufficient, "unsubstantiated, conclusory allegation" because the defendants have never identified a witness whose appearance they will be unable to obtain at a Texas trial. But detail regarding which witnesses would be called and what evidence would be unavailable is not necessary in a case such as this where the practical problems of trying a personal injury case hundreds of miles from the scene of the occurrence, the place where the lay witnesses reside, and where most other evidence is located is manifest. *See Reyno*, 454 U.S. at 258. Reasonable access to witnesses and evidence is a fundamental need in regard to any trial—asbestos or otherwise.

Richards also points to the recently decided case of *Sales v. Weyerhaeuser*, 177 P.3d 1122 (Wash. 2008), in which the Washington Supreme Court concluded that a trial court should have considered the effect of MDL 875 when analyzing the convenience of forums for forum non conveniens purposes. In *Sales*, Charles Sales filed suit in Washington against Weyerhaeuser, a Washington corporation that owned a lumber mill in Arkansas. *Id.* at 1124. Sales alleged he was exposed to asbestos in Arkansas and that the exposure caused him to develop mesothelioma. *Id.* The trial court granted Weyerhaeuser's motion to dismiss on forum non conveniens grounds over Sales's arguments that if he refiled the suit in Arkansas it would be removed to federal court and transferred to MDL 875 which would impede the progress of his suit based on the inherent delays there. *Id.* The Washington Supreme Court concluded that the trial court should have considered the effect of MDL 875 on the convenience of litigating in Arkansas. *Id.* at 1126. It did not conclude that

MDL 875 proceedings would make Washington the more convenient setting, but rather, it concluded that the trial court should have considered whether MDL 875 proceedings would impact the speed, ease, and expense of the proceedings which would weigh in favor of litigation in Washington over Arkansas. *Id.*

A trial court must take all relevant factors into consideration with regard to the public and private interest factors. However, in this case, even including the effect of a possible transfer to MDL 875 does not change the balance: the factors in section 71.051(b)(5) weigh in favor of Maine as an alternate forum for Richards's claim. First and foremost, and as previously noted, is the fact that both Maine and MDL 875 are subject to the federal Constitution and the rights it guarantees to Richards. Further, there is only a potential that the case will end up in MDL 875. There are a number of events that could occur that would prevent that from happening (such as if Richards decides to file suit in a state other than Maine). Additionally, if Richards refiles the case in Maine and it is transferred to MDL 875, there is still only the potential for delay. Richards presented statistics from 1999 and cases indicating that claims were left pending for many years and the MDL 875 judge, Judge Weiner, resolved cases through negotiation not trial. The defendants pointed out that Judge Wiener was no longer presiding over MDL 875. He was replaced by Judge Giles who had issued orders outlining changes to docket management and directed quarterly meetings of all counsel to address the processing and administration of claims.

Section 71.051(b)(5) requires a trial judge to balance the public and private interests to determine whether those factors predominate in favor of the claim being more properly heard in a

forum outside Texas, and on balance, it is clear that the factors weigh in favor of Richards's action being heard in Maine.

6. Section 71.051(b)(6)—Unreasonable Duplication of Litigation

Richards asserts that the defendants failed to show dismissal would not result in unreasonable duplication of litigation. He claims dismissal would result in two lawsuits: the Texas case against the nonmoving defendants would remain pending while a new suit would be filed against the moving defendants in Maine. We disagree that had the trial court granted the defendants' motions to dismiss, this would have resulted in unreasonable duplication of litigation. Section 71.051(b) currently provides that if a court decides "a claim or action" would be more properly heard in another forum, the court shall stay or dismiss "the claim or action." The language is broad and does not require that a trial court dismiss only the claims or actions against moving defendants. *See* TEX. CIV. PRAC. & REM. CODE § 71.051(b) (requiring dismissal of a claim or action on written motion of "a" party).

In all the motions to dismiss, the defendants requested dismissal of the entire case, not just the claims against themselves.[4] For example, General Electric concluded its motion by stating "this case should be dismissed because it would be in the interest of justice and convenience to do so." It argued throughout the motion that the statutory factors weighed in favor of dismissal for all the defendants.

[4] One defendant, Spence Engineering, initially argued only for dismissal of the claims against it, but later adopted and joined another defendant's motion to dismiss the "Plaintiff's claims." Zy-Tech Global Industries argued that section 71.051 factors "compel dismissal of Plaintiffs' action or, in the alternative, dismissal of their claims against Zy-Tech."

If Richards's action or part of the action is dismissed for forum non conveniens, the extent to which his litigation might be fragmented or duplicated lies in his hands, not those of the Texas court. If he were to refile suit in a jurisdiction other than Maine, then he might again be met with assertions by defendants that the action or a claim in the action is subject to a forum non conveniens challenge. But those contingencies depend on decisions by Richards to file suits in forums other than Maine and run the risk of multiple suits in multiple venues.

We disagree with Richards's position in regard to the section 71.051(b)(6) factor. The potential that a trial court might grant a motion to dismiss as to only part of an action and that some duplication of litigation could occur, depending on Richards's own litigation decisions, does not turn the trial court's decision to grant motions to dismiss such as the ones in this case into decisions causing unreasonable duplication of litigation. Under the circumstances, the section 71.051(b)(6) factor—that the stay or dismissal would not result in unreasonable duplication or proliferation of litigation—weighs in favor of the claim being more properly heard in a forum outside Texas.

7. Waiver of Removal Rights

The defendants claim the trial court abused its discretion by denying their motions when they refused to waive their right to remove the case to federal court. They also argue that section 71.051(c), which allows a court to set terms and conditions for dismissing a claim, is unconstitutional to the extent it allows imposing such a condition.

The trial court initially stated in a letter that he would deny the motions to dismiss, but he then granted the defendants' motions to reconsider and vacated the letter. The court then denied the motions to dismiss without stating a reason. Thus, the trial court did not impose the condition of

which defendants complain. We do not address the issue because our opinion would be an advisory opinion on an abstract question of law that would not bind the parties. *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007).

III. Conclusion

When all section 71.051(b) factors in a case favor the conclusion that an action or claim would be more properly held in a forum outside Texas, as they do here, the statute requires the trial court to grant motions requesting that it decline to exercise its jurisdiction. The trial court's denial of the relators' motions to dismiss violated the forum non conveniens statute and was an abuse of its discretion. We conditionally grant the petition for writ of mandamus and direct the trial court to grant the relators' motions. The writ will issue only if the trial court fails to comply.

_____

Phil Johnson
Justice

OPINION DELIVERED: December 5, 2008

IN THE SUPREME COURT OF TEXAS

NO. 07-0221

JOHN A. ADAMS AND JANE A. ADAMS, INDIVIDUALLY, AND AS NEXT FRIENDS OF A.A., A MINOR, PETITIONERS,

v.

YMCA OF SAN ANTONIO, D/B/A YMCA OF SAN ANTONIO AND HILL COUNTRY, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

PER CURIAM

Nine-year-old A.A. was sexually abused by his counselor while at summer camp, leading to this suit against the YMCA for negligently hiring, retaining, and supervising the perpetrator. The jury found that the abuse caused the child serious mental injury and awarded future, but no past, mental anguish damages. The trial court rendered judgment on the jury's award. The court of appeals reversed, however, concluding no evidence supported the jury's finding of future mental anguish. 220 S.W.3d at 1, 3. We hold that legally sufficient evidence supports the jury's award and reverse the court of appeals' judgment.

The YMCA of San Antonio owns and operates a children's summer camp, and hired Kenneth Trimble to be a camp counselor during the summers of 1998 and 1999. In the spring of 2000,

Trimble was arrested and confessed to sexually inappropriate conduct with a number of the young campers, including A.A. Specifically, Trimble confessed to, in his words, "getting on top of [A.A.] & 'dry humping' him w/both our clothes on." A.A. did not reveal the incident to his parents, who learned about it as a result of Trimble's confession. A.A. subsequently described Trimble as "bumping [him] so hard" that A.A. feared he would fall out of the bed. A.A.'s parents, individually and as A.A.'s next friend, filed this negligence suit against the YMCA. The jury found in A.A.'s favor and apportioned responsibility 95% to Trimble and 5% to the YMCA. Finding that Trimble caused A.A. serious mental injury, the jury awarded $500,000 for mental anguish that A.A. would in reasonable probability sustain in the future but awarded no damages for mental anguish sustained in the past.

The YMCA challenged the jury's award on a number of grounds, contending A.A. failed to secure a necessary finding that a legally cognizable tort was committed, there was no evidence that Trimble's conduct was foreseeable, the evidence was legally and factually insufficient to support an award for future mental anguish, and the judgment should be modified to reflect the percentage of responsibility that the jury apportioned. The court of appeals reversed the trial court's judgment and rendered judgment in the YMCA's favor, concluding that the evidence supporting future mental anguish damages was legally insufficient and that a presumption as to future damages was unsupportable given the jury's failure to find compensable injury in the past. 220 S.W.3d at 4–6. We disagree.

We apply a traditional no-evidence standard to a mental anguish finding to determine whether the "record reveals any evidence of 'a high degree of mental pain and distress' that is 'more

than mere worry, anxiety, vexation, embarrassment, or anger.'" *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995) (quoting *J.B. Custom Design & Bldg. v. Clawson*, 794 S.W.2d 38, 43 (Tex. App.—Houston [1st Dist.] 1990, no writ)). To support an award for future mental anguish, A.A.'s parents were required to demonstrate a reasonable probability that A.A. would suffer compensable mental anguish in the future. *See Fisher v. Coastal Transp. Co.*, 230 S.W.2d 522, 523–24 (Tex. 1950). In reviewing the jury's finding, we consider whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 822, 827 (Tex. 2005). We consider all of the evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it. *Id. at* 822.

The evidence in this case showed that, when A.A.'s parents learned of Trimble's confession and asked A.A. about Trimble, A.A. became "hysterical almost," "went ballistic," and was "unconsolable." At his mother's suggestion, A.A. wrote a letter to Trimble to express his feelings. That letter reflects A.A.'s intense anger and resentment, and graphically demonstrates the profound impact that the incident had on him. A.A.'s grandfather testified that he witnessed A.A.'s fury and rage over the event, and described A.A.'s yelling as so "visceral" that it left a "lasting impression" on him. The jury also heard A.A.'s own testimony that he had a "vivid memory" of the night Trimble climbed into his bed, but that he had put it "in a vault."

According to the expert testimony presented at trial, A.A.'s reference to putting the incident "in a vault" meant that he is using denial as a temporary coping mechanism, which is a common

response to childhood sexual abuse. A.A.'s experts testified to other short- and long-term effects that sexual abuse has on child victims, some of which A.A. exhibited, and they described what A.A. is "more than likely to face in the future" because of the incident. Short-term effects could be seen in the enormous emotional outpouring expressed in the letter A.A. wrote to Trimble. Another common effect that A.A. experienced was poor performance in school. A.A.'s math teacher reportedly engaged in inappropriate classroom behavior by snapping girls' bras and slapping male students on their backsides, which reminded A.A. of Trimble and caused "phobic anxiety" that led to his failing math. A.A.'s outbursts to his parents and grandfather further demonstrated the incident's more immediate traumatic effects.

There was also expert testimony that the trauma A.A. suffered will not simply disappear but will have to be processed in some manner when A.A. is ready, which may not happen for many years. In many cases where the victim "incapsulate[s]" the incident in a vault, as A.A. has in this case, there is an "enormous reaction" when that vault opens later in life. The evidence further showed that, while A.A. presently appeared to be functioning well, children who have been sexually abused are often not diagnosed with depression or anxiety until they are adults in their thirties, forties, and fifties.

The court of appeals appeared to acknowledge that the evidence would support a claim for past mental anguish, but concluded that the jury's denial of mental anguish in the past meant there was insufficient evidence of a compensable injury in the future. Based on the evidence presented, we disagree. The jury's failure to award damages for A.A.'s past mental anguish does not mean that they found no injury to A.A. in the past; to the contrary, the jury specifically found that Trimble's

conduct "cause[d] serious mental impairment or injury [to A.A.]." The jury's allocation of damages was entirely consistent with the testimony presented that A.A. was coping well by repressing his intense distress, which would inevitably surface in the future. We have recognized the consensus among experts that child victims of sexual abuse frequently repress and suppress memories and emotions associated with the event until their adult years. *See S.V. v. R.V.*, 933 S.W.2d 1, 8, 17 (Tex. 1996). The evidence of A.A.'s emotional outbursts and phobic anxiety, coupled with the expert testimony, supports a reasonable inference that an "enormous" reaction is likely when the "vault" of A.A.'s memory opens. Texas law permits jurors to make such a determination, and the trial court did not err in rendering judgment on their verdict.

We grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment and remand the case to that court for consideration of the YMCA's remaining issues. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: September 26, 2008

IN THE SUPREME COURT OF TEXAS

NO. 07-0240

MIGUEL HERNANDEZ, M.D., PETITIONER,

v.

JULIOUS EBROM AND RICHARD HUNNICUTT, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued October 15, 2008

JUSTICE JOHNSON delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE GREEN, and JUSTICE WILLETT joined.

CHIEF JUSTICE JEFFERSON filed a dissenting opinion, in which JUSTICE O'NEILL and JUSTICE MEDINA joined.

A defendant in a health care liability claim may appeal from the interlocutory order denying its objection to the plaintiff's expert report. The statutes authorizing the defendant's objection and appeal do not impose consequences if an interlocutory appeal is not pursued. In this case, we consider whether a defendant health care provider's failure to challenge the adequacy of an expert report by interlocutory appeal precludes a challenge of the report by appeal from a final judgment when the plaintiff later nonsuits before trial. The court of appeals held it does; we hold it does not. We reverse and remand to the court of appeals.

I. Background

Dr. Miguel Hernandez, a member of McAllen Bone and Joint Clinic, performed surgery on Julious Ebrom's knee. Ebrom experienced complications, filed a health care liability suit against Dr. Hernandez and the clinic, and timely provided the required expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a).

Dr. Hernandez and the clinic filed a motion to dismiss, asserting that the report was deficient because no curriculum vitae for the expert making the report was submitted, the report was conclusory, and it did not mention either defendant. Both defendants sought recovery of their attorney's fees and costs. *See id.* § 74.351(b)(1). The trial court granted the motion as to the clinic but denied it as to Dr. Hernandez. Six months later, and before trial, Ebrom filed notice of nonsuit. The trial court dismissed the case with prejudice. Following entry of the final judgment of dismissal, Dr. Hernandez appealed the trial court's denial of his earlier motion to dismiss. He re-urged his contention that Ebrom's expert report was deficient and sought his attorney's fees.

The court of appeals dismissed the appeal for lack of jurisdiction. ___ S.W.3d ___. It held that the order denying the motion to dismiss was rendered moot by the subsequent nonsuit and order of dismissal. *Id.* at ___. The appeals court relied on two cases we have since reversed: *Villafani v. Trejo*, No. 13-04-449-CV, 2005 WL 2461821 (Tex. App.—Corpus Christi Oct. 6, 2005), *rev'd*, 251 S.W.3d 466 (Tex. 2008), and *Barrera v. Rico*, No. 13-04-480-CV, 2005 WL 1693698 (Tex. App.—Corpus Christi July 21, 2005), *rev'd per curiam*, 251 S.W.3d 519 (Tex. 2008). We held in those cases that a health care provider may appeal the trial court's denial of a motion for sanctions

and dismissal despite a nonsuit, as "the purpose of the sanctions . . . survive[s] [the plaintiff's] nonsuit." *Villafani*, 251 S.W.3d at 471; *see also Barrera*, 251 S.W.3d at 520. Under *Villafani*, Ebrom's assertion that the nonsuit rendered Dr. Hernandez's subsequent appeal moot is invalid.

However, Ebrom also asserts that because Dr. Hernandez failed to pursue an interlocutory appeal, his complaints have been waived. *See* TEX. CIV. PRAC. & REM. CODE §§ 51.014(a)(9), 74.351.[1] Dr. Hernandez argues that because the plain language of the statute says an interlocutory appeal "may" be taken from an order denying a challenge to an expert report, an interlocutory appeal is permitted but not mandated. *See id.* § 51.014(a).

We agree with Dr. Hernandez. His failure to pursue an interlocutory appeal did not waive the right to challenge the order after Ebrom nonsuited and final judgment was entered.

II. Discussion

Under the Medical Liability Insurance Improvement Act (MLIIA) as it applies to this case, a health care liability claimant must serve an expert report on the defendant provider within 120 days of filing suit. *Id.* § 74.351(a). Each health care defendant whose conduct is implicated in the report may object to the report's sufficiency. *Id.* However, the objection must be made "not later than the 21st day after the date it was served, failing which all objections are waived." *Id.* If a timely and sufficient report is not served, the trial court must award the provider its attorney's fees and costs and dismiss the case with prejudice. *Id.* § 74.351(b).

[1] *Villafani* also involved an appeal from a final judgment after a nonsuit. However, *Villifani* was filed prior to enactment of section 51.014(a)(9) allowing interlocutory appeal of such orders. *See Villafani*, 251 S.W.3d at 468 ("Such an interlocutory appeal was not available under the version of the MLIIA applicable to this case.").

Generally, appeals may only be taken from final judgments, *Ogletree v. Matthews*, 262 S.W.3d 316, 319 n.1 (Tex. 2007), and an order denying a health care defendant's objection to an expert report is not a final judgment. However, section 51.014(a)(9) of the Texas Civil Practice and Remedies Code provides that a person "may" appeal from an interlocutory order that "denies all or part of the relief sought by a motion under Section 74.351(b)."

In construing statutes, "our primary objective is to ascertain and give effect to the Legislature's intent." *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006). If the Legislature provides definitions for words it uses in statutes, then we use those definitions in our task. *See* TEX. GOV'T CODE § 311.011(b). We give effect to legislative intent as it is expressed by the statute's language and the words used, unless the context necessarily requires a different construction or a different construction is expressly provided by statute. *See id.* § 311.016; *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). Unambiguous statutory language is interpreted according to its plain language unless such an interpretation would lead to absurd results. *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

According to the Code Construction Act, "'[m]ay' creates discretionary authority or grants permission or a power." TEX. GOV'T CODE § 311.016(1). In this case, Ebrom does not contend that some context or express language in section 51.014 makes it necessary to read "may" differently than how it is defined. Nor do we see in the statute either express language or a context that necessitates construing "may" as imposing a duty as opposed to creating authority or granting permission or a power.

In other cases where this Court has construed "may," we considered the plain language of the statutes. For example, in *Dallas County Community College District v. Bolton*, 185 S.W.3d 868, 873 (Tex. 2005), the issue was whether a statute prohibited the collection of technology fees if they were not used for bond repayment when the statute provided such fees collected by public junior colleges "may be pledged to the payment of [revenue] bonds." The Court recognized "[w]e cannot disregard the Legislature's choice of language in providing that the authorized fees '*may* be pledged to the payment' of revenue bonds rather than requiring that they *must* or *shall* be so pledged." *Id.* We concluded that "'may' and 'shall' mean different things, and there is no clear indication from the Legislature that it intended otherwise." *Id.* at 874; *see also Mid-Century Ins. Co. of Tex. v. Ademaj*, 243 S.W.3d 618, 623 (Tex. 2007) (statute providing the insurance commissioner "may" give consideration to certain expenses was permissive and did not compel him to do so).

The Legislature *authorized* health care providers to pursue interlocutory appeals from trial court denials of challenges to plaintiffs' expert reports, but we see no indication that the Legislature effectively *mandated* interlocutory appeals by providing that if no appeal was taken, then the health care provider waived the right to challenge the report under all circumstances. Neither section 51.014(a)(9) nor section 74.351 indicates there are consequences if an appeal from the interlocutory order is not pursued. *Cf. Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 495 (Tex. 2001) ("To determine whether a timing provision is mandatory, we first look to whether the statute contains a noncompliance penalty."). The statute providing for interlocutory appeals states only that "[a] person may appeal from" certain specified interlocutory orders. TEX. CIV. PRAC. & REM. CODE § 51.014. And section 74.351, which requires expert reports and allows health care providers to

challenge them, does not reference the question of appeal, interlocutory or otherwise, from such a challenge or the ruling on it.

Ebrom relies on *Bayoud v. Bayoud*, 797 S.W.2d 304 (Tex. App.—Dallas 1990, writ denied), to support his argument that failure to pursue an interlocutory appeal waives the issue. In *Bayoud*, the appellant challenged the trial court's grant of a temporary injunction enjoining a receiver from selling a company's assets on the ground that the trial court failed to require the appellant, who had requested the injunction, to file a bond. *Id.* at 308. The court held that the appellants "lost their right to complain of the validity of the bond or the injunction order as they should have appealed within proper time limits after the grant of the injunction." *Id.* at 312 (citing TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4)). But *Bayoud* was not addressing the type of interlocutory appeal at issue here.

Appeals of some interlocutory orders become moot because the orders have been rendered moot by subsequent orders. *See, e.g.*, *Richards v. Mena*, 820 S.W.2d 372, 372 (Tex. 1991) (the appeal of a temporary injunction was rendered moot by the rendering of a permanent injunction); *Lincoln Prop. Co. v. Kondos*, 110 S.W.3d 712, 715 (Tex. App.—Dallas 2003, no pet.) (recognizing that the issue of whether the trial court properly granted class certification was rendered moot by the trial court's grant of the defendant's motion for summary judgment). But as to the statute involved here, we recently held that a motion to dismiss and for sanctions is not rendered moot by a nonsuit. *Villafani*, 251 S.W.3d at 471.

Appellate review in this case would allow Dr. Hernandez to pursue a right given to him by the Legislature—the statutory right to potential reimbursement for certain of his attorney's fees and costs. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b)(1). Precluding defendants from asserting that

statutory right would dilute the deterrent value of the statute. *See Villafani*, 251 S.W.3d at 470 ("Allowing defendants to seek sanctions under the MLIIA for attorney's fees and dismissal with prejudice deters claimants from filing meritless suits."); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001) ("The Legislature has determined that failing to timely file an expert report, or filing a report that does not evidence a good-faith effort to comply with the definition of an expert report, means that the claim is either frivolous, or at best has been brought prematurely. This is exactly the type of conduct for which sanctions are appropriate." (citations omitted)).

Further, holding that failing to take an interlocutory appeal forfeits the right to statutory sanctions could induce defendants who might not otherwise take an interlocutory appeal from denials of their motions to do so in order to avoid losing any chance of recovering sanctions. Placing defendants in such a position surely would slow down the process of disposing of health care liability claims by increasing interlocutory appeals and would increase costs of resolving the claims. That would run counter to one purpose for which the MLIIA was enacted. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(2), 2003 Tex. Gen. Laws 847, 884 (stating that one purpose of the MLIIA was to decrease the cost of health care liability claims).

III. Response to the Dissent

The dissent agrees that section 51.014(a)(9) provides a defendant the right to an interlocutory appeal and queries whether the statute contemplates the appeal's immediate exercise. The question, however, is not whether the statute contemplates immediate exercise of the right to interlocutory

appeal, but whether the statute provides that a defendant loses its statutory right to seek attorney's fees and costs if an immediate interlocutory appeal is not taken.

Prior to the 2003 amendments, the statute provided no time limit for filing objections to the report, as we held in *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003) (per curiam). There, the defendant challenged the expert report more than 600 days after the plaintiff served it. *Id.* at 155. The trial court granted the motion to dismiss over the plaintiff's assertion that the defendant doctor had waived any challenge to the report by waiting so long. *Id.* We noted that the statute did not "impose a deadline for a health care provider to file a motion to dismiss" and held that the doctor's actions were not consistent with an intent to waive his right to challenge the report. *Id.* at 156.

Section 74.351 now imposes time limits for both filing expert reports and objecting to them. TEX. CIV. PRAC. & REM. CODE § 74.351(a). Section 74.351(a) specifies that reports must be served no later than 120 days after the original petition is filed and that objections to the sufficiency of such reports must be made within twenty-one days after the report is served. Consequences result if either of those deadlines are missed. *See id.* § 74.351(b). If the report is not timely filed, the suit must be dismissed with attorney's fees and costs awarded to the defendant. *See id.* If a defendant fails to timely object to a report, any objection is waived. *See id.* § 74.351(a).

The time limitation on filing objections was added by amendment in 2003 when the Legislature also authorized interlocutory appeals from orders denying defendants' objections to reports.[2] In contrast to the specific time limits the Legislature set in section 74.351(a) for filing

[2] *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 1.03, 10.01, 2003 Tex. Gen. Laws 847, 849, 875.

reports and objecting to them when it amended the statute in 2003, it provided no limitation in section 74.351(b) for appealing from final judgments and challenging the interlocutory orders denying objections to reports. We presume the Legislature placed into the statute words it intended to be there and that it purposefully omitted words not found there. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). When the Legislature has prescribed certain time limits and procedures, it is not our prerogative to add further limitations to them.

Finally, the dissent queries whether the same rule that applies to this case will apply following a trial on the merits and a final judgment for the plaintiff based on the trial. The dissent suggests that because section 74.351(b) provides the trial court "shall" dismiss an action for failure to comply with the expert report requirement, dismissal for an inadequate report would be required even after a final judgment for the plaintiff. We do not believe the statute contemplates such a result for at least two reasons.

First, by requiring timely expert reports, the Legislature intended to reduce frivolous claims; it indicated no intent to preclude meritorious claims. If a full trial occurs and the plaintiff prevails after introducing evidence of the appropriate standard of care for the defendant, the defendant's breach of that standard, and a causal relationship between the breach and the plaintiff's damages, then the claim could not sensibly be classified as frivolous. Construing the statute to require post-trial dismissal of such a claim because of an earlier inadequate report would be construing the statue to yield an unjust and nonsensical result—one we presume the Legislature did not intend. *See* TEX. GOV'T CODE § 311.021(3) ("In enacting a statute, it is presumed that . . . a just and reasonable result is intended."); *City of Rockwall*, 246 S.W.3d at 626 (noting that a statute will not be construed to

yield an absurd result); *McKinney v. Blankenship*, 282 S.W.2d 691, 698 (Tex. 1955) ("Unless there is no alternative, a statute will not be interpreted so as to lead to a foolish or absurd result.").

Second, the situation referenced by the dissent is similar to the situation involving the denial of a motion for summary judgment. Texas Rule of Civil Procedure 166a(c) states that a judgment "shall" be rendered when a motion for summary judgment establishes the movant is entitled to judgment as a matter of law. As the dissent acknowledges, a party may not, after trial and an unfavorable judgment, prevail on a complaint that the party's motion for summary judgment should have been granted. Likewise, we do not see how section 74.351(b) could have been intended to require dismissal of the action because of an inadequate expert report after a full trial and introduction of evidence establishing the appropriate standard of care, breach of the standard, and a causal relationship of the breach to the plaintiff's damages. As stated above, such a result would be unjust and nonsensical—one we presume the Legislature did not intend.

IV. Conclusion

The court of appeals had jurisdiction over Dr. Hernandez's appeal and erred by dismissing it. We reverse the court of appeals' judgment and remand the case to that court for it to consider the merits of the appeal.

_____

Phil Johnson
Justice

OPINION DELIVERED: July 3, 2009

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CHIEF JUSTICE JEFFERSON, joined by JUSTICE O'NEILL and JUSTICE MEDINA, dissenting.

The Court proposes a categorical rule: a health care provider may challenge an order denying his motion to dismiss a claim due to the inadequacy of an expert report either in an interlocutory appeal or after final judgment. And then it proposes the opposite: a provider may *not* appeal an order denying his motion to dismiss if the plaintiff establishes at trial "the appropriate standard of care, breach of the standard, and a causal relationship of the breach to the plaintiff's damages." ___ S.W.3d at ___. As to the first holding, the Court relies on the statute's plain language. Because "[n]either section 51.014(a)(9) nor section 74.351 indicate there are consequences if an appeal from the interlocutory order is not pursued," the Court reasons, a provider who elects not to appeal the trial court's order denying dismissal may complain after final judgment. *Id*. at ___. "When the

Legislature has amended the statute to prescribe certain time limits and procedures, it is not our prerogative to add further limitations to them." *Id.* at ___.

But the Court adds a "further limitation" in the next breath: a provider loses his statutory right to dismissal if the plaintiff prevails at trial. *Id.* at ___. In other words, "may appeal" means "must appeal" in that instance. This transmutation depends not on the statute's plain language, but on the Court's belief that an exception is required when the plaintiff has secured a judgment establishing malpractice. The Court limits its exception to judgments in which the plaintiff wins after a full trial; a successful *defendant* could resurrect his complaint about the inadequate expert report, and make the plaintiff pay his fees and costs, despite his failure to avail himself of an interlocutory appeal when available. While the Court recognizes that the Legislature's goals were threefold—reducing frivolous claims, preserving meritorious ones, and decreasing the cost of health care litigation—its rule furthers none of them. The question this case presents deserves more thoughtful consideration about the Legislature's broader mission, which must inform our construction of the right to an interlocutory appeal in this context. *See City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006) ("[O]ur primary objective is to ascertain and give effect to the Legislature's intent."). Because the Court's holding contradicts that mission, I respectfully dissent.

Interlocutory appeals are disruptive, time-consuming, and expensive. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (noting "the disruption and burden of interlocutory appeal"); 19 GEORGE C. PRATT, MOORE'S FEDERAL PRACTICE § 201.10[1] (3d ed. 2009) ("The purposes of the final judgment rule are to avoid piecemeal litigation, to promote judicial efficiency,

and to defer to the decisions of the trial court."); 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3907, at 269 (2d ed. 1992) ("When courts attempt to explain the policies that underlie the final judgment rule, . . . [they] speak of 'efficiency,' protecting the role of the trial judge, and the need to avoid such evils as interference with the trial court, deciding unnecessary issues, and deliberate delay or harassment."); *cf.* FED. R. CIV. P. 23 advisory committee's note (1998) (observing that ten-day window for seeking interlocutory review in federal cases involving class certification "is designed to reduce the risk that attempted appeals will disrupt continuing proceedings"); *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 461 (Tex. 2008) (noting that "[a]ppellate courts cannot afford to grant interlocutory review of every claim that a trial court has made a pre-trial mistake").

There are instances, however, when the Legislature deems a right or remedy so important that its vindication need not wait until the case concludes. Examples are strewn throughout Texas statutes[1]; the one at issue today resides among several others in section 51.014 of the Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9). Section 51.014 uses the permissive term "may" in conferring the right to an interlocutory appeal. *Id.* § 51.014(a). In the Court's view, that term governs the disposition in this case. Because the defendant is not *required*

[1] *See, e.g.*, TEX. CIV. PRAC. & REM CODE § 15.003(c) (authorizing interlocutory appeal of venue rulings in certain cases involving multiple plaintiffs and intervening plaintiffs); *Id.* § 26.051(b) (permitting interlocutory appeal from denial of plea to jurisdiction in a class action if state agency has exclusive or primary jurisdiction of action); TEX. FAM. CODE § 6.507 (recognizing interlocutory appeal for orders appointing receivers); TEX. HEALTH & SAFETY CODE § 574.070 (authorizing accelerated appeal from order requiring court-ordered mental health services).

to appeal an interlocutory order, he may postpone his complaint until the ruling merges with a final judgment. This approach is easy to understand but has obvious flaws.

For example, while the same plain language says that an order granting a temporary injunction "may" be appealed, it *must* be appealed before final judgment if the enjoined party wants relief. By its nature, a temporary injunction ceases to exist when the trial court signs a final judgment. An order appointing a receiver becomes the basis of commercial transactions with third parties. If a challenge to that order "may" await the final judgment years later, are those transactions dissolved when the receiver is removed? A media defendant "may" immediately appeal the denial of its motion for summary judgment. If it foregoes that right and loses at trial, can an appellate court render a take-nothing judgment because the trial court previously denied a motion for summary judgment that it should have granted?

It is not enough to say that because "may"—which applies to every appeal in section 51.014(a)—is permissive, a party can always elect to appeal either immediately or after final judgment. *See Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 570 n.3 (Tex. 2006) (noting that "'[in] dozens of cases, courts have held "may" to be synonymous with "shall" or "must"'") (quoting BLACK'S LAW DICTIONARY 1000 (8th ed. 2004)); *see also Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998) ("Statutes providing that a party 'may recover,' 'shall be awarded,' or 'is entitled to' attorney fees are not discretionary.") (citations omitted). We must also examine the nature of the claim and the right sought to be vindicated. Efficiency, third-party interests, public policy, jurisdiction, a preference for outcomes based on substance—these and other concerns have historically informed the decision whether an interlocutory appeal is lost if not taken immediately.

The analysis can be straightforward in a given case, but it may also require a deeper understanding of the purposes interlocutory review was meant to serve. Whether an interlocutory appeal may await final judgment depends on circumstances that evade the easy fix the Court applies today. We should attempt to discern general principles that will govern future cases, and then determine the scope of the appellate remedy with those principles in mind.

I
Background

Until 2003, medical professionals had no right to an interlocutory appeal if a trial court erroneously denied a motion to dismiss the case based on deficiencies in the claimant's expert report. *See, e.g.*, *Villafani v. Trejo*, 251 S.W.3d 466, 468 (Tex. 2008). While some courts of appeals granted mandamus relief in that circumstance, entitlement to it was by no means guaranteed. *See In re Woman's Hosp. of Tex., Inc.*, 141 S.W.3d 144, 158 (Tex. 2004)(Owen, J., concurring in part and dissenting in part to the denial of mandamus petitions). This Court was ultimately persuaded that, with respect to health care liability claims, public policy required that we reassess our traditional reluctance to intervene in lower court proceedings. *In re McAllen Med. Ctr.*, 275 S.W.3d at 466. The Legislature spoke, in apocalyptic terms, about a "medical malpractice insurance crisis" that had significantly reduced access to health care services and dramatically increased the cost of malpractice insurance in this state. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(a)(5), 2003 Tex. Gen. Laws 847, 884. Medical professionals were subjected to jury trials in frivolous cases, which were "affecting the availability and affordability of health care" and "driving physicians from Texas and patients from medical care they need." *In re McAllen Med. Ctr.*, 275 S.W.3d at 466. And so we

recognized a right to immediate mandamus relief when a trial court refuses to dismiss a case in which the expert report is inadequate. *Id.* at 467.

Our holding in *McAllen* was reinforced by legislative action that was similarly designed to accelerate dismissal of frivolous cases. Noting that "the number of health care liability claims" had "increased . . . inordinately," the Legislature enacted section 74.351 and granted an accelerated appeal from an order denying a motion to dismiss for failure to file an adequate report. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(a)(1), 2003 Tex. Gen. Laws 847, 884. This provision had one goal in mind:

> The obvious intent of this statutory provision was to stop suits that had no merit from proceeding through the courts. The Legislature's hope was, and is, that this would reduce waste of the parties', the courts', and the insurers' time and money, which would favorably impact the cost of insurance to health care providers and thus the cost and availability of health care to patients.

In re Woman's Hosp. of Tex., Inc., 141 S.W.3d at 147 (Owen, J., concurring in part and dissenting in part to the denial of mandamus petitions); *see also* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(1), (3), 2003 Tex. Gen. Laws 847, 884 (intent of legislation was to "reduce excessive frequency and severity of health care liability claims through reasonable improvements and modifications in the Texas insurance, tort, and medical practice systems . . . in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the [medical liability insurance] crisis").

II
The interlocutory appeal was designed to remove frivolous cases from the judicial system at the earliest opportunity.

It is clear, then, that when the Legislature gave health care providers authority to appeal an interlocutory order that denies a motion to dismiss, it did so to quickly dispose of frivolous cases that increase the cost of insurance and drive doctors away from Texas. The question here is whether the Court's holding today furthers or frustrates that purpose. *See* TEX. GOV'T CODE § 311.023 (providing that courts may consider "the object sought to be attained" and the "consequences of a particular construction").

The Court and I agree that "may," as it applies to interlocutory appeals under section 51.014(a)(9), "'creates authority or grants permission or a power.'" ___ S.W.3d at ___ (quoting TEX. GOV'T CODE § 311.016(1)). If the claimant were proposing that a defendant had no right to an interlocutory appeal, we would reject it unanimously. The Court says its holding "would allow Hernandez to pursue a right given him by the Legislature," suggesting that the approach I favor would not. To the contrary, the statute clearly permits a provider to pursue the right if it so chooses. The question is not whether the defendant has the right, but whether the statute contemplates its immediate exercise. Our treatment of this issue must therefore be sensitive to the law's underlying rationale. Those reasons vary according to the nature of the interlocutory appeals section 51.014 permits.

As the Court notes, the oldest interlocutory appeal, that from an order creating or dissolving a temporary injunction, must either be taken immediately or lost, because a temporary injunction, by its very nature, ceases to exist when the controversy has proceeded to final judgment. *See Janus Films, Inc. v. City of Fort Worth*, 358 S.W.2d 589, 589 (Tex. 1962) ("The purpose of a temporary injunction is to preserve the status quo of the subject matter of the suit pending a final trial of the

case on its merits."). Accordingly, even though section 51.014 says a party "may appeal" a temporary injunction, the opportunity to review that order is lost if not taken immediately.

Courts of appeals have held that orders appointing receivers may be challenged by interlocutory appeal *only*. *Long v. Spencer*, 137 S.W.3d 923, 926 (Tex. App.—Dallas 2004, no pet.) (holding parties must challenge appointment of receiver by interlocutory appeal or complaint is waived); *Sclafani v. Sclafani*, 870 S.W.2d 608, 611 (Tex. App.–Houston [1st Dist.] 1993, writ denied); *Benningfield v. Benningfield*, 155 S.W.2d 827, 827 (Tex. Civ. App.—Austin 1941, no writ); *McFarlane v. Greenameyer*, 199 S.W. 304, 305 (Tex. Civ. App.—Galveston 1917, no writ). As one court explained:

> [Permitting appeal from final judgment] would mean that a party could rightfully attempt to set aside an order of receivership in an appeal regardless of how long ago the receivership order was entered. The setting aside of an order of receivership has "the effect of nullifying all intervening acts of the receiver . . . or, at least, of raising serious questions concerning the validity of such intervening acts." Allowing the vacation of a receivership at any time after its creation would work undue hardship on third parties who have dealt in good faith with the receiver. Furthermore, an unlimited time to appeal would mean that the order of receivership would *never* be beyond challenge, and thus never attain the finality upon which the parties, the receiver, and those who have transacted with the receiver, are entitled to depend.

Sclafani, 870 S.W.2d at 611 (internal citation omitted). Again, section 51.014 says a party "may appeal" these orders, but courts recognize that, in these circumstances, review cannot await final judgment. This is not unlike the rule governing interlocutory appeals in probate proceedings, in which "[t]he need to review 'controlling, intermediate decisions before an error can harm later phases of the proceeding'" justifies an exception to the "one final judgment" rule. *De Ayala v.*

Mackie, 193 S.W.3d 575, 578 (Tex. 2006) (quoting *Logan v. McDaniel*, 21 S.W.3d 683, 688 (Tex. App.—Austin 2000, pet. denied)).

Similarly, the right to complain of a trial court's denial of a media defendant's motion for summary judgment on certain defamation claims may well be lost if not challenged by interlocutory appeal, *see* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6), as it is settled in both state and federal court that the denial of a motion for summary judgment may not be challenged on appeal from final judgment following trial, *see Johnson v. Sawyer,* 120 F.3d 1307, 1316 (5th Cir. 1997) ("We have held repeatedly that orders denying summary judgment are not reviewable on appeal where final judgment adverse to the movant is rendered on the basis of a subsequent full trial on the merits."); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 (Fed. Cir. 1986); *Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1966) (holding that to allow an appeal of the denial of a motion for summary judgment following a subsequent dismissal or full trial on the merits "could result in judgments which would be patently unjust"). We have noted that:

> It would seem incongruous for a court, upon finding that a judgment following a full and complete conventional trial should be reversed because of the admission of improper evidence, to then review the action of a trial court in overruling a summary judgment, particularly if it appears from the evidence adduced upon the conventional trial that there were genuine issues of fact in the case even though the summary judgment record might not reflect this situation because of an incomplete development of the facts.

Id. at 365 (noting that many of the same concerns would arise if the final judgment appealed from was one of dismissal). The Fifth Circuit has explained the justification for this rule:

> It makes no sense whatever to reverse a judgment on the verdict where the trial evidence was sufficient merely because at summary judgment it was not. As we noted in *Woods v. Robb*, 171 F.2d 539 (5th Cir. 1948): "The saving of time and

> expense is the purpose to be attained by a summary judgment in a proper case. When in due course the final trial is had on the merits it becomes the best test of the rights of the movant. If he wins on trial he has his judgment. If he loses on a fair trial it shows that he ought not to have any judgment." *Id*. at 541. For all of these reasons, we are firmly convinced that the better course is to decline to review the district court's denial of motions for summary judgment when the case comes to us on the movant's appeal following adverse judgment after full trial on the merits.

Black v. J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994) (footnote omitted).

By contrast, cases involving jurisdictional matters generally follow a different rule. We have implicitly concluded that the failure to pursue the interlocutory appeal given to governmental entities whose immunity-based pleas to the jurisdiction are denied does not prevent them from raising the same issue on appeal from a final judgment. *See, e.g., State ex rel. State Dep't of Highways and Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 331 (Tex. 2002) (concluding, on appeal from final judgment, that governmental immunity barred claim and rendering take-nothing judgment despite trial court's interlocutory denial of plea to the jurisdiction on that ground); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 412 (Tex. 1997) (same); *see also* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

This rule would presumably extend to interlocutory orders involving the trial court's personal jurisdiction over a party. The prevailing view is that an order granting or denying a special appearance may be challenged after final judgment. *See GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 866-67 (Tex. App.—Austin 2008, no pet.) (holding that appellate jurisdiction to review special appearance rulings was not limited solely to interlocutory appeal authorized by section 51.014(a)(7)); *Canyon (Australia) Pty., Ltd. v. Maersk Contractors, Pty., Ltd.*, No. 08-00-00248-CV, 2002 WL 997738, at *4 (Tex. App.—El Paso May 16, 2002, pet. denied) (concluding that interlocutory appeal was not "mandatory" and trial court's special appearance grant could be reviewed on appeal from

final judgment); *but see Matis v. Golden*, 228 S.W.3d 301, 305 (Tex. App.—Waco 2007, no pet.) (concluding that challenge to order denying special appearance, raised for the first time on appeal from final judgment, was untimely because parties failed to bring an interlocutory appeal); *see also* TEX. R. CIV. P. 120a(1) (providing for special appearances to object to jurisdiction "over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State").

And while we have not considered the issue, federal courts have concluded that a party's failure to seek interlocutory review of an order granting or denying class certification does not bar the same complaint on final judgment. *See, e.g., Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 199 n.12 (3d Cir. 2008) (concluding that "plaintiffs may appeal the denial of class certification once a final judgment has been entered"); *Asher v. Baxter Int'l, Inc.*, 505 F.3d 736, 740 (7th Cir. 2007) (noting that if Rule 23(f)'s brief opportunity for interlocutory review passes, "the entitlement to review at the end of the case remains"); *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1292 (11th Cir. 2007); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1192 (10th Cir. 2006); *Gary v. Sheahan*, 188 F.3d 891, 892 (7th Cir. 1999); *see also Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 664 n.6 (Tex. 2004) (noting that federal decisions and authorities interpreting current federal class action requirements are persuasive authority in Texas courts). The federal interlocutory review provision was adopted to address countervailing concerns:

> An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of certification. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the

> risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

FED. R. CIV. P. 23 advisory committee's note (1998).[2]

III
An expert report is a means to determine quickly if the claim has arguable merit.

In cases involving health care liability claims, the expert report serves as a screening mechanism to weed out frivolous suits. The report is not admissible in evidence; may not be used in a deposition, trial, or other proceeding; and may not even be referred to by any party during the course of the action for any purpose. TEX. CIV. PRAC. & REM. CODE § 74.351(k). If a trial court denies a provider's motion to dismiss, the Legislature authorized a narrow window of interlocutory review; once that review is complete, parties know what, if anything, remains at stake. *Cf. Gary*, 188 F.3d at 893 (discussing Fed. R. Civ. P. 23(f) interlocutory review of orders involving class certification and noting that it "permit[s] the parties to proceed in confidence about the scope and stakes of the case thereafter"). Our precedent contemplates an interlocutory resolution of these matters. *See, e.g., Leland v. Brandal*, 257 S.W.3d 204, 205 (Tex. 2008) (holding that when elements of expert report are deficient, either by trial court or on appeal, an appellate court may remand the case so that the trial court can consider whether to grant a thirty-day extension to cure the

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[2] It is worth noting, though, that class certification cases brought in Texas courts are resolved primarily through interlocutory appeals, because certification is often "the whole ball of wax." Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Tort Reform Past, Present and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237, 264 (2000) (quoting Eddie Curran, *Critics Blast Alabama Judges' "Drive By" Rulings*, MOBILE REG., Dec. 28, 1999, at 9A).

deficiency). The number of cases decided on interlocutory appeal—both affirming and reversing a trial court's refusal to dismiss—is testimony to the fact that providers are utilizing this remedy and

that it is working as intended.[3] *See id.* at 210 (Brister, J., dissenting) (noting that "a substantial part

[3] There are far too many to comfortably cite, so I have collected only a sampling of some of the cases decided in 2008. *See, e.g., Young v. Pinto*, No. 09-08-299 CV, 2008 WL 4998346, at *8-9 (Tex. App.—Beaumont Nov. 26, 2008, no pet.) (mem. op.) (affirming trial court's denial of motion to dismiss); *Azle Manor, Inc. v. Vaden*, No. 2-08-115-CV, 2008 WL 4831408, at *10 (Tex. App.—Fort Worth Nov. 6, 2008, no pet.) (mem.op.) (affirming in part and reversing in part trial court's denial of motion to dismiss); *Hendrick Med. Ctr. v. Hewitt*, No. 11-07-00333-CV, 2008 WL 4439843, at *11 (Tex. App.—Eastland Oct. 2, 2008, no pet.) (mem. op.) (reversing trial court's judgment, rendering judgment dismissing claims, and remanding for calculation of attorney's fees, because trial court abused its discretion in denying motion to dismiss); *Reardon v. Nelson*, No. 14-07-00263-CV, 2008 WL 4390689, at *7 (Tex. App.—Houston [14th Dist.] Sept. 30, 2008, no pet.) (mem. op.) (reversing trial court's order denying motion to dismiss and remanding for consideration of whether to grant extension); *Butters v. Noyola*, Nos. 13-07-00713-CV, 13-08-00184-CV, 13-08-00183-CV, 13-08-00038-CV, 13-07-00765-CV, 13-08-00203-CV, 2008 WL 3984168, at *7 (Tex. App.—Corpus Christi Aug. 29, 2008, no pet.) (mem. op.) (same); *Heritage Gardens Healthcare Ctr. v. Pearson*, No. 05-07-00772-CV, 2008 WL 3984053, at *7 (Tex. App.—Dallas Aug. 29, 2008, no pet.) (mem. op.) (affirming trial court's denial of motion to dismiss); *Rivera v. Loweree*, 281 S.W.3d 515, 521 (Tex. App.—El Paso 2008, pet. denied) (same); *Troeger v. Myklebust*, 274 S.W.3d 104, 105 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (same); *Wilson N. Jones Mem'l Hosp. v. Ammons*, 266 S.W.3d 51, 53 (Tex. App.—Dallas 2008, pet. filed) (reversing trial court's judgment, rendering judgment dismissing claims, and remanding for calculation of attorney's fees, because trial court abused its discretion in denying motion to dismiss); *Ctr. for Neurological Disorders v. George*, 261 S.W.3d 285, 296 (Tex. App.—Fort Worth 2008, pet. denied) (affirming in part and reversing in part trial court's order denying motion to dismiss); *Marvin v. Fithian*, No. 14-07-00996-CV, 2008 WL 2579824, at *6 (Tex. App.—Houston [14th Dist.] July 1, 2008, no pet.) (mem. op.) (affirming trial court's order denying motion to dismiss); *Merritt v. Williamson*, No. 01-08-00293-CV, 2008 WL 2548128, at *8 (Tex. App.—Houston [1st Dist.] June 26, 2008, no pet.) (mem. op.) (reversing trial court's order denying motion to dismiss, and remanding for consideration of whether extension would be appropriate); *Schmidt v. Dubose*, 259 S.W.3d 213, 219 (Tex. App.—Beaumont 2008, no pet.) (holding that trial court did not err in denying motion to dismiss); *Woofter v. Benitez*, No. 01-06-01123-CV, 2008 WL 2466223, at *2 (Tex. App.—Houston [1st Dist.] June 19, 2008, no pet.) (mem. op.) (reversing trial court's order denying motion to dismiss and remanding for consideration of extension request); *Eikenhorst v. Wellbrock*, No. 01-07-00459-CV, 2008 WL 2339735, at *11 (Tex. App.—Houston [1st Dist.] June 5, 2008, no pet.) (mem. op.) (affirming trial court's order denying motion to dismiss); *Springer v. Johnson*, 280 S.W.3d 322, 334 (Tex. App.—Amarillo 2008, no pet.) (same); *San Jacinto Methodist Hosp. v. Bennett*, 256 S.W.3d 806, 819 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (affirming trial court's order denying motion to dismiss); *Educare Cmty. Living Corp. v. Rice*, No. 05-07-00964-CV, 2008 WL 2190988, at *3-4 (Tex. App.—Dallas May 28, 2008, no pet.) (mem. op.) (reversing trial

of the state's appellate resources are already being expended reviewing preliminary expert reports").

When a claim lacking merit is immediately dismissed, and the claimant obliged to pay attorney's fees, future such claims are deterred. It is shortsighted, then, to think that the Legislature was concerned only about particular cases. The larger goal, revealed time and again in legislative findings and statutory amendments, is to muster not only claimants and defendants, but also trial and appellate courts, in a war against the crisis that ensues when the system allows frivolous cases to

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court's order denying motion to dismiss and remanding for consider of extension); *Arboretum Nursing & Rehab. Ctr. of Winnie, Inc. v. Isaacks*, No. 14-07-00895-CV, 2008 WL 2130446, at *8 (Tex. App.—Houston [14th Dist.] May 22, 2008, no pet.) (mem. op.) (affirming trial court's denial of motion to dismiss); *Bogar v. Esparza*, 257 S.W.3d 354, 373 (Tex. App.—Austin 2008, no pet.) (reversing trial court's judgment, rendering judgment dismissing claims, and remanding for calculation of attorney's fees, because trial court abused its discretion in denying motion to dismiss); *Pallares v. Magic Valley Elec. Coop, Inc.*, 267 S.W.3d 67, 75 (Tex. App.—Corpus Christi 2008, pet. denied) (affirming trial court's order denying motion to dismiss); *Rivenes v. Holden*, 257 S.W.3d 332, 341 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (reversing trial court's judgment, rendering judgment dismissing claims, and remanding for calculation of attorney's fees, because trial court abused its discretion in denying motion to dismiss); *Maris v. Hendricks*, 262 S.W.3d 379, 387 (Tex. App.—Fort Worth 2008, pet. denied) (affirming trial court's order denying motion to dismiss); *Tamtam v. Waiters*, No. 04-07-00398-CV, 2008 WL 1882784, at *5 (Tex. App.—San Antonio Apr. 30, 2008, no pet.) (mem. op.) (same); *IHS Acquisition No. 140, Inc. v. Travis*, No. 13-07-481-CV, 2008 WL 1822780, at *9 (Tex. App.—Corpus Christi Apr. 24, 2008, pet. denied) (mem. op.) (same); *Victoria Gardens of Frisco v. Walrath*, 257 S.W.3d 284, 286 (Tex. App.—Dallas 2008, pet. denied) (reversing trial court's judgment and dismissing claims with prejudice); *Greenberg v. Gillen*, 257 S.W.3d 281, 282 (Tex. App.—Dallas 2008, pet. dism'd) (concluding that trial court abused its discretion in denying motion to dismiss); *Univ. of Tex. Med. Branch v. Railsback*, 259 S.W.3d 860, 870 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (affirming in part and reversing in part trial court's order denying motion to dismiss); *CHCA Mainland, L.P. v. Wheeler*, No. 09-07-634 CV, 2008 WL 960798, at *5 (Tex. App.—Beaumont Apr. 10, 2008, no pet.) (mem. op.) (affirming trial court's denial of motion to dismiss); *Jones v. King*, 255 S.W.3d 156, 161 (Tex. App.—San Antonio 2008, pet. denied) (reversing trial court's judgment, rendering judgment dismissing claims, and remanding for calculation of attorney's fees, because trial court abused its discretion in denying motion to dismiss).

fester. The motive to bring these cases to fruition right away is lost if postponed until damage to the health care system has already been realized.

It is no less myopic to presume that the Legislature built a one-way ratchet to protect only the health care industry. The Legislature's directive that the civil justice system repel weak claims stands alongside its insistence that malpractice be penalized. The issue is one of incentives. The claimant is encouraged to bring only those claims that have merit because not only will those found lacking be dismissed, but the claimant and his attorney will be saddled with attorney's fees and costs for bringing a meritless claim. TEX. CIV. PRAC. & REM. CODE § 74.351(b)(1). The defendant has reason to seek dismissal the moment an expert report reveals its deficiency, or risk the costs of trial and potential defeat at the hands of a jury and judge.

IV
The Court's exception exposes the limit of a categorical rule and undermines the Legislature's requirement that a trial court dismiss a case in which the report is inadequate.

The Court suggests that if the defendant foregoes an interlocutory appeal when it would have succeeded, and the resulting trial establishes malpractice, the defendant can no longer complain about the trial court's failure to dismiss. Why would that be the case? The statute says, without equivocation, that the trial court "shall . . . dismiss[]" a valid challenge to an inadequate report. TEX. CIV. PRAC. & REM. CODE § 74.351(b). Those words are as plain after a final judgment as before. Under normal practice, an appellate court would reverse the trial court's judgment and "render the judgment that the lower court should have rendered." *See* TEX. R. APP. P. 60.2(c). The case, then,

would be dismissed and the victim ordered to pay the tortious defendant.[4] *See, e.g., Jernigan v. Langley*, 195 S.W.3d 91, 94 (Tex. 2006) (per curiam) (dismissing with prejudice claims against physician due to inadequate report); *Horizon/CMS Healthcare Corp., Inc. v. Fischer*, 111 S.W.3d 67, 68 (Tex. 2003) (same); *Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003) (same); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 880 (Tex. 2001) (same).

The Court's proposed answer to such a travesty—that the matter becomes "moot" when the issue is tried or that the statute may be ignored as "unjust"—is unpersuasive. ___ S.W.3d at ___; *cf. Carrillo v. State*, 480 S.W.2d 612, 618 (Tex. 1972) (holding that appeal of juvenile delinquency adjudication was not moot, despite juvenile's reaching majority during proceedings, as "juvenile should have the right to be exonerated by appeal"). The statute imposes an explicit penalty for non-compliant reports; there is no exception for cases in which the claim's merits are proved. The Court likens the situation to the court-created rule that denials of summary judgment may not be challenged following post-trial adverse judgments. *See, e.g., Ackermann*, 403 S.W.2d at 365. But that conflicts with the Court's earlier conclusion that inadequate reports may be contested after final judgment because "section 74.351 [does not] indicate there are consequences if an appeal from the interlocutory order is not pursued." ___ S.W.3d at ___.

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[4] The statute entitles a doctor who successfully challenges a claimant's expert report to attorney's fees, but the Court's holding does not address what attorney's fees are recoverable—could the physician recover only those fees incurred until the expert report was challenged or all fees incurred before final judgment? *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b).

If the statute's silence authorizes an appeal at any time, why would it be limited only to challenges made before "a full trial [in which] the plaintiff prevails"? And why would "trial on the merits" be the only exception to the Court's rule—wouldn't a final summary judgment have the same effect? What if the plaintiff wins at trial but loses on appeal? Would the Court's exception still apply? What if the claimant establishes some (though not conclusive) evidence of breach, causation, and damages, demonstrating that the case has arguable merit, but the jury nevertheless finds for the defendant? I presume the Court would conclude the defendant is entitled to his fees and costs, as its exception is conditioned on the claimant's success at trial. If that is so, then it matters little whether the claimant prosecutes a serious claim; the trial court must dismiss even those cases, and make the claimant pay the provider's fees, if the defendant prevails.

V

Because the Legislature intended a quick dismissal of frivolous claims and trial of meritorious claims, a defendant asserting a report's inadequacy must immediately appeal to preserve the right to dismissal.

A bright line rule that requires an immediate appeal is superior to the alternative and consistent with the statute's broader design. Give the defendant a procedural means to test the legitimacy of the claim in the first instance. If refuted by the trial court, give him an immediate appeal. Weak claims will die and the defendant will be made whole; the system will avert the crisis meritless claims impose on society because others will be deterred. Even if the claim is good, the claimant will lose if she proffers a report that masks its worth. And because the lawyer hired to vindicate a good claim will know that half measures will not suffice, she will devote greater resources at the initial stage. The defendant, for strategic reasons (thinking the cost of appeal

outweighs the risk of trial) or prudent ones (assessing the report as sufficiently chronicling an actionable breach of the standard of care)—still may elect to try the case, but would then be limited to arguing the merits. This approach ensures that a meritorious case is not unduly restricted, while preserving an argument on appeal that no or insufficient evidence requires reversal.

VI
Conclusion

Allowing a defendant to challenge the expert report after final judgment, as the Court does, injects an element of uncertainty into the case and risks turning this screening mechanism into a trump card. It prolongs litigation in those cases in which an expert report is clearly insufficient, contrary to the Legislature's intent. The exception the Court adopts amounts to a concession that, under some circumstances, the interlocutory route must be followed or lost. But the exception raises at least two concerns. First, as a matter of principle, the exception is inconsistent with the reasoning underlying the Court's general rule. The statute requires speedy dismissal when the provider timely challenges an inadequate report. Nowhere does the Act provide that the sanction disappears when the claimant prevails. The injustice the Court attempts to evade is best addressed by requiring that the provider immediately appeal a trial court's refusal to dismiss a case when the report is flawed. Second, the Court's exception applies only if the plaintiff prevails. There will be many instances in which the claimant has amassed competent evidence of damages, caused by a breach of the appropriate standard of care, and yet fails to persuade the trier of fact by a preponderance of the evidence. If an exception is to apply, it should encompass all cases in which the record demonstrates the claim's arguable validity, irrespective of the outcome.

Because the statutory goal is to quickly dispense with frivolous health care litigation, I would hold that section 51.014(a)(9) authorizes a provider to immediately appeal a trial court's denial of relief under section 74.351(b), and that his failure to do so forecloses a later complaint about the ruling. Because the Court concludes otherwise, I respectfully dissent.

_____
Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0301

EMORY B. PERRY, ET AL., PETITIONERS,

v.

DARRYL R. COHEN, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

PER CURIAM

In this case, the trial court dismissed a suit with prejudice after determining that the plaintiffs' amended pleadings failed to comply with an order granting defendants' special exceptions. The court of appeals held that the plaintiffs waived error as to the merits of the order sustaining special exceptions because they did not separately challenge the order on appeal. We hold that the plaintiffs preserved error by challenging the merits of the special exceptions order in the body of their appellate brief, even though they did not separately and specifically challenge the order in their notice of appeal or in the issues of their appellate brief. We reverse and remand to the court of appeals.

Emory Perry and other shareholders (collectively, "shareholders") of RAMP Corporation filed suit against Darryl R. Cohen, Andrew M. Brown, and the law firm of Jenkens & Gilchrist (collectively, "Cohen") after RAMP filed for bankruptcy. The shareholders alleged that before

RAMP declared bankruptcy, Cohen induced the shareholders to hold RAMP stock they owned or to purchase additional stock by misrepresenting the nature of RAMP's finances. The shareholders asserted claims for negligence, common law fraud, statutory fraud, and conspiracy. Cohen specially excepted to the shareholders' pleadings. The shareholders responded by filing a First Amended Petition, and later, a Second Amended Petition. The shareholders added claims for violations of the Texas Securities Act in the Second Amended Petition.

Cohen then reasserted the special exceptions previously filed and also objected to the shareholders' claims on the basis that the shareholders lacked standing to bring derivative claims belonging to RAMP. The trial court granted Cohen's special exceptions and entered an order directing the shareholders to replead the allegations supporting each shareholder's cause of action against each defendant, identify the maximum amount of damages each shareholder suffered, and identify any alleged harm separate from that allegedly suffered by RAMP. The order stated that failure to replead appropriately would result in dismissal of all the shareholders' claims.

The shareholders filed a Third Amended Petition. Cohen moved to dismiss the suit because the amended pleadings failed to comply with the trial court's prior order sustaining the special exceptions. Following a hearing, the trial court entered an order dismissing all the shareholders' claims with prejudice for (1) failing to specify the allegations supporting each cause of action by each plaintiff against each defendant, and (2) failing to specifically identify any alleged injury to the shareholders that was distinct from injury to RAMP.

The court of appeals affirmed. ___ S.W.3d ___. The court of appeals held, in part, that the shareholders waived error as to the merits of the order granting special exceptions by failing to

properly challenge the order on appeal. *Id.* at ___. The shareholders contend that the court of appeals erroneously refused to address the merits of their claims.[1]

The shareholders are entitled to reversal of the trial court order dismissing their causes of action for failing to comply with the order granting special exceptions if the order granting special exceptions was improper. *See* TEX. R. APP. P. 44.1(a)(1). But to obtain reversal, they must have preserved error in the trial court, timely appealed from the order of dismissal, and then asserted the issues on appeal. *See* TEX. R. APP. P. 25.1(d), 33.1, 38.1(f). Cohen does not contend that the shareholders failed to preserve error in the trial court or to timely appeal and identify the order of dismissal. But Cohen argues that the court of appeals properly concluded the shareholders waived any appellate challenge to the special exceptions order.

While a challenge to the merits of an order granting special exceptions may be waived by a failure to challenge the order on appeal, we disagree that in this instance the shareholders waived error. The first issue in the shareholders' court of appeals brief urged that the trial court erroneously dismissed their causes of action. The issue did not specify that the shareholders were challenging the trial court's interlocutory order granting special exceptions, but the arguments under the issue did. We need not detail the shareholders' arguments as to the merits of the order granting special exceptions because the defendants acknowledged the arguments in their court of appeals briefs. For example, Cohen stated in his brief:

> Here, in their notice of appeal, Plaintiffs appealed only the order of dismissal, not the order sustaining special exceptions. . . .

[1] Additionally, the shareholders urge that the trial court violated public policy by dismissing their cause of action under the Texas Securities Act and erred by dismissing their causes of action with prejudice. They also contend that the court of appeals applied an incorrect standard of review. We do not reach and express no opinion as to those issues.

. . . .

> [W]hile failing to actually appeal the order sustaining special exceptions, Plaintiffs devote virtually all of their appellate brief to a challenge of the basis of that order – the trial court's determination that Plaintiffs' holding claims fail to state a cause of action.

And Jenkens & Gilchrist, although arguing that the shareholders waived any complaint regarding the *dismissal* order by failing to challenge its basis, likewise referenced the shareholders' argument as to the merits of the special exceptions order:

> The Plaintiffs spend the bulk of their brief complaining of the trial court's determinations that their pleadings failed to allege recognized causes of action. Because these sections of the Plaintiffs' brief reiterate arguments the Plaintiffs made to the trial court when the Plaintiffs opposed Defendants' special exceptions, these sections apparently challenge the trial court's decision that the Plaintiffs had failed to allege recognized causes of action.

We initially note that the shareholders were not required to state in their notice of appeal that they were challenging the interlocutory order granting special exceptions. They were required only to state the date of the judgment or order appealed from—in this instance the order dismissing their suit. TEX. R. APP. P. 25.1(d)(2). Next, we note that disposing of appeals for harmless procedural defects is disfavored. *Verburgt v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997). That policy is reflected in Texas Rule of Appellate Procedure 38.1(f) which provides that the statement of an issue will be treated as covering every subsidiary question that is fairly included. Appellate briefs are to be construed reasonably, yet liberally, so that the right to appellate review is not lost by waiver. *See El Paso Natural Gas v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 316 (Tex. 1999). Simply stated, appellate courts should reach the merits of an appeal whenever reasonably possible. *See Verburgt*, 959 S.W.2d at 616.

The court of appeals relied on *Cole v. Hall*, 864 S.W.2d 563 (Tex. App.—Dallas 1993, writ dism'd w.o.j.), to conclude that the shareholders waived any challenge to the trial court's special exceptions order. In *Cole*, the court held that for the merits of a trial court's order sustaining special exceptions and dismissing a suit to be reviewed on appeal, the plaintiff must challenge both the order granting special exceptions and the order of dismissal. 864 S.W.2d at 566-67. We agree with that determination. Both the final order of dismissal and the interlocutory order granting special exceptions must be challenged in order for the merits of the order granting special exceptions to be reviewed. We disagree with how the court of appeals applied the rule in this case.

Cohen asserts that the shareholders needed to present a separate issue challenging the trial court's special exceptions order to preserve error. Our cases as to construction of the Rules of Appellate Procedure do not support this assertion. *E.g.*, *El Paso Natural Gas*, 8 S.W.3d at 316; *Verburgt*, 959 S.W.2d at 616. One of the shareholders' issues in the court of appeals challenged dismissal of their suit. Their brief in support of that issue addressed the merits of the trial court's order sustaining Cohen's special exceptions, and "we liberally construe issues presented to obtain a just, fair, and equitable adjudication of the rights of the litigants." *El Paso Natural Gas*, 8 S.W.3d at 316. The shareholders were entitled to have the court of appeals review the merits of the order granting Cohen's special exceptions.

Without hearing oral argument, we reverse the judgment of the court of appeals and remand to that court for further proceedings consistent with this opinion. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: November 14, 2008

IN THE SUPREME COURT OF TEXAS

NO. 07-0315

FRANCES B. CRITES, M.D., PETITIONER,

v.

LINDA COLLINS AND WILLIE COLLINS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

PER CURIAM

In this health care liability lawsuit, the plaintiffs voluntarily nonsuited their claims against the defendant health care provider after failing to serve a medical expert report within the 120-day deadline required by the Medical Liability Insurance Improvement Act (MLIIA). *See* TEX. CIV. PRAC. & REM. CODE § 74.351. Before the trial court entered an order of nonsuit, the defendant filed a motion for dismissal with prejudice and for attorneys' fees and costs as sanctions for noncompliance with the expert report deadline. *See id*. A month after the trial court signed the order of nonsuit, it issued an order denying the defendant's motion. The court of appeals affirmed, concluding that the filing of a notice of nonsuit precludes consideration of a subsequent motion for statutory sanctions. 215 S.W.3d 924, 927. We hold that sanctions authorized under the MLIIA remain available following a voluntary nonsuit filed after the expert deadline. We therefore reverse

the court of appeals' judgment and remand the case to that court to consider the merits of the defendant's claims.

Although neither party raises the issue, we must first determine whether Dr. Frances B. Crites timely filed her notice of appeal, and thus whether the court of appeals had jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993). Dr. Crites filed her notice of appeal on March 24th, more than thirty days after the trial court signed the order of nonsuit, but less than thirty days after the trial court signed the order denying the motion for sanctions. Under Texas Rule of Appellate Procedure 26.1,"[t]he notice of appeal must be filed within 30 days after the judgment is signed . . . ." TEX. R. APP. P. 26.1. The question here is whether the order of nonsuit or the order denying sanctions triggered the thirty day filing period. *See id.*

We have previously held that, when there has been no traditional trial on the merits, no presumption arises regarding the finality of a judgment. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 199–200 (Tex. 2001). To determine whether an order is final, courts and parties must examine the express language of the order and whether the order actually disposes of all claims against all parties. *Id.* at 200. If neither examination indicates that the order is final, then the order is interlocutory and unappealable. *Id.* A judgment dismissing all of a plaintiff's claims against a defendant, such as an order of nonsuit, does not necessarily dispose of any cross-actions, such as a motion for sanctions, unless specifically stated within the order. *Id.* at 199. If other claims remain in the case, "an order determining the last claim is final." *Id.* at 200.

Because there was no trial on the merits in this case, no presumption of finality arose as to the order of nonsuit. Therefore, we examine the language of the order and whether it disposed of

all claims. The order of nonsuit included a typed portion, which said: "A NOTICE OF NON-SUIT HAVING BEEN RECEIVED BY THE COURT, THE ABOVE ENTITLED AND NUMBERED CAUSE IS HEREBY DISMISSED . . . ." After that language, the presiding judge redacted the remainder of the sentence and inserted, by hand, "as to Def[endant] Frances B. Crites only," without mentioning Dr. Crites's motion for sanctions.

In *Lehmann*, we found instructive, as evidence of the trial court's intent, the fact that the trial court issued an order forty-six days after he signed the summary judgment order that set the case for trial. *Id.* at 195. Likewise, it is instructive here that the trial court held a hearing on the motion for sanctions thirty-six days after signing the order of nonsuit.

The language of the order at issue does not unequivocally express an intent to dispose of all claims and all parties; instead, it specifically disposes of only the plaintiffs' claims against the defendant. *See id.* at 199. Dr. Crites had already filed a motion for sanctions at the time the trial court signed the order of nonsuit. Therefore, it remained pending when the trial court signed the order of nonsuit, and the order of nonsuit did not resolve the pending motion because it did not contain specific language denying or granting relief.

Because the order of nonsuit itself does not unequivocally express an intent for the order to be a final and appealable order, and because it does not address all pending claims, the order was not final. Only when the trial court issued its second order denying sanctions was a final order entered, and only at that point did the case become appealable. *Id.* at 200; *see also Villafani v. Trejo*, 251 S.W.3d 466, 468 (Tex. 2008) (holding that "the trial court's denial of Villafani's motion for sanctions and dismissal and Trejo's nonsuit *collectively* disposed of all the claims between the two

parties") (emphasis added). As a result, Dr. Crites's notice of appeal, which she filed thirty days after the order denying sanctions, was timely. We now consider the merits of the appeal.

On August 18, 2005, Linda and Willie Collins sued Dr. Crites on various health care liability theories. Section 74.351 of the Texas Civil Practice & Remedies Code required the Collinses to file a medical expert report no later than December 16, 2005, 120 days after they filed their claim. The Collinses failed to file the report by the deadline. Instead, on December 30, 2005, the Collinses voluntary nonsuited all claims against Dr. Crites. The next business day, January 3, 2006, Dr. Crites filed a motion for sanctions seeking a dismissal with prejudice, attorneys' fees, and costs as provided by Chapter 74 of the Texas Civil Practice & Remedies Code. On January 19, 2006, the trial court signed an order of nonsuit, dismissing the claims without prejudice. The trial court did not hold a hearing on sanctions until February 24, 2006, at which point the court denied the motion, indicating that the sanctions provided in Chapter 74 are not mandatory. Dr. Crites appealed the trial court order denying sanctions, and the court of appeals denied relief, reasoning that Chapter 74 allows a plaintiff to nonsuit and avoid Chapter 74 sanctions if the plaintiff nonsuits before the defendant requests them. 215 S.W.3d at 926–27.

On appeal to this Court, Dr. Crites argues that Chapter 74 sanctions are mandatory because the Collinses failed to file an expert report within 120 days of filing suit and the court of appeals erroneously failed to consider the merits of the sanctions request. Section 74.351(b) of the Texas Civil Practice & Remedies Code states:

> If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a) [120 days after the claim is filed], the court, on the motion of the affected physician or health care provider,

> *shall*, subject to Subsection (c) [discretionary thirty-day extension], enter an order that:
>
> (1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and
>
> (2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.

TEX. CIV. PRAC. & REM. CODE § 74.351(b) (emphasis added). Dr. Crites contends that her entitlement to these statutory sanctions arose the moment the Collinses failed to file their expert report by the deadline.

When the Collinses filed the notice of nonsuit, Dr. Crites had not yet filed the motion for sanctions. She filed the sanctions motion in the interim between the filing of the notice of nonsuit and the trial court's ministerial task of signing the order of nonsuit. The court of appeals determined the filing of the nonsuit "took effect immediately, extinguishing the Collinses' claims the moment it was filed." 215 S.W.3d at 926. Because Dr. Crites filed her motion for sanctions after this occurred, the court of appeals determined that she "waived her entitlement to that relief." *Id.* at 927.

In *Villafani v. Trejo*, which issued after the court of appeals' opinion in this case, we considered the relationship between voluntary nonsuits, motions for dismissal with prejudice, and attorneys' fees under former Article 4590i, predecessor to Chapter 74. 251 S.W.3d at 468–70. *See* Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884 (hereinafter Article 4590i). We noted that whether sanctions survive a nonsuit depends on the purpose of the sanction. 251 S.W.3d at 470 (citing *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996)). We determined that the relief under Article 4590i is a statutory sanction intended to deter claimants

from filing meritless suits. *Id.* at 470. Depending on the facts of a case, these statutory sanctions may be claims for affirmative relief, which cannot be mooted by a voluntary nonsuit. *Id.*; *cf. also Klein v. Dooley*, 949 S.W.2d 307, 307 (Tex. 1997) (considering a voluntary nonsuit in a suit under the Deceptive Trade Practices Act); *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 840 (Tex. 1990) (holding that a nonsuit cannot affect nonmovant's independent claim for affirmative relief). We held that a defendant physician can appeal a trial court order denying a motion for sanctions for failure to timely file an expert report, despite a later nonsuit by the plaintiff. *Villafani*, 251 S.W.3d at 471.

In contrast to *Villafani*, in this case, Dr. Crites's motion for sanctions was not filed until after the plaintiffs' nonsuit, which we have held is effective immediately. 251 S.W.3d at 467; *see Univ. of Tex. Med. Branch at Galveston v. Blackmon*, 195 S.W.3d 98, 100 (Tex. 2006). A nonsuit does not affect a motion for sanctions "*pending* at the time of dismissal." TEX. R. CIV. P. 162 (emphasis added). Still, we have held that:

> Rule 162 merely acknowledges that a nonsuit does not affect the trial court's authority to act on a pending sanctions motion; it does not purport to limit the trial court's power to act on motions filed after a nonsuit. In this case, the trial court imposed sanctions while it retained plenary jurisdiction. Nothing in Rule 162 or any previous decision of this Court deprives a trial court of this power.

Schexnider, 940 S.W.2d at 596. As such, the fact that Dr. Crites filed her motion for sanctions after the plaintiffs had already filed their effective-immediately nonsuit does not affect whether the trial court had the power to grant sanctions, so long as the trial court's plenary authority has not expired.

In concluding that Dr. Crites's motion for sanctions was mooted by the filing of the Collinses' nonsuit, the court of appeals also relied heavily on previous interpretations of former

Article 4590i. Under that statute, a plaintiff was required to file an expert report within 180 days of filing suit or to nonsuit the claim voluntarily. TEX. REV. CIV. STAT. art. 4590i § 13.01(a) (repealed). The court of appeals noted that other courts of appeals considering the issue had determined that former Article 4590i created a "'race to the courthouse' between the plaintiff to file a nonsuit and the defendant to file a motion [for sanctions]." 215 S.W.3d at 927 (citing *Moseley v. Behringer*, 184 S.W.3d 829, 833 (Tex. App.—Fort Worth 2006, no pet.); *Jones v. Khorsandi*, 148 S.W.3d 201, 203 (Tex. App.—Eastland 2004, pet. denied); *Martinez v. Lakshmikanth*, 1 S.W.3d 144, 148 (Tex. App.—Corpus Christi 1999, pet. denied)). Chapter 74, however, does not contain a similar provision allowing a plaintiff to choose between voluntarily nonsuiting and filing an expert report by the deadline. The Legislature removed the reference to the option of filing a nonsuit, yet the statute continues to provide mandatory sanctions if a plaintiff fails to file an expert report by the statutory deadline. *See* TEX. CIV. PRAC. & REM. CODE § 74.351; *see also Ogletree v. Matthews*, 262 S.W.3d 316, 319–20 (Tex. 2007) (observing that trial courts have no discretion to deny a request for dismissal with prejudice under section 74.351).

Although the court of appeals recognized that section 74.351 differs textually from former Article 4590i, the court determined that a plaintiff's ability to nonsuit pursuant to Texas Rule of Civil Procedure 162 renders a motion to dismiss and for sanctions under 4590i a nullity because rule 162 allows a plaintiff to nonsuit a case at any time before the plaintiff has introduced all but rebuttal evidence. 215 S.W.3d at 926 n.1; TEX. R. CIV. P. 162. Our holding and rationale in *Villafani* makes clear, however, that a motion for sanctions under either Article 4590i or Chapter 74 survives a nonsuit, regardless of whether the movant brings the motion before or after the nonsuit, provided the

motion is filed within the trial court's plenary jurisdiction. In *Villafani*, we reaffirmed that "'[r]ule 162 merely acknowledges that a nonsuit does not affect . . . a pending sanctions motion; it does not purport to limit the trial court's power to act.'" 251 S.W.3d at 469 (quoting *Schexnider*, 940 S.W.2d at 596).

For these reasons, we hold that the court of appeals erroneously determined that the Collinses' notice of nonsuit prevented Dr. Crites from seeking sanctions under Chapter 74. Because the court of appeals did not consider the merits of Dr. Crites's sanctions motion, we grant the petition for review, reverse the judgment of the court of appeals, and remand this case to that court for further proceedings consistent with this opinion. *See* TEX. R. APP. P. 59.1, 60.2(f).

OPINION DELIVERED: May 15, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0322

IN RE JAMES ALLEN HALL

ON PETITION FOR WRIT OF MANDAMUS

Argued November 12, 2008

JUSTICE MEDINA delivered the opinion of the Court.

In this original mandamus proceeding, we must decide whether an indigent person, adjudicated a juvenile delinquent as a minor and sentenced to forty years, has a statutory right under the Juvenile Justice Code to the appointment of an attorney in a habeas corpus proceeding filed after that person becomes an adult. The juvenile offender in this case filed a pro se motion with the juvenile court several years after his transfer to an adult facility. In this motion, he requested a hearing and the appointment of counsel to pursue habeas corpus relief challenging the legality of his imprisonment under Title 3 of the Texas Family Code, also known as the Juvenile Justice Code. *See* Act of May 24, 1973, 63d Leg., R.S., ch. 544, 1973 Tex. Gen. Laws 1460 (enacting Title 3 of the

Family Code to provide procedures relating to delinquent children).[1] The juvenile court denied the request.

The offender subsequently filed a petition for writ of mandamus with the court of appeals, seeking to compel the trial court to appoint counsel for him and conduct a hearing. The court of appeals, in a memorandum opinion, denied mandamus relief, concluding that the offender was not entitled to appointed counsel because he no longer qualified as a child under the Juvenile Justice Code. *In re Hall,* 2007 WL 460698, 2007 Tex. App. LEXIS 1056 (Tex. App.—San Antonio Feb. 14, 2007) (mem. op.). Although we do not believe that the juvenile offender's age is determinative, we agree that the Juvenile Justice Code does not provide the offender the right to appointed counsel under the present circumstances and likewise deny mandamus relief for reasons we explain below.

I

In January 1996, fourteen-year-old James Allen Hall was adjudicated and sentenced in juvenile court under the Juvenile Justice Code. *See generally* TEX. FAM. CODE § 54.03. A jury found that Hall had engaged in delinquent conduct by committing capital murder and the court assessed punishment at a sentence of forty years. TEX. FAM. CODE § 54.04(d)(3)(A). Hall served his sentence at a Texas Youth Commission facility until age eighteen, at which time the juvenile court conducted a hearing to determine whether he should be transferred to the Texas Department of Criminal Justice. *See* TEX. FAM. CODE § 54.11(a) (requiring juvenile courts to conduct a hearing assessing an offender's transfer status). The juvenile court concluded that Hall should be transferred

[1] The offender engaged in the underlying delinquent conduct in 1995, when he was thirteen years old. The Code has been amended since 1994 but none of the substantive changes are at issue here.

to an adult prison to serve the remainder of his sentence, and the court of appeals affirmed the transfer order. *In re J.A.H.*, 2000 WL 1283734, 2000 Tex. App. LEXIS 6194 (Tex. App.—San Antonio Sept. 13, 2000)(not designated for publication).

Seven years later, Hall filed the motion at issue with the juvenile court, requesting that the court appoint counsel to assist him in pursuing post-adjudication habeas corpus relief. Unaided by an attorney, Hall argued that he was entitled to appointed counsel under the Juvenile Justice Code. The juvenile court disagreed, however, and denied his request. Hall thereafter sought mandamus relief from the court of appeals to compel the appointment, but the court denied relief. The court of appeals reasoned that Hall was not entitled to have counsel appointed for him under the Juvenile Justice Code because he no longer met the Code's definition of a child. *In re Hall*, 2007 WL 460698, 2007 Tex. App. LEXIS 1056 (Tex. App.—San Antonio Feb. 14, 2007) (mem. op).

Hall next sought mandamus relief in this Court. Hall also made a written request for assistance to the Pro Bono Committee of the Appellate Section of the State Bar of Texas, which approved his request and provided an attorney to assist him in this proceeding.

II

The Legislature enacted the Juvenile Justice Code as a separate system for the prosecution, adjudication, sentencing, and detention of juvenile offenders to protect the public and provide for the wholesome moral, mental, and physical development of delinquent children. TEX. FAM. CODE § 51.01(1), (2), (3). This separate system often provides enhanced procedural protections to juvenile offenders, who, because of youth, ordinarily lack the mental and emotional maturity needed to navigate the Juvenile Justice Code and maintain an adequate defense. *In re J.G.*, 905 S.W.2d 676,

680 (Tex. App.—Texarkana 1995, writ denied); *In re S.C.*, 790 S.W.2d 766, 770-71 (Tex. App.—Austin 1990, writ denied); *In re E.Q.*, 839 S.W.2d 144, 146 (Tex. App.—Austin 1992, no writ). Although quasi-criminal in nature, proceedings in juvenile court are considered civil cases; thus, this Court, rather than the Court of Criminal Appeals, is the Texas court of last resort for such matters. *See, e.g., In re M.A.F*, 966 S.W.2d 448, 450 (Tex. 1998); *Ex parte Valle*, 104 S.W.3d 888, 889-90 (Tex. Crim. App. 2003).

The Code covers the proceedings in all cases involving a child's delinquent conduct. TEX. FAM. CODE § 51.04(a). "Child" is defined to include persons less than eighteen years old. *Id.* § 51.02(2). "Delinquent conduct" is defined to include, among other things, conduct that violates state or federal penal law punishable by imprisonment. *Id.* § 51.03(a)(1). Thus Hall, by taking part in a murder at age thirteen, engaged in delinquent conduct as a child under the Code.

The juvenile court generally has exclusive original jurisdiction over proceedings involving a child's delinquent conduct. *Id.* § 51.04(a). A person's status as a child is determined by the person's age at the time of the alleged offense. *Id.* If the child is adjudicated delinquent, the juvenile court retains jurisdiction over the person even after that person reaches majority. *See, e.g., id.* §§ 51.041, 51.0411, 51.06.

Because juvenile proceedings are civil matters, the Court of Criminal Appeals has concluded that it lacks jurisdiction to issue extraordinary writs in such cases, even those initiated by a juvenile offender who has been transferred to the Texas Department of Criminal Justice because he is now an adult. *Ex parte Valle*, 104 S.W.3d at 889; *see also Vasquez v. State*, 739 S.W.2d 37, 42 (Tex. Crim. App. 1987) (plurality op.) (recognizing that delinquency proceedings are civil in nature). The

Court of Criminal Appeals has further concluded that it is the applicant's age at the time he commits the delinquent acts that determines jurisdiction, rather than his age when applying for habeas corpus. *See Ex parte Valle*, 104 S.W.3d at 889 (recognizing that the effect of adjudication of delinquency differs from that of conviction). Because this is a civil matter, we can reach the issue the Court of Criminal Appeals could not: whether the Juvenile Justice Code provides a mandatory right to assistance of counsel to an adult pursuing a post-adjudication habeas corpus claim involving his commitment as a juvenile offender. *See id.* at 889-90 (dismissing case falling under Juvenile Justice Code for want of jurisdiction).

III

An indigent person convicted as an adult offender does not have the right to appointed counsel in collateral, post-conviction proceedings such as the underlying habeas corpus petition in this case. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Ex parte Graves*, 70 S.W.3d 103, 110-11 (Tex. Crim. App. 2002). Hall submits, however, that a juvenile offender has the right to appointed counsel under these circumstances pursuant to the Juvenile Justice Code. He contends that the Code expressly extends the right to counsel during every stage of the proceedings, including habeas corpus.

The argument is premised on section 51.10(a) of the Code, which provides:

> **§ 51.10. Right to Assistance of Attorney; Compensation**
>
> (a) *A child may be represented by an attorney at every stage of proceedings under this title, including:*
>
> (1) the detention hearing required by Section 54.01 of this code;

(2) the hearing to consider transfer to criminal court required by Section 54.02 of this code;

(3) the adjudication hearing required by Section 54.03 of this code;

(4) the disposition hearing required by Section 54.04 of this code;

(5) the hearing to modify disposition required by Section 54.05 of this code;

(6) hearings required by Chapter 55 [pertaining to issues of mental health and mental retardation] of this code;

(7) *habeas corpus proceedings challenging the legality of detention resulting from action under this title*; and

(8) proceedings in a court of civil appeals or the Texas Supreme Court reviewing proceedings under this title.

TEX. FAM. CODE § 51.10(a)(1)-(8) (emphasis added). Hall also relies on section 51.10(f), which provides that the juvenile court "shall" appoint an attorney to represent the interest of the child "entitled to representation by an attorney" if the child is not represented by an attorney, the child's family is financially unable to hire an attorney, and the child has not waived his right to counsel or the Code prohibits waiver. *Id*. § 51.10(f). If the child's family is financially able, the juvenile court is directed to order the parent or other financially responsible person to employ an attorney for the child. *See id*. § 51.10(d). Taken together, Hall submits that the accused or adjudicated juvenile offender is ensured representation by an attorney at each of the eight stages itemized in subsection (a), including (7), habeas corpus proceedings. *Id*. § 51.10(a)(1)-(8).

The State concedes that juvenile offenders have a right to counsel in specific instances under the Juvenile Justice Code, but argues that a post-adjudication habeas corpus claim is not one of those instances. The State submits that this is clear from the text of section 51.10(a)(7) which refers only

to "habeas corpus proceedings challenging the legality of [the child's] detention." The State argues that "detention" here refers to the pre-adjudication confinement of the child, not the post-adjudication commitment at issue here.[2] We agree.

The Juvenile Justice Code does not define the term "detention." Undefined terms in a statute are typically given their ordinary meaning. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). But we will not give an undefined statutory term a meaning that is out of harmony or inconsistent with other provisions in the statute. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). Thus, if a different, more limited, or precise definition is apparent from the term's use in the context of the statute, we apply that meaning. *See Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002) (courts should not give an undefined statutory term a meaning out of harmony or inconsistent with other provisions).

"Detention" is commonly defined as either (1) "the act or fact of detaining or holding back; *esp*: a holding in custody" or (2) "the state of being detained; *esp*: a period of temporary custody prior to disposition by a court." WEBSTER'S NEW COLLEGIATE DICTIONARY 307 (1981). The latter definition is closer to the intended meaning here. In context and consistent with the Juvenile Justice Code's scheme, detention refers to the period of temporary custody preceding the adjudication of the charges against the child.

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[2] The State also argues that even if the statute provides juveniles with a right to an attorney during a habeas proceeding, it is a limited right that terminates when the juvenile offender reaches the age of majority. Hall contends that taking away his statutory right to habeas counsel because of his age is arbitrary and a denial of due process. Because we conclude that Hall does not have a statutory right to counsel under the circumstances here, we do not reach his constitutional argument.

The Code requires that a juvenile court promptly conduct a detention hearing to determine whether the child should be immediately released from custody. TEX. FAM. CODE §§ 54.01(a), (h), (i). Following this hearing, the court must release the child unless it finds that the child (1) is likely to leave its jurisdiction, (2) lacks suitable supervision or care, (3) lacks a parent or other responsible adult, (4) is dangerous to himself or others, or (5) has previously been found delinquent and is likely to commit an offense if released. *Id*. § 54.01(e)(1)-(5). The juvenile court is not required to appoint an attorney for the child prior to the detention hearing, but, if it determines that an unrepresented child should not be released, the child is entitled to an attorney. *Id*. § 51.10(c). An attorney appointed under these circumstances is entitled to request a de novo detention hearing for the child. *Id*. § 54.01(n).

The Juvenile Justice Code provision on which Hall asserts his right to appointed counsel references this detention period: "A child may be represented by an attorney at . . . (7) habeas corpus proceedings challenging the legality of detention resulting from action under this title." *Id.* § 51.10(a)(7). Assuming for the sake of argument that this provision grants the child a right to appointed counsel, it would not apply here because Hall is not challenging the legality of his detention. The time for doing that has long since passed. Hall's habeas corpus proceeding in the juvenile court must instead challenge the legality of his commitment following the adjudication of the charges against him. Section 51.10(a)(7) simply does not provide a juvenile offender, who has been transferred to adult prison, with a general right to appointed counsel in post-adjudication habeas corpus proceedings.

The Code does, however, provide for the appointment of counsel for a number of different proceedings. For example, the child is entitled to counsel at the adjudication hearing at which the issue of the child's delinquent conduct is tried. *Id*. §§ 51.10(b)(2), 54.03. If, at the conclusion of that hearing the child is found to have engaged in delinquent conduct, the court must set a disposition hearing at which the child is again entitled to counsel. *Id*. §§ 51.10(b)(3), 54.03(h), 54.04. When the delinquent conduct involves the commission of a felony, as in this case, the disposition may involve sentencing "the child to commitment in the Texas Youth Commission with a possible transfer to the Texas Department of Criminal Justice" for completion of the sentence. *Id*. § 54.04(d)(3). The Code accordingly provides for a release or transfer hearing at which the child is also entitled to counsel. *Id.* § 54.11(a), (e). The Code further provides for the appointment of counsel if there is a hearing to transfer the child to criminal court in lieu of adjudication under the Juvenile Justice Code. *Id.* §§ 51.10(b)(1), 54.02(e). And as already mentioned, the child is entitled to an attorney if the court determines that the child should not be released as a preliminary matter but rather detained through the adjudication and disposition hearings. *Id.* § 51.10(c). Thus, the Code provides a right to appointed counsel in a number of different circumstances, but a post-adjudication habeas corpus proceeding is not one of them.

* * *

We have not found any provision in the Juvenile Justice Code requiring the appointment of counsel for the juvenile offender under the circumstances presented here. The juvenile court therefore did not abuse its discretion in denying Hall's motion for appointment of counsel in the

underlying post-adjudication habeas corpus, and we accordingly deny his petition for writ of mandamus.

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David M. Medina
Justice

Opinion delivered: June 12, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0410

EMPLOYEES RETIREMENT SYSTEM OF TEXAS, PETITIONER,

v.

XAVIER DUENEZ AND IRENE DUENEZ, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

JUSTICE BRISTER delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE WILLETT joined.

JUSTICE HECHT delivered a dissenting opinion.

JUSTICE WAINWRIGHT delivered a dissenting opinion, in which JUSTICE JOHNSON joined.

The curious question in this case is whether a state agency can demand dismissal of its own claim in court because it failed to exhaust administrative remedies in front of itself. The Employees Retirement System of Texas ("ERS") asserts a subrogation claim against former member Xavier Duenez and his family, seeking reimbursement of funds it paid their health-care providers. After the claim was filed in court, ERS sought to dismiss it because it had exclusive jurisdiction of its own claim.

The Legislature granted ERS exclusive jurisdiction of questions relating to "payment of a claim," but ERS's subrogation suit seeks *collection* of a claim. When it pays claims, ERS holds the

money and can require claimants to come and get it through the agency's administrative processes. But when ERS collects claims, someone else holds the money and has no reason to join ERS's administrative processes. That is why the first thing ERS's agent had to do was file suit in court.

Exhaustion of administrative remedies cannot be a prerequisite to filing suit when filing suit is itself a prerequisite to exhausting those administrative remedies. Because ERS does not have exclusive jurisdiction of this claim, the court of appeals' opinion does not conflict with any of our own, so we dismiss the petition for want of jurisdiction.

I. Background

These parties are not new to this Court. When the Duenezes were injured in a collision caused by a drunk driver, ERS paid benefits of more than $400,000 through its agent and administrator, Blue Cross Blue Shield of Texas.[1] But Blue Cross refused to pay for in-home nursing care for Ashley Duenez (deeming it custodial rather than medical), so the Duenezes filed sued in court without exhausting ERS's administrative remedies. We held in *Duenez I* that ERS had exclusive jurisdiction of claims for benefits, and thus dismissed the suit until the Duenezes complied with those administrative procedures.[2]

In the meantime, the Duenezes sued and obtained a judgment for $44 million against the convenience store that sold beer to the drunk driver. On appeal, three of the Duenezes settled their claims with the convenience store for $35 million. In *Duenez II*, we reversed the judgment as to the

[1] *See* TEX. INS. CODE § 1551.056; *Blue Cross Blue Shield of Tex. v. Duenez* (Duenez I), 201 S.W.3d 674, 676 (Tex. 2006).

[2] *Duenez I*, 201 S.W.3d at 676–77.

remaining two and remanded for a new trial to include apportionment of liability.[3] Neither Blue Cross nor ERS were parties in that case, but they hope to be reimbursed from the proceeds of the settlement.

Before we decided either *Duenez I* or *Duenez II*, ERS filed this suit for subrogation against the Duenezes. By then, the Duenezes were no longer participants in ERS: Xavier Duenez had left his employment with the state, obtained coverage from a new insurer, and dropped all claims for benefits from ERS.[4]

Blue Cross filed this suit on ERS's behalf, specifically alleging that the funds it sought were for ERS's benefit. Oddly, Blue Cross nevertheless named ERS as a defendant. And paradoxically, the suit sought both a court judgment and a declaration that no court had jurisdiction because ERS had exclusive jurisdiction.

ERS filed a plea to the jurisdiction demanding dismissal for the Duenezes to pursue their claims administratively even though they had no affirmative claims to pursue. The trial court denied ERS's plea to the jurisdiction, and the court of appeals affirmed.[5] ERS petitioned for review, asserting that the denial of its plea to the jurisdiction here conflicts with our opinion granting its plea to the jurisdiction in *Duenez I*.[6]

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[3] *See F.F.P. Operating Partners, L.P. v. Duenez* (Duenez II), 237 S.W.3d 680, 694 (Tex. 2007).

[4] *See Duenez I*, 201 S.W.3d at 675.

[5] 221 S.W.3d 809.

[6] *See* TEX. GOV'T CODE § 22.225(b), (c). We disagree with JUSTICE HECHT that the issues here are nonjusticiable. ERS wants $400,000 from the Duenezes, and they do not want to pay; ERS wants this case decided administratively, and the Duenezes want their day in court. These are all live controversies that this case and this appeal can decide. *See U.S. v. Interstate Commerce Comm'n*, 337 U.S. 426, 430 (1949) (holding that "courts must look behind

II. Does ERS Have Exclusive Jurisdiction of Subrogation?

The Legislature created ERS to attract and retain state employees by providing health, insurance, and retirement benefits.[7] The powers granted ERS appear in the Texas Employees Group Benefits Act.[8] The Act authorizes ERS to adopt a plan "reasonably necessary to implement this chapter and its purposes."[9] ERS adopted a 70-page "Employee Benefit Plan" that included a subrogation provision on its penultimate page:

> **Subrogation/Right of Recovery**
> To the extent of such services provided, the Plan is subrogated to all rights of recovery the Participant has and the Plan may assert such rights independent of the Participant. Also, if the Participant has obtained or obtains a court judgment, settlement, arbitration, award, or other monetary recovery from another party, because of the injury or sickness, the Plan is entitled to reimbursement from the proceeds of recovery to the extent of benefits provided. If a recovery is made, the Plan shall have first priority over the Participant or any other party to receive from said recovery reimbursement of the benefits the Plan has provided . . . .
>
> In the event that the Participant fails to cooperate with the Plan or prejudices its subrogation rights, the Plan may deduct from any pending or subsequent claim made under the Plan any amounts the Participant owes the Plan until such time as cooperation is provided or the prejudice ceases.

The Duenezes argue ERS had no authority to adopt this provision because the Act says nothing about subrogation. But the Act also says nothing about what services are covered or excluded, when preapproval is required, what range of charges are allowed, or how fast benefits must

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names that symbolize the parties to determine whether a justiciable case or controversy is presented").

[7] TEX. INS. CODE § 1551.002.

[8] *Id*. §§ 1551.001–.407.

[9] *Id*. § 1551.052(b).

be paid — all important parts of a health benefits plan. Instead, the Act authorized ERS to specify these details in a plan that would "implement this chapter and its purposes."[10] The Act also expressly authorized ERS to "contain costs,"[11] and to provide benefits "at least equal to those commonly provided in private industry."[12] As subrogation reduces costs,[13] and private plans commonly include subrogation,[14] we disagree that ERS was not authorized to include subrogation in the plan it adopted.

But allowing subrogation is not the same thing as granting exclusive jurisdiction of it. When an agency has exclusive jurisdiction of a dispute, the courts have no jurisdiction until administrative procedures are exhausted.[15] In deciding whether an agency has exclusive jurisdiction, we look to its

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[10] *Id*. § 1551.052(b).

[11] *Id*. § 1551.055(13).

[12] *Id*. § 1551.002(2).

[13] *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 35 (Tex. 2008); *see* David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 882 n.99 (2002) ("The widespread use of insurance subrogation strongly indicates that individuals benefit from avoiding not only the moral hazard costs, but also the lost utility from paying for duplicative coverage.").

[14] *See, e.g.*, *FMC Corp. v. Holliday*, 498 U.S. 52, 54 (1990); *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 644 (Tex. 2007); *see also* Katherine E. King, *The Interplay Between R.C. § 2315.20 and* Robinson v. Bates, 3 OHIO TORT L.J. 59 (2007)("[N]early every (if not every) health insurance plan and policy, as well as Medicare and Medicaid, includes a subrogation provision . . . ."); Gerard Sinzdak, Sereboff v. Mid-Atlantic Medical Services, Inc.: *The Supreme Court's Current View on the Enforceability of Third-Party Reimbursement Clauses Under ERISA*, 27 BERKELEY J. EMP. & LAB. L. 523, 523 (2006) ("Employer health insurance plans commonly include third-party reimbursement clauses—sometimes referred to as subrogation clauses . . . ."); Paul R. Thomson, III, *Insurance Subrogation—A Subrogation Clause in a Health Insurance Policy is Enforceable Even Though the Insured Has Not Been Made Whole*, 16 U. ARK. LITTLE ROCK L. REV. 475, 476 (1994) ("Clauses permitting subrogation commonly appear in insurance and construction contracts . . . .").

[15] *State v. Fid. & Deposit Co. of Md.*, 223 S.W.3d 309, 311 (Tex. 2007); *Duenez I*, 201 S.W.3d at 675.

authorizing legislation for an express grant of exclusive jurisdiction,[16] or for "a pervasive regulatory scheme" indicating that was the Legislature's intention.[17] Exclusive jurisdiction is a question of law we review de novo.[18]

The Act here expressly grants ERS exclusive jurisdiction of disputes relating to payment of a claim:

> The executive director has exclusive authority to determine all questions relating to enrollment in or *payment of a claim* arising from group coverages or benefits provided under this chapter other than questions relating to payment of a claim by a health maintenance organization.[19]

While the Act does not define "claim," it uses the term only in connection with demands for benefits.[20] Thus, we held in *Duenez I* that this provision granted ERS exclusive jurisdiction of claims "for payment of ERS-derived benefits."[21] But there is no claim for benefits in this suit. The Duenezes past medical bills have already been paid, and their future bills are the responsibility of

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[16] *See, e.g.*, *Houston Mun. Employees Pension Sys. v. Ferrell*, 248 S.W.3d 151, 157 (Tex. 2007); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 223 (Tex. 2002).

[17] *E.g.*, *In re Sw. Bell Tel. Co.*, 235 S.W.3d 619, 625 (Tex. 2007); *In re Entergy Corp.*, 142 S.W.3d 316, 323 (Tex. 2004); *see also Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006).

[18] *Thomas*, 207 S.W.3d at 340; *David McDavid Nissan*, 84 S.W.3d at 222.

[19] TEX. INS. CODE § 1551.352 (emphasis added).

[20] *See, e.g.*, *id.* §§ 1551.059, .062, .211, .215, .216, .259, .351, .354, .401.

[21] *Duenez I*, 201 S.W.3d at 676.

a new insurer. The question here is not a member's claim for payment of benefits (as it was in *Duenez I*), but ERS's claim for *reimbursement* of benefits it has already paid.[22]

Nor does the Act provide a detailed regulatory scheme suggesting ERS must have exclusive jurisdiction of its own subrogation claims. The Act provides many details about eligibility,[23] dependents,[24] coverage plans,[25] and contributions,[26] but there are no details suggesting a regulatory scheme for pursuing subrogation against third parties. To the contrary, the Act states that its administrative remedies "are the exclusive remedies available to an employee, participant, annuitant, or dependent,"[27] but does not include ERS as a potential administrative claimant in that list. The Act also authorizes ERS to file suit (*not* an administrative claim) to resolve questions that might expose it to double liability.[28] Viewing the Act as a whole, it appears the Legislature intended ERS's administrative procedures to handle claims for benefits by employees, not claims against third parties by ERS.

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[22] *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 207-08 (Tex. 2002) (holding exclusive jurisdiction of agency to regulate relations between car manufacturers and dealership owners did not include tortious interference claim by prospective buyer).

[23] *See* TEX. INS. CODE §§ 1551.101–.114.

[24] *Id.* §§ 1551.151–.159.

[25] *Id.* §§ 1551.201–.206, .251–.259.

[26] *Id.* §§ 1551.301–.324.

[27] *Id.* § 1551.014.

[28] *Id.* § 1551.354.

Support for this conclusion also arises from ERS's own plan.[29] Of course, exclusive jurisdiction must be granted by the Legislature; an agency cannot grant exclusive jurisdiction to itself.[30] But when ERS adopted a plan providing for subrogation, it specified no administrative remedies except that "the Plan may deduct from any pending or subsequent claim made under the Plan any amounts the Participant owes the Plan." Deducting subrogation from a benefits payment falls within ERS's exclusive jurisdiction; pursuing money damages to reimburse benefits already paid is a different matter.

Moreover, ERS's plan allowed it to assert subrogation against third parties "independent of the Participant." So rather than suing the Duenezes after their settlement, ERS could have sued the convenience store independently or intervened in *Duenez II*.[31] If ERS has exclusive jurisdiction of subrogation, then it could have demanded that the Dram Shop claim in *Duenez II* be dismissed for exhaustion of administrative remedies. We do not think the Legislature intended ERS to handle administratively every tort suit involving injured state employees.

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[29] *See Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001) (noting that we consider an agency's interpretation of its own powers "if that interpretation is reasonable and not inconsistent with the statute").

[30] *See id.* ("An agency may not, however, exercise what is effectively a new power, or a power contradictory to the statute, on the theory that such a power is expedient for administrative purposes.").

[31] *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 774 (Tex. 2007) ("Contractual (or conventional) subrogation is created by an agreement or contract that grants the right to pursue reimbursement from a third party in exchange for payment of a loss . . . ."); *see, e.g.*, *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 34 (Tex. 2008); *Estrada v. Dillon*, 44 S.W.3d 558, 560 (Tex. 2001); *Guillot v. Hix*, 838 S.W.2d 230, 232 (Tex. 1992).

Finally, we must avoid constitutionally suspect constructions of the Act if we can.[32] Relegating common-law claims to administrative remedies implicates the Texas Constitution's open-courts provision.[33] We have rejected open-courts complaints when a grant of exclusive jurisdiction involved claims that did not exist at common law.[34] But subrogation existed at common law long before ERS was created.[35] We decline to construe the Act to relegate subrogation defendants to administrative procedures before ERS, *especially when the claimant is ERS itself*, and then have judicial access limited to substantial-evidence review.[36]

It is true that the Act provides for exclusive jurisdiction of questions "relating" to payment of claims, which arguably extends far beyond paying claims alone. But immediate problems arise if we construe the Act that broadly. Large insurance or retirement payments may attract the attention of creditors, former spouses, competing heirs, or tax collectors. The commercial, marital, probate, and tax questions in such cases could all arguably "relate" to the underlying payment of a claim, but nothing in the Act suggests the Legislature intended ERS to exercise expertise in all these areas. ERS's expertise is in deciding payment of benefits, and we should not read "relating to" more broadly than that.

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[32] *City of Houston v. Clark*, 197 S.W.3d 314, 320 (Tex. 2006); *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 706 (Tex. 2002).

[33] *See* TEX. CONST. art I, § 13.

[34] *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 227 (Tex. 2002).

[35] *See, e.g.*, *Faires v. Cockrill*, 31 S.W. 190, 194 (Tex. 1895) ("Perhaps the courts of no state have gone further in applying the doctrine of subrogation than has the court of this state.").

[36] *See* TEX. INS. CODE § 1551.359.

While we reject ERS's claim of exclusive jurisdiction over its own subrogation claims, that does not mean its administrative procedures could never play a role. One of several declarations the Duenezes sought by counterclaim was a declaration that ERS "incorrectly determined that the amount owed" by the Duenezes was $113,174.76 for nursing services the trial court ordered ERS to pay. Had this declaration challenged the amounts ERS paid to health-care providers (a matter within its expertise), the doctrine of primary jurisdiction would require such a claim to be abated and referred to ERS for an initial determination.[37] But the Duenezes' pleadings and briefs do not challenge the *amount* of these charges, but whether they *owe* them.[38] As the question is not whether ERS should have paid these benefits but whether the Duenezes should reimburse them, that is a subrogation question outside ERS's exclusive jurisdiction.

Nor, of course, do we reject ERS's claim for subrogation on the merits. ERS has apparently never pursued a subrogation claim either administratively or in court, perhaps because all members other than the Duenezes have complied with the Plan's subrogation provisions. As we have noted with respect to workers' compensation cases, "[a] carrier's subrogation claim should hardly ever be

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[37] *See In re Sw. Bell Tel. Co.*, 226 S.W.3d 400, 403 (Tex. 2007); *David McDavid Nissan*, 84 S.W.3d at 221 (holding courts should defer to administrative agencies under doctrine of primary jurisdiction when "(1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations").

[38] We disagree with JUSTICE WAINWRIGHT'S interpretation that the Duenezes are "directly attack[ing] ERS's decision to pay, or to decide not to pay" these benefits. ___ S.W.3d at ___. To the contrary, the Duenezes *insisted* that ERS pay these charges, and got the trial court to order ERS to do so.

contested" as "claimants should already know how much they have received in benefits."[39] The only defenses the Duenezes have raised to subrogation appear to be equitable defenses barred by the Plan under which they accepted benefits.[40] But none of that provides exclusive jurisdiction for ERS to decide its own subrogation claims.

The dissenting opinions agree there is something odd about the procedural posture of this case, but fail to recognize that ERS and its agent Blue Cross had no other choice. Had no benefits been paid, ERS could have effectively invoked its administrative procedures by simply withholding payment and requiring the Duenezes or their providers to file administrative claims for them. But once the benefits were paid, ERS had no choice but to seek reimbursement in court.

Construing the Act as a whole,[41] we conclude that the court of appeals' opinion rejecting ERS's claim of exclusive jurisdiction here does not conflict with this Court's opinion in *Duenez I* affirming ERS's exclusive jurisdiction of questions relating to payment of benefits. Accordingly, without argument,[42] we dismiss the petition for want of jurisdiction.

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Scott Brister
Justice

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[39] *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 37 (Tex. 2008).

[40] The ERS plan provided for subrogation "even though the third–party payment does not compensate the Participant for his or her whole loss," and that it "shall not be defeated by any so-called 'Fund Doctrine,' or 'Common Fund Doctrine.'" *See Fortis Benefits v. Cantu*, 234 S.W.3d 642, 650 (Tex. 2007) ("We agree with those courts holding that contract-based subrogation rights should be governed by the parties' express agreement and not invalidated by equitable considerations that might control by default in the absence of an agreement.").

[41] TEX. GOV'T CODE § 311.021(2).

[42] *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0410

EMPLOYEES RETIREMENT SYSTEM OF TEXAS, PETITIONER,

v.

XAVIER DUENEZ AND IRENE DUENEZ, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

JUSTICE HECHT, dissenting.

Strange as it may seem, a state agency has sued itself to have its own jurisdiction declared exclusive, then moved to dismiss its action for want of jurisdiction, and now complains that the trial court denied its motion. To be clear: the agency does not contend that it should have won a declaratory judgment; it contends that its motion to dismiss *its own action* should have been granted. One may ask: why doesn't the agency simply take a nonsuit? If the agency is trying to obtain judicial approval of its claim of exclusive jurisdiction, the plan has backfired: the court of appeals held against the agency.[1] But a party's dispute with itself is nonjusticiable.

> There is much argument with citation of many cases to establish the long-recognized general principle that no person may sue himself. Properly understood the general principle is sound, for courts only adjudicate justiciable controversies. They do not

[1] 221 S.W.3d 809 (Tex. App.–Corpus Christi-Edinburg 2007).

> engage in the academic pastime of rendering judgments in favor of persons against themselves.[2]

The court of appeals should have dismissed this interlocutory appeal.[3]

The Court's opinion does not clearly set out the peculiar posture of this case, which is so unusual that it must be carefully understood. The Employees Retirement System of Texas (ERS), a state agency,[4] provided health and accident benefits to Xavier Duenez, a state employee,[5] under a plan administered by Blue Cross and Blue Shield of Texas (BCBST). The plan paid for health care for Duenez's daughter Ashley, who along with her parents and siblings was injured in a car accident with a drunk driver. The driver had purchased beer at a convenience store just before the accident, and Duenez and his wife Irene sued the store owner under the Texas Dram Shop Act.[6] The Duenezes obtained a substantial judgment, and BCBST requested a partial assignment to protect ERS's right of subrogation. When the Duenezes refused, BCBST sued them as well as ERS, alleging that ERS was "a person whose joinder as a party to this litigation is needed for just adjudication." BCBST

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[2] *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 430 (1949) (quoted in *United States Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603, 612 (Tex. 2008) (Green, J., joined by Jefferson, C.J., and Johnson, J., dissenting)).

[3] *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445-446 (Tex. 1993) (standing, as a matter of subject matter jurisdiction, may be raised for the first time on appeal).

[4] Article XVI, § 67(b)(2) of the Texas Constitution requires the Legislature to "establish by law an Employees Retirement System of Texas to provide benefits for officers and employees of the state". The Legislature has done so in chapters 811-815 of the Texas Government Code. Section 811.003 provides that "[t]he retirement system is a public entity."

[5] Benefits were provided under the Texas Employees Uniform Group Insurance Benefits Act, Act of April 21, 1975, 64th Leg., R.S., ch. 79, 1975 Tex. Gen. Laws 208, as amended, formerly TEX. INS. CODE art. 3.50-2, recodified as the Texas Employees Group Benefits Act, now TEX. INS. CODE §§ 1551.001-.407.

[6] TEX. ALCO. BEV. CODE § 2.02.

requested the following relief: "[a] declaration of the respective rights and other legal relations of ERS, BCBST as ERS' administering firm and manager, Xavier Duenez, Irene Duenez, and Ashley Duenez"; "[a] declaration that ERS/BCBST is entitled to have [the Duenezes] execute and deliver to ERS/BCBST . . . an appropriate partial assignment"; attorney fees; and costs. ERS answered with a general denial, characterizing itself as "Defendant ERS".

The case languished for several years while the Dram Shop case was on appeal, until the Duenezes settled their claims for their injuries and Ashley's for $35 million.[7] The Duenezes then filed a pleading entitled "cross claim and third party action", "seeking a judicial declaration that [the Duenezes] owe no subrogation to Blue Cross/Blue Shield", or alternatively, "that any subrogation to which Plaintiff is entitled to [is] subject to the common fund doctrine". The pleading did not mention ERS. ERS filed an amended answer to BCBST's petition and "motion to dismiss for lack of jurisdiction", asserting that its sovereign immunity from suit had not been waived, that by statute it had exclusive jurisdiction to determine its right to subrogation,[8] and that administrative remedies had not been exhausted. ERS sought relief only against BCBST — that the court "dismiss the Plaintiff's Petition" and "that Plaintiff take nothing". ERS did not mention the Duenezes' cross-claim.

[7] According to the Duenezes, settlement funds were allocated $12,644,000 to Ashley, $6,104,000 to Irene, $3,052,000 to Xavier, and $13,200,000 to attorney fees and expenses. The judgment for the claims of two other Duenez family members injured in the accident was reversed and remanded by this Court in *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680 (Tex. 2007).

[8] ERS cited TEX. INS. CODE § 1551.352.

The Duenezes amended their cross-claim to seek the identical relief against ERS as well as BCBST, and to request abatement of any administrative proceedings before ERS, pending conclusion of the lawsuit. ERS responded to this pleading only by reasserting its claim to exclusive jurisdiction, not by moving to dismiss the Duenezes' cross-claim. BCBST amended its petition to request declarations:

- "that ERS has exclusive jurisdiction . . . to determine whether the group health care coverages and benefits provided by ERS . . . with administrative support from Blue Cross are or are not subject to . . . any . . . legal or equitable doctrine";
- "that the statutory remedies provided to Xavier Duenez with respect to ERS' decisions regarding subrogation for benefits paid to Xavier Duenez are exclusive";
- "that ERS/Blue Cross is entitled to recover its full subrogation interest from Defendants"; and
- "of the respective rights and other legal relations of ERS, Blue Cross as ERS' administering firm, Xavier Duenez, Irene Duenez, and Ashley Duenez".

BCBST added a request for "[m]onetary judgment in favor of ERS/Blue Cross for the full amount of the ERS subrogation interest". The amount of that interest, as asserted in letters from ERS to the Duenezes' counsel, was $295,105.57.[9]

At the hearing on ERS's motion to dismiss, the trial court was puzzled why BCBST would sue yet assert that the only remedy was administrative. The court asked BCBST's counsel: "If you thought you had administrative relief, why did you file a case in District Court?" Though counsel's answer was not entirely clear, he said this:

[9] ERS also asserted that it overpaid $113,174.76 in benefits that Duenez improperly claimed.

> When we found out about [the judgment in the Dram Shop case], we thought, what is the best way to preserve whatever right we have, whatever subrogation right we have. They [*i.e.*, the Duenezes] had already indicated to the ERS that they didn't think ERS had jurisdiction over anything, and it became clear to us that we were not going to be able to get their attention proceeding through administrative proceedings only. Therefore, we decided the way to preserve whatever subrogation interest there is — they say there really isn't one, we say there's a dollar-for-dollar one — the best way to preserve that is to file a lawsuit. . . . Now, ERS did not join in that lawsuit, we, Blue Cross, as the administering firm, filed what we, as Blue Cross, thought would be the best thing to do at the time. Now, for the record today, we are on board with ERS in terms of the ERS exclusive authority . . . .

The trial court denied ERS's motion to dismiss and ordered that administrative proceedings be abated.

The court of appeals recognized that BCBST and ERS have identical interests in this case:

> Although ERS is named as a defendant by BCBS's live petition, ERS is a defendant in name only. ERS is not adverse to BCBS's claims. In fact, BCBS's claims have been pled for the express benefit of ERS . . . . Not only are the parties not adverse to each other, they also have an ongoing agency relationship controlled by statute. . . .
>
> BCBS brings its lawsuit in its capacity "as ERS's administrating firm" — as an agent for ERS. In addition, ERS maintains on appeal that BCBS has no right or interest in the settlement proceeds, a contention that BCBS has not contested. . . . Based on its pleadings, it is unclear why BCBS named ERS as a defendant.
>
> ERS moved to dismiss this lawsuit. The trial court denied its request. In this appeal, ERS argues that it has exclusive jurisdiction over subrogation disputes, including the subrogation claim filed by BCBS on its behalf. BCBS has not filed an appellate brief with this Court. It is worth noting, however, that BCBS's live petition requests from the district court, in the alternative to a money judgment, "[a] declaration that ERS has primary jurisdiction and authority" over the parties' subrogation dispute. It therefore appears that the interests of BCBS and ERS are fully aligned in this litigation, even though BCBS has named ERS as a defendant.[10]

[10] 221 S.W.3d 809, 812 (Tex. App.–Corpus Christi-Edinburg 2007) (citations and footnote omitted).

The court of appeals nevertheless proceeded to tackle the issue of ERS's statutory authority because ERS and the Duenezes disagree. But ERS never moved to dismiss the Duenezes' cross-claim. ERS's motion to dismiss was expressly directed at BCBST's suit. The Duenezes certainly have no standing to support the trial court's jurisdiction over BCBST's suit. Were BCBST's suit dismissed, the Duenezes claim would be unaffected unless they were somehow in privity with BCBST, and they are not. To be sure, the Duenezes are interested in the extent of ERS's authority to decide subrogation issues, but they are no more interested in a dispute between BCBST and ERS than an amicus curiae would be. Indeed, it would be to the Duenezes' benefit if BCBST's suit were dismissed — including its claim against the Duenezes for $295,105.57, attorney fees, and costs.

ERS's interlocutory appeal from the trial court's order denying its motion to dismiss BCBST's suit raised no justiciable issue. We should grant ERS's petition for review, vacate the court of appeals' judgment, and dismiss the appeal.[11] Because the Court does not do so, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: July 3, 2009

[11] *See New York Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 679 (Tex. 1990) (per curiam) (reversing the court of appeals' judgment and rendering judgment dismissing the appeal for lack of jurisdiction because the trial court had not rendered a final judgment) (citing *Long v. Humble Oil & Refining Co.*, 380 S.W.2d 554, 555 (Tex. 1964) (per curiam)); *see also Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 164 (Tex. 2004); *Brown v. Todd*, 53 S.W.3d 297, 306 (Tex. 2001).

IN THE SUPREME COURT OF TEXAS

NO. 07-0410

EMPLOYEES RETIREMENT SYSTEM OF TEXAS, PETITIONER,

v.

XAVIER DUENEZ AND IRENE DUENEZ, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

JUSTICE WAINWRIGHT, joined by JUSTICE JOHNSON, dissenting.

A drunk driver injured the Duenezes in an automobile accident. The Employees Retirement System of Texas (ERS) benefits plan paid approximately $400,000 in medical benefits to the family. ERS then sought to recover the benefits it paid to the Duenezes after they recovered $35 million from the tortfeasor who caused the injuries. ERS's right to seek reimbursement of the medical benefits paid arises by virtue of contractual subrogation rights in the benefits plan. The question in this case is a narrow one: Is the Duenezes' dispute of ERS's subrogation claim subject to the exclusive statutory jurisdiction of ERS to determine whether to pay "claims" under the plan and to decide issues "relating to" the payment of claims? I would hold that the statute and benefits plan vest ERS with exclusive jurisdiction over this dispute. Because the Court does not, I respectfully dissent.

I. Factual and Procedural Background

Xavier Duenez, a state employee, applied for benefits under ERS's HealthSelect of Texas Managed Care Plan (the Plan) for injuries he and his family sustained in an automobile accident with a drunk driver. As administrator of the Plan, Blue Cross Blue Shield of Texas (BCBS) certified that the requested care was covered and began paying benefits.[1] BCBS ultimately paid the Duenezes approximately $400,000 in benefits before the Duenezes changed insurers.

While BCBS was paying benefits to the Duenezes under the Plan, the Duenezes sued to recover damages for the injuries sustained in the accident and obtained a $35 million settlement from the tortfeasor.[2] The executive director of ERS sent the Duenezes' attorney a letter asserting a right to recoupment of approximately $400,000—$300,000 for subrogation claimed and a little over $100,000 for overpayment of medical benefits. It appears from the record that the approximately $100,000 in improperly paid benefits at issue here was also the subject of *Duenez I*, in which we held that ERS has exclusive jurisdiction over coverage decisions. 201 S.W.3d at 676. Upon learning of the settlement, BCBS sued under both subrogation and overpayment theories to recoup the $400,000 it paid to the Duenezes in benefits under the Plan and for declaratory judgment. BCBS's subrogation

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[1] After initially certifying coverage, BCBS later informed the Duenezes that the care was not covered and that BCBS planned to discontinue paying benefits. *Blue Cross Blue Shield of Tex. v. Duenez* (*Duenez I*), 201 S.W.3d 674, 675 (Tex. 2006). The Duenezes pursued a declaratory judgment that the care was covered. *Id.* We held that ERS has exclusive jurisdiction over coverage decisions and dismissed the case for want of jurisdiction. *Id.* at 676.

[2] The Duenezes sued the drunk driver and the owner of the convenience store that sold the drunk driver alcohol on the day of the accident, obtaining a $35 million jury verdict that the court of appeals affirmed. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 682–83 (Tex. 2007) (*Duenez II*). While F.F.P.'s petition was pending before this Court, the Duenezes settled the claims of Xavier, Irene, and Ashley Duenez. *Id.* We reversed and remanded the remaining claims of Carlos and Pablo Duenez for a new trial, holding that the trial court abused its discretion when it severed F.F.P.'s claims against the drunk driver and when it refused to submit jury questions to allow the jury to determine the drunk driver's proportionate responsibility. *Id.* at 683, 694.

rights in this case arise from a provision in article IX of the Plan, which entitles the Plan to reimbursement from the proceeds of a settlement for any benefits provided by the Plan.

BCBS joined ERS as a co-defendant in the lawsuit. *See* TEX. R. CIV. P. 39(a) (permitting joinder of a party necessary for the just adjudication of the lawsuit). ERS moved to dismiss the suit for want of jurisdiction, arguing it has exclusive jurisdiction over this subrogation dispute.[3] The trial court denied ERS's motion, and the court of appeals affirmed. 221 S.W.3d 809, 815.

II. Employees Retirement System's Exclusive Jurisdiction

When the Legislature creates an administrative right that did not exist at common law, it can prescribe the procedures for pursuing and enforcing the right. *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78, 92 (Tex. 2008). The Legislature may confer exclusive jurisdiction on an administrative body to hear and decide disputes concerning the right created.[4] *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002). When it does, a party must exhaust its administrative remedies before seeking review in a trial court. *Duenez I*, 201 S.W.3d at 675. Until a party exhausts its administrative remedies, Texas trial courts lack jurisdiction over the

[3] In *City of Corpus Christi v. Public Utilities Commission*, we held that an agency's interpretation of a statute is entitled to deference if: (1) it is reasonable, and (2) it does not conflict with the statute's plain language. 51 S.W.3d 231, 261 (Tex. 2001). In that case, although the Commission's interpretation allowed for over-collection of transition charges, we held that the Commission did not err. *Id.*; *see also State v. Pub. Utils. Comm'n*, 883 S.W.2d 190, 196 (Tex. 1994) (holding, in a case about the PUC's authority to provide a remedy that the Legislature did not specifically include, that "the contemporaneous construction of a statute by the administrative agency charged with its enforcement is entitled to great weight").

[4] Texas trial courts have "exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." TEX. CONST. art. V, § 8.

dispute and must dismiss claims within the agency's exclusive jurisdiction. *Id.*; *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006).

A. Statutory Interpretation

Whether ERS has exclusive jurisdiction over this subrogation dispute is a matter of statutory interpretation, which we review de novo. *David McDavid Nissan*, 84 S.W.3d at 221; *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002). The Texas Employees Group Benefits Act (the Act) gives ERS exclusive jurisdiction over "all questions relating to enrollment in or payment of a claim arising from . . . benefits provided" under the Plan. TEX. INS. CODE § 1551.352.[5] Neither party disputes that ERS paid medical benefits to the Duenezes in accordance with the Plan and has exclusive jurisdiction to determine the benefits to be paid.

The Plan also contractually governs subrogation. It provides as follows:

> a. This provision applies when another party (person or organization) is or may be considered responsible for payment because of a Participant's injury or sickness for which benefits under the Plan have been provided.
>
> b. To the extent of such services provided, the Plan is subrogated to all rights of recovery the Participant has[,] and the Plan may assert such rights independent of the Participant. Also, if the Participant has obtained or obtains a court judgment, settlement, arbitration, award, or other monetary recovery from another party, because of the injury or sickness, the Plan is entitled to reimbursement from the proceeds of recovery to the extent of benefits provided.

The Plan expressly provides ERS with a right to subrogation from the Duenezes' recovery obtained from a tortfeasor, whether through settlement or otherwise.

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[5] When this case arose, the Act was codified at article 3.50-2 of the Texas Insurance Code. The Act was later repealed and recodified with non-substantive revisions. *See* Act of May 22, 2001, 77th Leg., R.S., ch. 1419, §§ 3, 31(b)(6), 2001 Tex. Gen. Laws 4153, 4209 (current version at TEX. INS. CODE § 1551). Citations are to the current version of the Act.

By disputing ERS's plea to the jurisdiction, the Duenezes contest ERS's jurisdiction to decide the right to recover both portions of the benefits paid through its subrogation rights. Their argument first depends on a holding that ERS does not have exclusive jurisdiction over the dispute of the alleged overpayment of $100,000 in medical benefits. This argument directly attacks ERS's decision to pay, or to decide not to pay, benefits under the Plan. The statute is clear that ERS has exclusive jurisdiction over "all questions relating to . . . payment of a claim." *See Duenez I*, 201 S.W.3d at 676 (quoting TEX. INS. CODE § 1551.352). The Court agrees, but then determines that because the Duenezes are no longer insureds of the Plan, ERS loses its ability to enforce its decision regarding the payment of benefits. The Court's holding allows easy circumvention of ERS's exclusive jurisdiction to decide the very issue of payment of Plan benefits. Surely the Legislature did not intend that an insured would be able to avoid its reimbursement obligation by simply changing insurers before ERS can seek subrogation. The Court's approach presents a simple roadmap for former Plan participants to circumvent the statute and improperly move to the courts claims to retain overpayments of medical benefits.

The Duenezes also argue that, because subrogation is collateral to payment and coverage under the Plan, ERS's assertion of exclusive jurisdiction to determine whether it should be reimbursed the $300,000 in legitimate benefits paid pursuant to its contractual subrogation rights is not related to payment of a claim. *See, e.g.*, *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 644 (Tex. 2007) (involving a subrogation dispute in which coverage was not disputed); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 213 (Tex. 2003) (same).

This point raises a question of the scope of the legislative grant of exclusive authority. The statute's grant of jurisdiction over "all questions relating to . . . payment of a claim" is broader than the Duenezes argue and the Court holds. In interpreting a statute, we "give words their ordinary meaning." *Geters v. Eagle Ins. Co.*, 834 S.W.2d 49, 50 (Tex. 1992); *see also In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d 609, 612 (Tex. 2006). In this case, the ordinary meaning comports with the accepted legal meaning, in that both definitions would only require the matter to have some connection with payment. *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1626 (1st ed. 1996) (defining "relate" as "to bring into or establish association, connection, or relationship"); *see also In re Morrison*, 555 F.3d 473, 479 (5th Cir. 2009) (defining bankruptcy courts' jurisdiction over cases related to the bankruptcy estate). The Legislature granted ERS's executive director exclusive authority to determine questions that have a connection or relationship to payment of a claim for benefits under the Plan—a definition that clearly extends beyond merely determining the actual payment of a claim. *See* § 1551.352.

We are mindful that the Legislature enacted a comprehensive regulatory scheme to govern health insurance for state employees. *See* TEX. INS. CODE § 1551.001, *et seq*. Its expressly stated purposes are both to improve the state's relations with its employees and to "provide uniformity in life, accident, and health benefit coverages." § 1551.002. The statute grants the Board of Trustees broad powers to "implement this chapter and its purposes." § 1551.052. Because this case relates to the recoupment of benefits paid under the Plan, I believe it falls within the broad scheme created by the Legislature to "provide uniformity."

In addition, ERS asserts its claim for subrogation in this case alongside a claim for overpayment of benefits, over which ERS would clearly have jurisdiction as a "question relating to . . . payment of a claim." ERS will have to parse the benefits paid, first by determining how much of the benefits were overpaid, which is clearly within ERS's jurisdiction, and then determining whether the Duenezes owe subrogation on the remaining amount. When two claims are so intertwined, it would not only be inefficient, but also against the Legislature's goal of promoting uniformity, to allow ERS to exercise its exclusive jurisdiction over part of the dispute and the trial court to decide the remainder, perhaps changing or nullifying ERS's payment decisions. This is untenable. Courts have the authority to change ERS's decisions, but only on appeal from ERS's final decision under a substantial evidence scope of review. TEX. GOV'T CODE §§ 2001.171, .174.

To interpret this provision as the Duenezes suggest would nullify a portion of the statute. *See In re Caballero*, 272 S.W.3d 595, 600 (Tex. 2008); *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008). The statute grants exclusive authority to determine "all questions relating to . . . payment of a claim arising from . . . benefits provided under this chapter." § 1551.352. This statutory language encompasses more than the payment of benefits—it encompasses payment of *a claim arising from* benefits provided.

Subrogation relates to the payment of a claim. *See Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 774 (Tex. 2007) (recognizing that subrogation depends on payment of a loss); *Fortis Benefits*, 234 S.W.3d at 644; *Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 530 (Tex. 2002) (recognizing that a statutory provision requiring employees to reimburse insurance carriers for payments made to the employees is a subrogation provision); *Medina v. Herrera*, 927 S.W.2d 597,

604 (Tex. 1996) ("Generally, an insurer paying a claim under a policy becomes equitably subrogated to any cause of action the insured may have against a third party responsible for the injury."). Subrogation arises from and depends on payment of a loss or debt and is limited to the amount of payments made by the subrogee to the subrogor. *Mid-Continent*, 236 S.W.3d at 774; *Argonaut*, 87 S.W.3d at 530. In other words, subrogation determines who ultimately pays the claim—ERS or the third party, such as the tortfeasor in this case. Whether the payment comes from the Plan or a plan participant's recovery should be ERS's initial decision to make.

Because subrogation relates to payment of the Plan participants' claims, contractual subrogation claims under the Plan should fall within ERS's exclusive jurisdiction. TEX. INS. CODE § 1551.352. The language of the statute governs. *City of Rockwell v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008); *Hogue*, 271 S.W.3d at 256.

The Court seems to suggest that BCBS and ERS colluded on a plan to sue in court and then seek dismissal for lack of jurisdiction. Nothing in the record suggests that ERS and BCBS had such a plan, and nothing in the Plan or statute requires a lawsuit as a predicate to administrative subrogation. Even if BCBS made a litigation misstep by bringing its claim in a court of law and joining ERS as a defendant, BCBS's misstep does not mean that ERS demanded dismissal of "its own claim," as the Court asserts. ___ S.W.3d ___. And such a misstep does not change the language of the statutes vesting ERS with exclusive authority to adjudicate matters relating to payment of claims or the language of the health care plan under which the Duenezes received hundreds of thousands of dollars.

B. Exercise of Jurisdiction

Even if a statute appears to grant an agency exclusive jurisdiction over certain claims, such jurisdiction may be limited if the agency lacks procedural mechanisms to resolve the claims and the agency is unable to award monetary damages. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 207–08 (Tex. 2002). This indicates that the Legislature did not intend to grant exclusive jurisdiction over a certain type of claim. *Id.* Although I believe the plain meaning of the ERS statute grants exclusive jurisdiction quite broadly, the effect would be tempered by further analysis. For example, we held in *Butnaru* that the Motor Vehicle Board's exclusive jurisdiction did not extend to claims for tortious interference and declaratory judgment due to: (1) the Motor Vehicle Code's failure "to establish any procedure through which the Board may resolve [the claims]," and (2) "the Board's inability to award monetary damages." *Id.* at 207–08.

The jurisdiction of the Motor Vehicle Board at issue in *Butnaru* extended to "Code-based claims," such as the denial of an application for a dealership. *Id.* at 207. The plaintiffs asserted a tort claim that would have to be proven under the common law. *Id.* at 208. We held that, because the types of claims asserted and the damages sought were so unlike the types of cases the Board usually heard, nothing in the statutory scheme suggested that the Legislature intended to replace common law remedies with administrative remedies. *Id.* (citing *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 18 (Tex. 2000)). Whether ERS has the capability to resolve the types of claims asserted bears on the scope of the legislative grant of jurisdiction.

In this case, the Plan creates the subrogation claim asserted by ERS, which arises from ERS's payment of benefits to the Duenezes. *See Fortis Benefits*, 234 S.W.3d at 647 (emphasizing that "the

policy declares the parties' rights and obligations"). The Plan is within ERS's particular expertise. This contrasts with *Butnaru*, where two independent parties unrelated to the agency sued in an agency proceeding based on substantive tort law. On the other hand, probate, marital, and tax questions, which the Court fears would also fall within ERS's exclusive jurisdiction under our definition, would be more similar to the situation in *Butnaru*. ERS has not attempted to exercise exclusive jurisdiction over such collateral matters, but if it did, it would be clear that the Legislature did not intend to extend exclusive jurisdiction that far. *See Butnaru*, 84 S.W.3d at 208.

It is true that ERS has not adopted substantive rules specifically governing the resolution of administrative subrogation proceedings; however, this appears to be the first such subrogation dispute a Plan beneficiary has pursued through the courts. ERS presumably determines the majority of subrogation claims through the administrative process without dispute. Importantly, the enabling statute grants ERS the authority to adopt rules "it considers necessary to implement this chapter and its purposes," including the rules governing subrogation proceedings. *See* § 1551.052. The attorney general points out that the Legislature tied ERS's exclusive jurisdiction to "a pervasive regulatory scheme," thus arguing that the lack of an express provision for subrogation does not limit ERS's jurisdiction. *See In re Entergy Corp.*, 142 S.W.3d 316, 321–22 (Tex. 2004). I agree.

As the court of appeals and the Court note, the lack of substantive guidance on subrogation disputes stands in contrast to other matters within ERS's exclusive jurisdiction, such as eligibility for benefits and coverage, both covered by the Act. 221 S.W.3d at 815; §§ 1551.101–.159, .202–.206. However, ERS's subrogation rights are available only under the Plan, not under the Act. The substantive right to subrogation and the obligation to reimburse ERS are created by the Plan, and the

agency and the Plan beneficiary are both stakeholders in the dispute. In fact, no equitable defenses apply when subrogation rights arise from a contract, as they do in this case. *Fortis Benefits*, 234 S.W.3d at 647. Rather, "the policy declares the parties' rights and obligations." *Id.* Hence, the dispute is much different from the one addressed in *Butnaru*. *See* 84 S.W.3d at 206.

Further, unlike the Motor Vehicle Code at issue in *Butnaru*, the Act provides a general framework for ERS to resolve contested subrogation issues. The statute directs that the executive director make all determinations over which he has jurisdiction, which, in this case, came in the form of a letter to the Duenezes. § 1551.352. The participant then has the opportunity to appeal the determination to the ERS Board of Trustees. § 1551.351(d). Here, the Duenezes appealed to the Board of Trustees;[6] however, the trial court abated the agency proceeding pending a determination of its jurisdiction. Had the appeal proceeded, the Duenezes would have been entitled to a contested case hearing by the ERS Board of Trustees with the opportunity to present defenses. *See* TEX. INS. CODE §§ 1551.351(d), .355(d); s*ee also* TEX. GOV'T CODE §§ 2001.051–.103 (providing minimum standards of uniform procedure for administrative hearings in contested cases). If still dissatisfied after the appeal, the Duenezes, having exhausted all of their administrative remedies, would then be

[6] If the participant failed to file a timely appeal, his or her administrative remedies would similarly be exhausted. Just as an appeal to the Board of Trustees would qualify as a contested case, so too would the decision of a participant not to appeal. *See* TEX. GOV'T CODE § 2001.003(1) ("'Contested case' means a proceeding . . . in which the legal rights, duties, or privileges of a party are to be determined by a state agency after *an opportunity* for adjudicative hearing." (emphasis added)); *see* 25 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 423.02 (2007). If the participant failed to appeal the determination of the executive director of ERS, such determination must necessarily represent the final determination of the administrative agency. *See* § 2001.144. At that point, ERS would be able to enforce its judgment in the trial court. *See* § 2001.202 (stating that the attorney general may, at the request of ERS, represent its interest in a trial court to "compel compliance with the final order," but that representation by the attorney general "is in addition to any other remedy provided by law").

free to file suit in a trial court in Travis County.[7] *See* TEX. INS. CODE § 1551.359 ("A person aggrieved by a final decision of the Employees Retirement System of Texas in a contested case . . . is entitled to judicial review of the decision."); TEX. GOV'T CODE § 2001.171 (providing that a person who has exhausted all administrative remedies available within an agency and is aggrieved by a final decision in a contested case is entitled to judicial review); *Cash. Am. Int'l*, 35 S.W.3d at 15 ("When the Legislature vests exclusive jurisdiction in an agency, exhaustion of administrative remedies is required.").[8] The procedures through which ERS resolves other disputes based on the Plan are already in place and can accommodate the subrogation dispute at issue here.

Second, in *Butnaru*, the plaintiffs sought monetary damages based on the common law claim of tortious interference and a declaratory judgment for a breach of contract claim. 84 S.W.3d at 206. We held that the agency's inability to award monetary damages or a declaratory judgment undermined the argument that its jurisdiction extended to those claims. *Id.* at 206–07. Unlike the agency in *Butnaru*, ERS has the authority to obtain reimbursement of funds, the damages sought here. *See* TEX. INS. CODE § 1551.351(a)–(b) (allowing reimbursement of funds obtained through fraudulent or quasi-fraudulent means). The remedies provided under the Act "are the exclusive remedies available to an employee, participant, annuitant, or dependant." *Id.* § 1551.014; *see Unigard Sec. Ins. Co. v. Schaefer*, 572 S.W.2d 303, 307 (Tex. 1974) ("When the Legislature specifies a particular extent of

[7] If the Board of Trustees finds in favor of the participant, ERS could request that the attorney general bring an action in trial court on its behalf. *See* TEX. GOV'T CODE § 2001.202.

[8] Clearly, then, filing suit is not a prerequisite to exhausting administrative remedies, as the Court suggests. ___ S.W.3d ___. Suit would be filed only after the administrative process has concluded, either by the Duenezes, unhappy with the result, or by ERS, to enforce the decision of the administrative body.

insurance coverage, any attempt to void or narrow such coverage is improper and ineffective."). Conspicuously absent from that list of parties is ERS. ERS has the authority to bring an action under the statute and then to enforce that judgment in the trial court. *See, e.g.*, TEX. INS. CODE § 1551.351(a); TEX. GOV'T CODE § 2001.202. Therefore, ERS is not limited exclusively to the remedies specifically provided in section 1551 and has the authority to fashion appropriate procedures and remedies to be used in subrogation disputes. TEX. INS. CODE §§ 1551.014, .052.

The Court relies on its assertion that ERS's procedures were never designed for collecting a claim. ___ S.W.3d ___. However, ERS must have the procedures for recovering money already paid in benefits, because the statute explicitly allows them to do so in another context. §§ 1551.351(b)(3), (5) (quasi-fraudulent conduct). After receiving a final judgment in the administrative proceeding, ERS would enforce its judgment in the trial court in the same manner it would enforce the recovery of payments made based on quasi-fraudulent conduct or any other administrative decision. *See* TEX. GOV'T CODE § 2001.202 (stating that the attorney general may, at the request of ERS, represent its interest in trial court to "compel compliance with the final order," but that representation by the attorney general "is in addition to any other remedy provided by law").

III. Conclusion

For the reasons discussed above, I conclude that the Legislature has granted ERS exclusive jurisdiction over this subrogation dispute. *In re Entergy Corp.*, 142 S.W.3d at 322. I would reverse the court of appeals' judgment and dismiss the case for want of jurisdiction. TEX. R. APP. P. 59.1.

Dale Wainwright
Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0419

IN RE LABATT FOOD SERVICE, L.P., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued September 9, 2008

JUSTICE JOHNSON delivered the opinion of the Court.

Under Texas law, wrongful death beneficiaries are generally bound by a decedent's pre-death contractual agreement because of the derivative nature of their claims. In this case, we consider whether the arbitration provision in an agreement between a decedent and his employer requires the employee's wrongful death beneficiaries to arbitrate their wrongful death claims against the employer even though they did not sign the agreement. We hold that it does.

I. Background

Labatt Food Service, L.P. does not provide workers' compensation insurance to cover its employees in the event of on-the-job injuries. Rather, it provides an "occupational injury plan" (the plan) under which its employees may elect to participate. To become participants in the plan, employees sign an agreement entitled "Election of Comprehensive Benefits, Indemnity, and Arbitration Agreement." The agreement contains several numbered paragraphs. Of primary relevance to this proceeding are three of those paragraphs. Paragraph three provides that the

employee elects to be covered under the plan "individually and on behalf of heirs and beneficiaries." Paragraph three also provides that the employee will indemnify Labatt from claims and suits based on injury to or death of the employee from occupational causes, except for claims filed pursuant to the plan. Paragraph four consists of an arbitration clause providing that disputes related to either the agreement, the plan, or to an employee's occupational injury or death must be submitted to binding arbitration pursuant to the Federal Arbitration Act (FAA). *See* 9 U.S.C. §§ 1-16. Paragraph eight provides for the severability of any invalid provision.

Carlos Dancy, Jr., an employee of Labatt, elected to participate in the plan and signed an agreement. Dancy later died from an apparent asthma attack that occurred while he was working. His parents and children filed a wrongful death action against Labatt. Labatt responded by filing a motion to compel arbitration in which it asserted the arbitration agreement bound the wrongful death beneficiaries. The beneficiaries argued they were not bound by Dancy's arbitration agreement for two reasons: (1) they were not signatories to the agreement, and (2) the entire agreement was void because the indemnity clause was a pre-injury waiver in violation of Texas Labor Code section 406.033(e).

The trial court denied Labatt's motion without stating its reasons. The court of appeals denied mandamus relief. Labatt now seeks mandamus relief from this Court.

II. Are the Beneficiaries Bound to Arbitrate?

A. Standard of Review

A party denied the right to arbitrate pursuant to an agreement subject to the FAA does not have an adequate remedy by appeal and is entitled to mandamus relief to correct a clear abuse of

discretion. *In re L & L Kempwood Assocs., L.P.*, 9 S.W.3d 125, 128 (Tex. 1999). Under an abuse of discretion standard, we defer to the trial court's factual determinations if they are supported by evidence, but we review the trial court's legal determinations de novo. *Brainard v. State*, 12 S.W.3d 6, 30 (Tex. 1999); *see Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992). Whether an arbitration agreement is enforceable is subject to de novo review. *See J. M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).

B. Governing Law

Under the FAA, whether an arbitration agreement binds a nonsignatory is a gateway matter to be determined by courts rather than arbitrators unless the parties clearly and unmistakably provide otherwise. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005); *see Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). As this arbitration agreement is silent about who is to determine whether particular persons are bound by the agreement, courts, rather than the arbitrator, should determine the issue. *See First Options of Chic., Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995).

We apply Texas procedural rules in determining whether nonsignatories are bound by an arbitration agreement. *In re Weekley Homes*, 180 S.W.3d at 130. It is not entirely clear, however, if state or federal substantive law governs whether nonsignatories are bound to arbitrate under an agreement subject to the FAA. *Id.*; *see Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004). Under the FAA, state law generally governs whether a litigant agreed to arbitrate, and federal law governs the scope of the arbitration clause. *In re Weekley Homes*, 180 S.W.3d at 130. But whether nonsignatories are bound by an arbitration agreement is a distinct issue

that may involve either or both of these matters. *Id.* at 130-31; *see also In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738 (Tex. 2005) (noting whether nonsignatory plaintiffs should be compelled to arbitrate their claims is related to validity but is also a distinct issue). The FAA does not specify whether state or federal law governs, and the United States Supreme Court has not directly addressed the issue. *In re Weekley Homes*, 180 S.W.3d at 130. Pending an answer from the United States Supreme Court, we have determined to apply state substantive law and endeavor to keep it consistent with federal law. *Id.* We keep in mind that a purpose of the FAA is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967); *see Fleetwood Enter., Inc. v. Gaskamp*, 280 F.3d 1069, 1074 n.5 (5th Cir. 2002).

Mindful of the foregoing, we move to the issue before us—whether an arbitration agreement governed by the FAA binds the nonsignatory wrongful death beneficiaries of a party to the agreement.

C. Beneficiaries as Nonsignatories

We have previously determined that nonsignatories to an agreement subject to the FAA may be bound to an arbitration clause when rules of law or equity would bind them to the contract generally. *In re Weekley Homes*, 180 S.W.3d at 131 (noting that if state law would bind a nonparty to a contract generally, the FAA appears to preempt an exception for arbitration clauses because the FAA requires states to place arbitration contracts on equal footing with other contracts); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (2005) (noting that a state "may not . . . decide that a contract is fair enough to enforce all its basic terms . . . [yet] not fair enough

to enforce its arbitration clause"). Therefore, we look to whether the agreement signed by Dancy would generally bind his beneficiaries under Texas law.

Several rules of law and equity may bind nonsignatories to a contract. For example, we have held that the principles of equitable estoppel and agency may bind nonsignatories to an arbitration agreement. *In re Weekley Homes*, 180 S.W.3d at 131-35; *see also In re Kellogg Brown & Root*, 166 S.W.3d at 739 (noting nonsignatories may be bound to arbitration agreement under "direct benefits estoppel"); *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 191-95 (Tex. 2007) (recognizing estoppel may bind a nonsignatory to an arbitration agreement but holding plaintiffs were not bound to arbitration agreement under "concerted misconduct estoppel" because it was not a recognized theory of estoppel under Texas law); *In re FirstMerit Bank*, N.A., 52 S.W.3d 749, 755-56 (Tex. 2001) (holding a nonsignatory who sues based on a contract subjects himself to the contract's terms, including its arbitration agreement).

Labatt argues that under these circumstances the beneficiaries should be bound by the agreement because (1) they are third party beneficiaries of the agreement; (2) they are bound by the agreement because of the derivative nature of their claims; and (3) Texas Family Code section 151.001 afforded Dancy the legal authority to bind his minor children to the agreement. Because we determine it is dispositive, we first consider Labatt's argument that the beneficiaries are bound to arbitrate due to the derivative nature of their claims.

At common law there was no recognized cause of action for the wrongful death of another person. *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 344 (Tex. 1992). The Legislature enacted the Wrongful Death Act in order to create a cause of action to allow a deceased tort victim's

surviving parents, children, and spouse to recover damages for their losses from the victim's death. *Shepherd v. Ledford*, 962 S.W.2d 28, 31 (Tex. 1998); *see* TEX. CIV. PRAC. & REM. CODE §§ 71.002-.004. Under the Wrongful Death Act as it applies here, wrongful death beneficiaries may pursue a cause of action "only if the individual injured would have been entitled to bring an action for the injury if the individual had lived." TEX. CIV. PRAC. & REM. CODE § 71.003(a). This language is not a recent innovation but is a recodification of language which has consistently been part of the Wrongful Death Act. *See Russell*, 841 S.W.2d at 346. And we have consistently held that the right of statutory beneficiaries to maintain a wrongful death action is entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death. *See id.* at 345-47. Thus, it is well established that statutory wrongful death beneficiaries' claims place them in the exact "legal shoes" of the decedent, and they are subject to the same defenses to which the decedent's claims would have been subject. *Id.* at 347.

Accordingly, we long ago held that a decedent's pre-death contract may limit or totally bar a subsequent action by his wrongful death beneficiaries. *See Sullivan-Sanford Lumber Co. v. Watson*, 155 S.W. 179, 180 (Tex. 1913); *Thompson v. Fort Worth & R.G. Ry. Co.*, 80 S.W. 990, 992 (Tex. 1904); *see also Russell*, 841 S.W.2d at 347 (affirming holdings in *Thompson* and *Sullivan-Sanford Lumber Co.*). In *Thompson*, R.K. Thompson sued to recover damages for injuries he suffered while riding a train. He accepted a settlement offer and executed a full release of the railway company. 80 S.W. at 990. Shortly after signing the release, Thompson died from his injuries. *Id.* at 991. His wife and children then sued the railway company seeking to recover damages for his death. *Id.* at 990. The Court noted that if Thompson had survived, he would not

have been entitled to bring suit because of the contractual release and because the Wrongful Death Act provided, in language similar to the current Act, that beneficiaries were only entitled to bring suit if the decedent would have been entitled to maintain an action for the injury. *Id.* at 991-92. The Court held that although the beneficiaries were not parties to the release, the contractual release signed by Thompson barred their wrongful death claims because they stood in the same legal shoes as Thompson and were subject to the same contractual defenses. *Id.* at 992.

In *Sullivan-Sanford Lumber Co.*, the Court again held that a pre-death contractual release signed by a decedent barred a subsequent action by his wrongful death beneficiaries. 155 S.W. at 180. The Sullivan-Sanford Lumber Company allowed non-employees to ride their trains without charge but issued them boarding passes containing the following language:

> The user of this pass rides only on the following conditions: (1) This permit is accepted with the understanding that the person using it assumes all risk of injury of any character while using the same and hereby waives any claim for damages in case of injury . . . .

135 S.W. 635, 636 (Tex. Civ. App.—Texarkana 1911), *rev'd*, 155 S.W. 179 (Tex. 1913). J.A. Watson was riding a train courtesy of a boarding pass when the train collided with another train killing Watson. *Id.* His wife and children sued the Lumber Company. *Id.* The Court held, as it did in *Thompson*, that the beneficiaries were not entitled to recover under the Wrongful Death Act because Watson himself could not have recovered for his injuries if he had survived, and his wrongful death beneficiaries were subject to the same contractual defenses that Watson would have been subject to had he sued. 155 S.W. at 180.

Consistent with our holdings in *Thompson* and *Watson*, many courts of appeals have held that a decedent's pre-death contract may limit or bar a subsequent wrongful death action. *See Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713, 719 (Tex. App.—San Antonio 1994, writ denied) (pre-injury liability release signed by decedent before taking scuba diving lessons barred subsequent wrongful death and survival action against scuba instructor); *Winkler v. Kirkwood Atrium Office Park*, 816 S.W.2d 111, 115 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (release executed by decedent before joining health club precluded his beneficiaries from bringing wrongful death and survival action); *McClellan v. Boehmer*, 700 S.W.2d 687, 690 (Tex. App.—Corpus Christi 1985, no writ) (release and settlement signed by automobile accident victim barred survival and wrongful death actions after victim died from injuries sustained in accident).

Despite this line of authority, the wrongful death beneficiaries argue that agreements to arbitrate are different than other contracts, and they should not be bound by Dancy's agreement. We reject their argument. If we agreed with them, then wrongful death beneficiaries in Texas would be bound by a decedent's contractual agreement that completely disposes of the beneficiaries' claims, but they would not be bound by a contractual agreement that merely changes the forum in which the claims are to be resolved. Not only would this be an anomalous result, we believe it would violate the FAA's express requirement that states place arbitration contracts on equal footing with other contracts. 9 U.S.C. § 2; *see Volt Info. Scs., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989).

The beneficiaries also argue that they should not be bound because Dancy did not have the authority to bind them to the arbitration agreement when the wrongful death cause of action actually

belongs to the surviving spouse, children, and parents of the deceased. While it is true that damages for a wrongful death action are for the exclusive benefit of the beneficiaries and are meant to compensate them for their own personal loss, the cause of action is still entirely derivative of the decedent's rights. TEX. CIV. PRAC. & REM. CODE §§ 71.003(a), .004(a); *Russell*, 841 S.W.2d at 347. Thus, regardless of the fact that Dancy's beneficiaries are seeking compensation for their own personal loss, they still stand in Dancy's legal shoes and are bound by his agreement.

In the alternative, the beneficiaries urge us to circumvent the derivative claim rule by holding that wrongful death actions are analogous to and should be treated similarly to loss of consortium claims. A tort action seeking damages for loss of consortium, however, is fundamentally different than a statutory wrongful death action. If Dancy had suffered a severe but nonfatal injury, his children would have been entitled to bring a claim to recover for the loss of care, guidance, love, and protection ordinarily provided by their father.[1] *Reagan v. Vaughn*, 804 S.W.2d 463, 466 (Tex. 1990). Their lost consortium claims would be derivative in the sense that the beneficiaries would be required to establish Labatt was liable for their father's underlying injury in order to recover damages. *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978). But loss of consortium claims are not entirely derivative as are wrongful death claims; instead, they are separate and independent claims distinct from the underlying action. *Id*. at 667, 669. Thus, a settlement agreement signed by an injured spouse does not bar a subsequent loss of consortium claim by the non-injured spouse. *Id.* at 669.

[1] Dancy's parents would not have been entitled to recover lost consortium damages had he survived his injuries. *See Roberts v. Williamson*, 111 S.W.3d 113, 119 (Tex. 2003).

A wrongful death action is different than a loss of consortium claim because the Wrongful Death Act expressly conditions the beneficiaries' claims on the decedent's right to maintain suit for his injuries. TEX. CIV. PRAC. & REM. CODE § 71.003(a); *see Russell*, 841 S.W.2d at 346. The Legislature created an entirely derivative cause of action when it enacted the Wrongful Death Act, and Dancy's beneficiaries are bringing an entirely derivative claim. Their wrongful death action is not in the same category as a loss of consortium claim for purposes of derivative status analysis. We decline their invitation to circumvent the clear language of the Wrongful Death Act.

In addition, other states have resolved this issue based on whether the wrongful death action is an independent or derivative cause of action under state law. *See Cleveland v. Mann*, 942 So.2d 108, 118-19 (Miss. 2006) (beneficiaries bound by decedent's arbitration agreement because under Mississippi Wrongful Death Act, beneficiaries may bring suit only if decedent would have been entitled to bring action immediately before death); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So.2d 661, 665 (Ala. 2004) (administrator of estate bringing wrongful death claim bound because administrator stands in legal shoes of decedent); *Ballard v. Sw. Detroit Hosp.*, 327 N.W.2d 370, 372 (Mich. Ct. App. 1982) (administrator bringing wrongful death action bound by arbitration agreement because wrongful death is a derivative cause of action under Michigan law); *but see Bybee v. Abdulla*, 189 P.3d 40, 43 (Utah 2008) (beneficiaries not bound because wrongful death is an independent cause of action under Utah law); *Finney v. Nat'l Healthcare Corp.*, 193 S.W.3d 393, 395 (Mo. Ct. App. 2006) (beneficiary not bound because under Missouri law the wrongful death act creates a new cause of action belonging to the beneficiaries). Other states, however, resolve the issue based on what the contracting parties intended. *Allen v. Pacheco*, 71 P.3d 375, 379-80 (Colo. 2003)

(beneficiaries bound when contract reflects intent of the parties to bind beneficiaries); *Herbert v. Superior Court*, 215 Cal. Rptr. 477, 480 (Cal. Ct. App. 1985) (beneficiaries bound when contract reflects intent of the parties to bind beneficiaries).

A review of the cases decided based on statutory language indicates that courts in states where wrongful death actions are recognized as independent and separate causes of action are more likely to hold that the beneficiaries are not bound by a decedent's agreement to arbitrate, *see, e.g.*, *Bybee*, 189 P.3d at 46-47; *Finney*, 193 S.W.3d at 395, while beneficiaries in states where wrongful death actions are wholly derivative in nature are generally held to be bound by a decedent's arbitration agreement. *See Cleveland*, 942 So.2d at 118-19; *Ballard*, 327 N.W.2d at 372; *Bybee*, 189 P.3d at 46 ("Courts that compel nonsignatory heirs to abide by arbitration agreements often do so because under their law a wrongful death cause of action is wholly derivative of and dependent on the underlying personal injury claim."). Our holding is consistent with those in the majority of states that have statutes similar to the Texas statute and have considered the issue.

Some Texas courts of appeals have held that wrongful death beneficiaries are not bound by a decedent's agreement to arbitrate. *See In re Kepka*, 178 S.W.3d 279, 288 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding [mand. dismissed]); *Gomez v. Zardenetta*, No. 04-97-0019-CV, 1998 WL 19858, at *7 (Tex. App.—San Antonio Jan. 21, 1998, no pet.) (not designated for publication). To the extent the holdings of courts of appeals conflict with our decision, we disapprove of them.

III. The Indemnity Clause

The Labor Code provides that an employee's cause of action against a non-subscriber employer to recover damages for personal injuries or death sustained in the course and scope of employment

> may not be waived by an employee before the employee's injury or death. Any agreement by an employee to waive [such] a cause of action . . . before the employee's injury or death is void and unenforceable.

TEX. LAB. CODE § 406.033(e). The beneficiaries challenge the validity of the entire agreement on the basis that the indemnification clause in paragraph three is in substance a pre-injury waiver that violates Labor Code section 406.033(e). They, however, specify that their challenge to the agreement's validity "is not dependent on or directed solely to the arbitration provision." Instead, they argue that the contract as a whole, including its arbitration clause, is rendered invalid by the allegedly illegal indemnity clause because the clause is not severable.

There are two types of challenges to an arbitration provision: (1) a specific challenge to the validity of the arbitration agreement or clause, and (2) a broader challenge to the entire contract, either on a ground that directly affects the entire agreement, or on the ground that one of the contract's provisions is illegal and renders the whole contract invalid. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). A court may determine the first type of challenge, but a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator. *Id.* at 448-49; *see Prima Paint*, 388 U.S. at 403-04 (claim of fraud in the inducement of arbitration clause itself may be adjudicated by court, but court may not consider claim of fraud in the inducement of the contract generally); *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51,

56 (Tex. 2008) ("[T]he party opposing arbitration must show that the fraud relates to the arbitration clause specifically, not to the broader contract in which it appears."); *Perry Homes v. Cull*, 258 S.W.3d 580, 589 (Tex. 2008) ("[A]rbitrators generally must decide defenses that apply to the whole contract, while courts decide defenses relating solely to the arbitration clause."); *In re Merrill Lynch*, 235 S.W.3d at 190 & n.12 (noting that a defense relating to the parties' entire contract rather than the arbitration clause alone is a question for the arbitrators); *In re FirstMerit Bank*, 52 S.W.3d at 756 (noting that the defenses of unconscionability, duress, fraudulent inducement, and revocation must specifically relate to the arbitration part of a contract and not the contract as a whole if they are to defeat arbitration, and that validity of an arbitration provision is a separate issue from validity of the whole contract).

We recently considered the first type of challenge in *In re Poly-America, L.P.*, 262 S.W.3d 337 (Tex. 2008). There, Johnny Luna and his employer, Poly-America, entered into a five-page-long arbitration agreement. *Id.* at 345, 360. After Luna was fired, he sued for retaliatory discharge and sought a declaratory judgment that the arbitration agreement was unenforceable because it contained provisions that violated public policy and were unconscionable. *Id.* at 345. One of his arguments was that provisions prohibiting the arbitrator from awarding punitive damages or ordering reinstatement violated Labor Code provisions authorizing such relief. *Id.* at 352. We determined that those provisions were unconscionable and void, but they were severable and did not invalidate the rest of the agreement to arbitrate. *Id.* at 359-60. We stated that "where a particular waiver of substantive remedies or other provision of a contract is unconscionable—independent of the agreement to arbitrate—it will be unenforceable even though included in an agreement to arbitrate."

Id. at 349. But that statement must be read in context of the case as it was presented to us. We were considering only provisions that were part of the arbitration agreement. There was no challenge to an invalid or illegal provision outside of the arbitration agreement because the entire contract at issue was an arbitration agreement. Because we were considering the various challenged provisions only as they were part of the arbitration agreement itself, the Court could properly adjudicate Luna's challenge. *Buckeye*, 546 U.S. at 444; *Prima Paint*, 388 U.S. at 409. At oral argument in this case, Labatt urged the Court to similarly sever the indemnity clause if we found it violated Labor Code section 406.033(e). But as we explain below, we do not reach the issue of whether the indemnity clause is void because it is a question for the arbitrator.

The case now before us presents a challenge of the second type that we refer to above: a broad challenge to the entire contract on the ground that one of the contract's provisions is illegal and renders the whole contract invalid, but not specifically challenging the arbitration clause. The Supreme Court addressed a similar challenge in *Buckeye*. 546 U.S. 440. There, Buckeye Check Cashing operated a deferred deposit service by which its customers obtained cash in exchange for the customer's check in the amount received plus a finance charge. *Id.* at 442. For each transaction, Buckeye's customers signed a "Deferred Deposit and Disclosure Agreement," which included an arbitration clause. *Id.* Buckeye customers brought a class action suit in Florida state court. *Id.* at 443. They alleged the finance charges in the agreement violated Florida lending and consumer protection laws. *Id.* Buckeye moved to compel arbitration, but the plaintiffs argued the contract as a whole, including the arbitration clause, was rendered invalid by the usurious finance charges. *Id.* The trial court denied the motion to compel, holding that the court rather than an arbitrator should

resolve the claim that a contract is void and illegal. *Id.* The Florida Supreme Court affirmed, but the United States Supreme Court reversed. *Id.* at 449. The United States Supreme Court held that "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.*

Like the plaintiffs in *Buckeye*, the beneficiaries in this case challenge the contract on the ground that an illegal clause renders the whole contract void. The beneficiaries challenge the arbitration clause only in the sense that they also challenge all parts of the agreement because the parts comprise the whole. But, unless a challenge is to the arbitration clause or arbitration agreement itself, as it was in *In re Poly-America*, the question of a contract's validity is for the arbitrator and not the courts. Accordingly, the beneficiaries' challenge to the validity of the agreement must be determined by the arbitrator, and we do not address it. *Buckeye*, 546 U.S. at 445-46; *In re Merrill Lynch*, 235 S.W.3d at 190 & n.12; *In re FirstMerit Bank*, 52 S.W.3d at 756, 758.

Because of our disposition of the case, we do not address Labatt's alternative argument that the FAA preempts Labor Code section 406.033(e) to the extent the state statute would prevent or restrict enforcement of the arbitration provision. *See In re Bison Bldg. Materials, Ltd.*, Nos. 01-07-00003-CV, 01-07-00029-CV, 2008 WL 2548568, at *8 (Tex. App.—Houston [1st Dist.] June 26, 2008, orig. proceeding) (mem. op.); *In re Border Steel, Inc.*, 229 S.W.3d 825, 831-32 (Tex. App.—El Paso 2007, orig. proceeding); *In re R & R Pers. Specialists of Tyler, Inc.*, 146 S.W.3d 699, 703-04 (Tex. App.—Tyler 2004, orig. proceeding).

IV. Conclusion

If Dancy had sued Labatt for his own injuries immediately prior to his death, he would have been compelled to arbitrate his claims pursuant to his agreement. His beneficiaries, therefore, must arbitrate as their right to maintain a wrongful death action is entirely derivative of Dancy's rights. The trial court clearly abused its discretion by refusing to compel arbitration.

We conditionally grant Labatt's petition for writ of mandamus. The trial court is directed to enter an order compelling arbitration of the beneficiaries' claims. We are confident the trial court will comply, and the writ will issue only if it fails to do so.

_____

Phil Johnson
Justice

OPINION DELIVERED: February 13, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0472

DAVID J. SACKS, P.C. D/B/A SACKS & ASSOCIATES, PETITIONER,

v.

CHARLES MCINTYRE HADEN, JR., INDIVIDUALLY, AND CHARLES MCINTYRE HADEN, JR. & COMPANY D/B/A HADEN & COMPANY, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

PER CURIAM

The question in this case is whether a written attorney's fee agreement that specifies only hourly fee rates may be modified by evidence of an oral capping agreement. We hold that it may not because parol evidence cannot modify a written agreement absent ambiguity. Accordingly, we reverse the court of appeals' judgment and remand the case to the court of appeals for consideration of other issues raised on appeal.

Haden & Company and its owner, Charles Haden, were involved in a lawsuit that was appealed to the federal circuit court of appeals. Haden hired David Sacks as his appellate counsel. The parties signed a written engagement letter prepared by Sacks. The letter stated the following:

> I am honored to represent you with regard to the above-referenced matter. At this point, you have requested that I assist with the writing of the Appellants' Brief and

> any reply. If oral arguments are granted by the Fifth Circuit, a decision will have to be made on who should argue the case.
>
> My normal rate is $300.00 per hour, but my rate for this particular matter will be $200.00 per hour. The other lawyers in my firm range from $150.00 to $200.00 per hour, and paralegals range from $50.00 to $100.00 per hour. You are responsible for all costs and expenses in the case as incurred. These expenses include, but are not limited to, copies; binding; fax transmissions; travel; lodging; parking; etc.
>
> Please submit a $10,000 retainer to be applied to fees and expenses.

Sacks's signature appears at the close of the letter. Below Sacks's signature is the statement, "Your signature below indicates acceptance of the terms of this fee agreement." The parties later agreed to change the amount of the retainer, and the face of the engagement letter shows that Haden signed the agreement, making that change by striking through the original $10,000 amount and superscripting the amount of $5,000 above the original typewritten numerals in handwriting, adding his initials beside that change. Haden forwarded a check for the $5,000 retainer with a letter, which stated:

> Pursuant to our telephone conversation, enclosed herewith is a check in the amount of five thousand dollars ($5,000) to be applied to fees and expenses in assisting with the writing of the Appellants' Brief and reply. Also enclosed is an executed copy of your August 4, 1997 letter indicating that I have acknowledged acceptance of the terms of your fee agreement on behalf of Haden & Company and myself, except that the initial retainer amount has been reduced to $5,000 per our agreement.

Sacks then filed a brief on behalf of Haden and his company seeking relief from the trial court's judgment. Sacks sent Haden an invoice for his legal services in the amount of $37,259.71, along with a letter stating that, "given the state of the record as we were eventually able to retrieve from the Court, putting together winning arguments took considerabl[y] more time than I anticipated after giving the cursory review of the initial documents." The letter also said, "We are committed

to excellence and will generally spend whatever time is necessary to develop a winning brief given the state of the record. Sometimes that gets a little more expensive than anticipated."

After Haden's opponent's responsive brief was received, Sacks prepared and filed Haden's reply brief. Sacks later sent Haden another invoice showing $40,304.71 in total charges for both the appellant's brief and the reply brief, crediting Haden $5,000 for the retainer, and requesting payment of the outstanding balance of $35,304.71. Haden paid Sacks only an additional $5,000.

Over the next two years, Sacks continued to request payment of the remaining amount but Haden contested the fees owed, stating that Sacks was only to review the brief already drafted by his trial counsel and maintaining that Haden had "made it clear" that $5,000 was all he could afford to spend. Sacks disputed Haden's assertions and filed this lawsuit.

The trial court rendered a partial summary judgment in favor of Sacks on his breach of contract claims, awarding Sacks the fees accrued preparing the briefs for Haden plus interest. The trial court also ruled that Sacks was entitled to attorney's fees incurred in pursuing the contract claim, but reserved ruling on the amount of reasonable attorney's fees. In addition, the trial court rendered a preliminary take-nothing summary judgment in favor of Sacks on Haden's counterclaims for unconscionable action, fraud, violations of the Deceptive Trade Practices Act, breach of fiduciary duty, and breach of contract.

Sacks next sought summary judgment on the reasonableness of the attorney's fees he incurred in seeking summary judgment on his breach of contract claim. The trial court then rendered a final judgment, which incorporated the earlier ruling on the contract claim, and awarded Sacks an additional $75,887.50 for attorney's fees incurred in pursuing his claim on the original fee

agreement, with contingent fees totaling $45,000 for appeals to an intermediate appellate court and for filing a petition for review in this Court.

Reviewing the trial court's grant of summary judgment, the court of appeals initially unanimously affirmed. On rehearing, the court reversed the trial court in a 2-1 decision, holding that a fact question existed with respect to whether there was a meeting of the minds between the parties when they entered into the fee agreement. 222 S.W.3d 580, 590–91 (Tex. App.—Houston [1st Dist.] 2007). Because the agreement did not explicitly state whether the parties had agreed to an open account or a flat, maximum fee, the court of appeals concluded that Haden's evidence of an oral agreement to cap the attorney's fees at $10,000 was admissible as a defense to Sacks's claim under the collateral and consistent exception to the parol evidence rule. *Id.* at 592–93.

The court of appeals raised meeting of the minds sua sponte, concluding that in the absence of a clear statement identifying the fee agreement as an open account, a question of fact was raised as to whether "the minds of the parties 'met' on the crucial obligation." *Id.* at 591. A meeting of the minds is necessary to form a binding contract. *E.g.*, *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986). However, the absence of a fixed total price for services does not indicate a failure of the parties to reach a meeting of the minds with regard to the essential terms of the contract. *See Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex. 1972); *Buxani v. Nussbaum*, 940 S.W.2d 350, 352–53 (Tex. App.—San Antonio 1997, no pet.). "Where the parties have done everything else necessary to make a binding agreement for the sale of goods or services, their failure to specify the price does not leave the contract so incomplete that it cannot be enforced. In such a case it will be presumed that a reasonable price was

intended." *Bendalin v. Delgado*, 406 S.W.2d 897, 900 (Tex. 1966); *see also Burnside Air Conditioning & Heating, Inc. v. T.S. Young Corp.*, 113 S.W.3d 889, 894–95 (Tex. App.—Dallas 2003, no pet.); *Buxani*, 940 S.W.2d at 353; *Pennington v. Gurkoff*, 899 S.W.2d 767, 770 (Tex. App.—Fort Worth 1995, writ denied). Though Sacks did not specify an exact total price for his services, the specified hourly rates confirm that the parties agreed that Sacks would charge and Haden would pay a reasonable price. The contract was explicit as to the services to be rendered and the manner that would be used in determining the price, and was therefore sufficiently clear to demonstrate a meeting of the minds between the parties as to all essential terms of the contract.

An unambiguous contract will be enforced as written, and parol evidence will not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports. *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 157 (Tex. 1951). Only where a contract is ambiguous may a court consider the parties' interpretation and "admit extraneous evidence to determine the true meaning of the instrument." *Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam). "Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered." *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). The plain language of the engagement letter demonstrates that Haden agreed to pay Sacks an hourly fee, and that no cap on fees was set. Haden argues that a fee agreement must specifically state that hourly fees will accrue without limit in order for the agreement to be unambiguous and enforceable. But the lack of such explicit language is irrelevant if the agreement can be reasonably interpreted only one way. *See*

id. at 591. We have never held that an open-ended hourly fee agreement will be enforced only if it expressly states there is no cap on fees, and we decline to do so now. If a contract is unambiguous, the parol evidence rule precludes consideration of evidence of prior or contemporaneous agreements unless an exception to the parol evidence rule applies. *See Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 31 (Tex. 1958).

Haden argues that the collateral and consistent exception applies. Under the exception, parol evidence can be used to demonstrate a prior or contemporaneous agreement that is both collateral to and consistent with a binding agreement, and that does not vary or contradict the agreement's express or implied terms or obligations. *Id.* But "[a] previous or simultaneous agreement to alter the fee agreed upon in a written contract is in conflict with the written contract and not merely collateral to it." *Lakeway Co. v. Leon Howard, Inc.*, 585 S.W.2d 660, 662 (Tex. 1979) (per curiam); *see also Rincones v. Windberg*, 705 S.W.2d 846, 849 (Tex. App.—Austin 1986, no writ) ("It is a fair conclusion, we think, that the parol evidence rule prohibits the admission of oral evidence which alters the payment terms of a written contract."). The evidence offered by Haden would alter the written fee agreement, and is therefore not admissible under the collateral and consistent exception to the parol evidence rule.

The court of appeals erred in holding that there was no meeting of the minds necessary to form a binding contract, and erred in holding that the parol evidence rule did not bar Haden's evidence of an oral agreement to cap fees. Accordingly, we grant Sacks's petition for review and, without hearing oral argument, *see* TEX. R. APP. P. 59.1, reverse the court of appeals' judgment and render judgment that the trial court's judgment with respect to the admissibility of parol evidence

be reinstated. We remand the case to the court of appeals for consideration of other issues raised on appeal.

OPINION DELIVERED: September 26, 2008

IN THE SUPREME COURT OF TEXAS

NO. 07-0484

IN THE MATTER OF ROLANDO CABALLERO

ON APPEAL FROM THE BOARD OF DISCIPLINARY APPEALS

Argued April 2, 2008

JUSTICE GREEN delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE BRISTER, and JUSTICE JOHNSON joined.

JUSTICE WILLETT filed a dissenting opinion, in which JUSTICE MEDINA joined.

The issue in this case is straightforward: under the compulsory discipline process set forth in the Texas Rules of Disciplinary Procedure, when an attorney's sentence has been fully probated, does the Board of Disciplinary Appeals (BODA) have discretion to disbar that attorney, or may it only suspend him for the length of the probation term? We hold that the rules give BODA discretion to disbar the attorney, and, therefore, affirm BODA's judgment of disbarment.

I

In 2004, Rolando Caballero was indicted in federal district court for wire fraud and mail fraud. After a plea agreement, he pled guilty to the mail fraud charge. The trial court placed him on supervised probation for five years and ordered him to pay restitution of $57,937.50 plus a

mandatory special assessment of $100.00. The prosecutor did not pursue the wire fraud charges further. The Chief Disciplinary Counsel of the Commission for Lawyer Discipline brought a compulsory disciplinary action against Caballero. Following a hearing on March 23, 2007, BODA entered a judgment disbarring Caballero. Caballero moved for a new trial but his motion was denied. Caballero then appealed to this Court. *See* TEX. R. DISCIPLINARY P. 7.11 (providing for direct appeal to the Supreme Court).[1]

II

The attorney disciplinary process is divided into two types of proceedings: the standard grievance procedure and the compulsory discipline procedure. *See In re Lock*, 54 S.W.3d 305, 306 (Tex. 2001). The standard grievance procedure applies in all instances of alleged attorney misconduct, except where an attorney is alleged to have committed an "intentional crime." *Id*. Under the standard grievance procedure, a grievance committee or district court determines violations and sanctions. *See* TEX. R. DISCIPLINARY P. 2.13–.18, 3.09–.10; *In re Mercier*, 242 S.W.3d 46, 47 (Tex. 2007) (per curiam). The reviewing body may disbar the attorney under the standard grievance process, but also has the ability to assess "a range of lesser sanctions, including various types of suspension and reprimand." *Lock*, 54 S.W.3d at 307.

The compulsory discipline procedure applies "[w]hen an attorney licensed to practice law in Texas has been convicted of an Intentional Crime or has been placed on probation for an Intentional Crime." TEX. R. DISCIPLINARY P. 8.01. An intentional crime is "(1) any Serious

[1] *See* TEX. R. DISCIPLINARY P. 7.11, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. A-1. All references to disciplinary rules in this opinion are to these rules, unless otherwise indicated.

Crime[2] that requires proof of knowledge or intent as an essential element or (2) any crime involving misapplication of money or other property held as a fiduciary." *Id*. at 1.06(T). The Chief Disciplinary Counsel commences a suit under the compulsory process by filing a petition with BODA. *Id*. at 8.01, .03. "The petition must allege the adjudication of guilt (or probation without an adjudication of guilt) of an Intentional Crime; allege that the Respondent is the same person as the party adjudicated guilty or who received probation . . . ; and seek the appropriate discipline." *Id*. at 8.03. In this regard, BODA's function is rather limited. BODA merely determines whether there has been an adjudication of guilt of an intentional crime and ensures that the subject attorney was actually adjudicated guilty. *Id*. at 8.03–.04. BODA then determines the appropriate discipline. *See id*. at 8.05–.06.

In this case, the compulsory discipline procedure applies because it is undisputed that Caballero's crime is an intentional crime. The issue, then, is to what extent Texas Rules of Disciplinary Procedure 8.05 and 8.06 give BODA discretion to determine Caballero's discipline, given that his sentence was fully probated.[3] Rule 8.05, entitled "Disbarment," states in relevant part:

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[2] "'Serious crime' means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes." TEX. R. DISCIPLINARY P. 1.06(Z).

[3] The Commission for Lawyer Discipline argued in its brief that the special assessment and restitution part of Caballero's sentence renders the sentence not "fully probated" for purposes of Rule 8.06. However, at oral argument, the Commission conceded that the sentence was fully probated for purposes of determining the discretionary discipline issue. We also note that BODA's final judgment made a finding of fact that Caballero's "criminal sentence was fully probated." *In re Caballero*, Judgment of Disbarment, Case No. 38821 (Tex. Mar. 28, 2007). Regardless, because we hold that Rule 8.05 gives BODA discretion to disbar or suspend an attorney whose sentence was fully probated, it is irrelevant whether Caballero's sentence was fully probated. BODA has the power to disbar an attorney whether his sentence was fully probated or not. Whether a sentence was fully probated would be an issue only if BODA decided to suspend an attorney's license under Rule 8.06.

> When an attorney has been convicted of an Intentional Crime, and that conviction has become final, or the attorney has accepted probation with or without an adjudication of guilt for an Intentional Crime, the attorney shall be disbarred unless the Board of Disciplinary Appeals, under Rule 8.06, suspends his or her license to practice law.

Id. at 8.05.[4] Rule 8.06, entitled "Suspension," states in relevant part:

> If an attorney's sentence upon conviction of a Serious Crime is fully probated, or if an attorney receives probation through deferred adjudication in connection with a Serious Crime, the attorney's license to practice law shall be suspended during the term of probation. If an attorney is suspended during the term of probation, the suspension shall be conditioned upon the attorney's satisfactorily completing the terms of probation. If the probation is revoked, the attorney shall be disbarred.

Id. at 8.06.[5] Caballero argues that Rule 8.06 mandates suspension of the attorney's license in the case of a fully-probated sentence. The Commission for Lawyer Discipline, however, argues that Rule 8.05 grants BODA discretion to either disbar an attorney, as provided by Rule 8.05, or to suspend the attorney's license for the term of probation as provided under Rule 8.06.

III

In resolving the meaning of these rules, we apply statutory construction principles. *See O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 399 (Tex. 1988) (instructing that "our disciplinary rules should be treated like statutes"). Statutory construction is a legal question, which we review de novo. *State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327

[4] "'Intentional Crime' means (1) any Serious Crime that requires proof of knowledge or intent as an essential element or (2) any crime involving misapplication of money or other property held as a fiduciary." TEX. R. DISCIPLINARY P. 1.06(T).

[5] "'Serious crime' means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes." TEX. R. DISCIPLINARY P. 1.06(Z).

(Tex. 2002). In doing this, we "give effect to all [a statute's] words and, if possible, do not treat any statutory language as mere surplusage." *State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006).

Rule 8.05 states that an attorney convicted of an intentional crime, or an attorney put on probation for an intentional crime, "*shall* be disbarred *unless* [BODA], under Rule 8.06, suspends his or her license to practice law." TEX. R. DISCIPLINARY P. 8.05 (emphasis added). Thus, the starting point is disbarment because BODA is instructed that it "shall" disbar. *Id.*; *see also* TEX. GOV'T CODE § 311.016(2) ("'Shall' imposes a duty."). But the "unless" clause referencing the Rule 8.06 suspension procedure gives BODA some discretion to suspend the attorney's license. TEX. R. DISCIPLINARY P. 8.05. Rule 8.06 then establishes the guidelines for that suspension. First, Rule 8.06 states a condition to its use: "If an attorney's sentence upon conviction of a Serious Crime is fully probated, or if an attorney receives probation through deferred adjudication in connection with a Serious Crime . . . ." *Id*. at 8.06. Second, Rule 8.06 dictates the length of the suspension: "[T]he attorney's license to practice law shall be suspended during the term of probation." *Id.*; *see also In re Ament*, 890 S.W.2d 39, 40 (Tex. 1994) (per curiam). Thus, BODA has discretion under Rule 8.05 to disbar the attorney or to suspend the attorney's license under Rule 8.06. But if BODA uses Rule 8.06, it must comply with Rule 8.06's conditions. *See Ament*, 890 S.W.2d at 40 (holding that the probationary period is "the ceiling, above which suspension may not climb"). We do not accept Caballero's argument that Rules 8.05 and 8.06 mandate suspension in the case of a fully-probated sentence because construing the rules in this manner would not give effect to the second half of Rule 8.05's language, which gives BODA discretion to use Rule 8.06. Rather, Caballero's proposed

construction would render it "mere surplusage." *Shumake*, 199 S.W.3d at 287. The rules must be read together.[6]

The prior disciplinary rules also gave BODA this discretion, albeit in a different manner.[7] The prior disbarment rule mandated that BODA use the suspension rule if it applied to the case—that is, if the attorney received a fully-probated sentence. *See* State Bar Rules art. 10, § 26(F) (repealed 1992) ("When an attorney has been convicted of a serious crime . . . the attorney shall be disbarred, *except as provided* in [the suspension rule].") (emphasis added). In the prior disbarment rule, there was no discretionary language allowing BODA to decide whether to utilize the suspension rule in the first place. *See id*. The discretion came under the suspension rule, which provided that BODA did have the discretion to disbar the attorney even if the suspension rule applied. *See* State Bar Rules art. 10, § 26(G) (repealed 1992) (providing that an attorney "shall be suspended during the term of the probation . . . [but BODA] may impose . . . such further disciplinary sanction as may be warranted, including disbarment"). Under these prior rules, BODA could exercise discretion to disbar an attorney with a fully-probated sentence under the suspension rule, but not the disbarment rule. The revised rules flipped this discretion, and now the 8.05 disbarment rule gives BODA

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[6] BODA has construed Rules 8.05 and 8.06 in a similar manner. *See, e.g.*, *In re Mercier*, BODA Case No. 38020 (Nov. 3, 2006); *In re Filippov*, BODA Case No. 30611, *aff'd*, 04-0151 (Tex. June 18, 2004). We have affirmed, without opinion, BODA decisions to disbar an attorney who received a fully-probated sentence. *See, e.g.*, *Filippov*, BODA Case No. 30611; *In re Goldberg*, BODA Case No. 25757, *aff'd*, 02-0853 (Tex. Mar. 3, 2003); *In re Raynor*, BODA Case No. 25458, *aff'd*, 02-0435 (Tex. Sept. 26, 2002); *In re Hartley*, BODA Case No. 06052, *aff'd*, 95-0511 (Tex. Oct. 27, 1995); *see also* TEX. GOV'T CODE § 311.023 ("In construing a statute . . . a court may consider . . . [an] administrative construction of the statute."); *In re State Bar*, 113 S.W.3d 730, 732 (Tex. 2001) (noting that we have delegated portions of the power to regulate the practice of law to BODA).

[7] The prior disciplinary rules were previously codified in Article X of the State Bar rules. In 1991, those rules were repealed and replaced by the Texas Rules of Disciplinary Procedure. *See* State Bar Rules art. 10 (repealed 1992); *see also* TEX. R. DISCIPLINARY P. 1.01–15.13, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. A-1.

discretion to decide whether to utilize the 8.06 suspension rule in the first place. *See* TEX. R. DISCIPLINARY P. 8.05 (providing that an attorney "shall be disbarred *unless the Board of Disciplinary Appeals*, under Rule 8.06, suspends his or her license to practice law") (emphasis added). But, under the current rules, once BODA decides to utilize the suspension rule, its discretion to disbar an attorney with a fully-probated sentence is removed. *See* TEX. R. DISCIPLINARY P. 8.06; *Ament*, 890 S.W.3d at 41 (holding that, under Rule 8.06, the suspension period must equal the probation term and that the discretion to impose additional punishment under Rule 8.06 has been removed).

Our construction here is also consistent with other portions of the rules. *See Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (instructing that "we must always consider the statute as a whole rather than its isolated provisions" and "[w]e should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone"). Rule 11.01, which addresses when an individual can apply for reinstatement after disbarment, describes an attorney who has been "disbarred or resigned in lieu of discipline by reason of conviction of *or having been placed on probation without an adjudication of guilt* for an Intentional Crime or a Serious Crime." TEX. R. DISCIPLINARY P. 11.01 (emphasis added). This language envisions disbarment following a probated sentence. Also, Rule 8.01 instructs that "[t]he completion or termination of any term of incarceration, *probation*, parole, or any similar court ordered supervised period does not bar [compulsory discipline procedures]." TEX. R. DISCIPLINARY P. 8.01 (emphasis added). This indicates that compulsory discipline procedures can be initiated even after the probation term has ended. *See id*. If Rules 8.05 and 8.06 did not permit

punishment other than suspension during the term of the probation, then Rule 8.01 could not allow the initiation of proceedings after this term was already completed.

Caballero relies on five cases to argue that BODA has no discretion to disbar him. *See Lock*, 54 S.W.3d 305; *In re Birdwell*, 20 S.W.3d 685 (Tex. 2000); *In re Humphreys*, 880 S.W.2d 402 (Tex. 1994); *Sanchez v. Bd. of Disciplinary Appeals*, 877 S.W.2d 751 (Tex. 1994) (per curiam); *Ament*, 890 S.W.2d 39. None of those cases address the issue before the Court today. We have not previously been called upon to resolve the interplay between Rule 8.05 and 8.06 and whether BODA has discretion to disbar or suspend in the case of a fully-probated sentence. *Lock*, *Birdwell*, and *Humphreys* all involved whether a particular crime was a crime of moral turpitude for purposes of using the compulsory discipline procedure in the first place. *See Lock*, 54 S.W.3d at 311 (holding that possession of a controlled substance is not a crime of moral turpitude per se); *Birdwell*, 20 S.W.3d at 686 (holding that conspiracy to defraud the IRS is a crime of moral turpitude); *Humphreys*, 880 S.W.2d at 408 (holding that tax evasion is a crime of moral turpitude). Rule 8.06 was not at issue in those cases. *See Lock*, 54 S.W.3d at 312 (concluding that the standard grievance procedure should apply); *Birdwell*, 20 S.W.3d at 686 (noting that the attorney was "ineligible for suspension under [Rule] 8.06"); *Humphreys*, 880 S.W.2d at 403 n.1 (noting that "Humphreys's prison sentence precludes Rule 8.06 suspension"). In *Sanchez*, the disbarred attorney made a constitutional challenge to the Rule 8.05/8.06 scheme in light of the fact that BODA could disbar attorneys in some instances while only suspending them in others. 877 S.W.2d at 752. Sanchez argued that the scheme was harsh and unconstitutional because it mandated disbarment in cases in which a sentence was not fully probated. *Id*. *Sanchez* did not involve a fully-probated sentence and

never touched on the extent of BODA's discretion in that instance. *See id.* at 751–52. *Ament* dealt with the length of a suspension under Rule 8.06, not whether suspension was mandated. *See* 890 S.W.2d at 40–41. *Ament* works to limit BODA's discretion when suspension under Rule 8.06 is imposed. *Id*. at 41. Once BODA decides to suspend an attorney's license under Rule 8.06, it can only impose a suspension for the length of the probation period.[8] *Id*.

Thus, both the language of the disciplinary rules and our caselaw confirm that BODA has discretion to disbar or suspend in the case of a fully-probated sentence. If BODA decides to suspend an attorney's license, the suspension period must equal the length of the probation period. *Id*.

IV

Caballero was convicted of an intentional crime and received a fully-probated sentence. BODA, therefore, had discretion to either disbar Caballero or suspend his license for the term of the probation. Further, although not briefed in this case, we find nothing in the record to indicate an abuse of discretion on BODA's part in disbarring Caballero. *See In re Filippov*, BODA Case No. 30611, at 11–12 (describing factors BODA considers when determining whether to disbar an attorney or suspend his license when the attorney's sentence is fully probated). Because we hold that BODA had discretion to disbar Caballero, and that it did not abuse that discretion, we affirm the judgment of disbarment.

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[8] The dissent claims that our holding, in light of *Ament*, "leads to a strange gap in discipline." ___ S.W.3d at ___. But while the rules may provide BODA with the option of imposing two varying degrees of discipline, BODA does not have unfettered discretion to impose discipline disproportionate to the attorney's acts. *See* TEX. R. DISCIPLINARY P. 7.11 ("[a BODA] case shall be reviewed under the substantial evidence rule"); TEX. GOV'T CODE § 2001.174(2)(E), (F) (directing that under the substantial evidence rule, a court shall reverse on a finding that a decision is "not reasonably supported by substantial evidence" or "arbitrary or capricious or characterized by abuse of discretion").

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Paul W. Green
Justice

OPINION DELIVERED: December 19, 2008

IN THE SUPREME COURT OF TEXAS

NO. 07-0484

IN THE MATTER OF ROLANDO CABALLERO

ON APPEAL FROM THE BOARD OF DISCIPLINARY APPEALS

Argued April 2, 2008

JUSTICE WILLETT, joined by JUSTICE MEDINA, dissenting.

Like the Court, I would attempt to harmonize Rules 8.05 and 8.06 of the Rules of Disciplinary Procedure and give meaning to each.[1] However, the Court sees discretion where I see only mandatory options for discipline. Because I believe the Court's attempt to harmonize the relevant rules and rulings strikes a discordant note, I respectfully dissent.

The parties do not dispute that the compulsory discipline rules apply. Rule 8.05, titled "Disbarment," provides that the Board of Disciplinary Appeals (BODA) "shall" disbar an attorney who is convicted of, or has accepted probation for, an Intentional Crime. The use of "shall" makes the Rule mandatory and "imposes a duty."[2]

[1] *See Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 870-71 (Tex. 2007) (per curiam); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001).

[2] TEX. GOV'T CODE § 311.016(2); *In re Gen. Elec. Co.*, ___S.W.3d___,___ (Tex. 2008).

The only exception mentioned in Rule 8.05 is Rule 8.06, titled "Suspension." Rule 8.05 states that the attorney "shall be disbarred unless" BODA, "under Rule 8.06, suspends his or her license to practice law." As we observed in *Sanchez v. Board of Disciplinary Appeals*, "Rule 8.05 mandates disbarment for a final conviction . . . except when Rule 8.06 applies."[3] Rule 8.06 sets out the exception by providing that if the attorney's sentence is "*fully* probated" (emphasis added), BODA *shall* suspend the attorney "during the term of probation."[4] We have so observed: BODA "is required to disbar an attorney" under Rule 8.05 "who is convicted of an intentional crime and whose sentence is not *fully* probated."[5] Like Rule 8.05, Rule 8.06 is mandatory by its terms.

I would reconcile the rules, and honor the mandatory "shall" used in both, by holding that when mandatory discipline is warranted, Rule 8.06 applies if the sentence is fully probated, and Rule 8.05 applies if the attorney's sentence is less-than-fully probated. Which is to say, BODA must disbar under Rule 8.05 if the attorney is sentenced to jail or to a combination of jail and probation, and BODA must suspend under Rule 8.06 (up to the length of the probated sentence) if the sentence is *fully* probated. Because Caballero's sentence was fully probated, I would hold that BODA was only authorized to suspend his license.

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[3] 877 S.W.2d 751, 751 (Tex. 1994).

[4] Rule 8.06 also applies where the attorney receives "probation through deferred adjudication." Deferred adjudication is imposed in lieu of further prosecution to a conviction that can be punished by a term of incarceration, and hence is always "fully probated" in the sense that the defendant receives no jail time so long as he complies with the terms of the deferred adjudication. *See, e.g.*, TEX. CRIM. PROC. CODE art. 42.12, § 5 (providing for community supervision in lieu of further proceedings to adjudicate guilt under deferred adjudication procedure).

[5] *In re Ament*, 890 S.W.2d 39, 41 n.2 (Tex. 1994) (emphasis added).

The plain language of the rules supports this result, and so does our prior precedent. In *Sanchez*, the Court held that Rule 8.05 mandates disbarment "except when Rule 8.06 applies," and it did "not apply to Sanchez because his sentence, a fine of $500, was not probated."[6] Later that same year, in *In re Ament*, we noted that the relevant disciplinary rules previously gave discretion to disbar an attorney who received a fully probated sentence, but under Rule 8.06, "[t]he provision providing for discretionary, additional punishment *is omitted*."[7] We described this omission as the "one, crucial" change in the rule.[8] Today the Court re-inserts that omitted discretion.

Seven years after *Sanchez*, we observed in *In re Lock* that the mandatory language of the two rules should be applied according to the nature of the sentence without regards for details that would ordinarily inform a discretionary review: "An attorney guilty of an intentional crime must be either suspended or disbarred—*depending solely on whether the attorney's criminal sentence was probated*—without regard for any collateral matters, and without any consideration or inquiry into the facts of the underlying criminal case."[9]

In that case we seemed to reject the view that BODA has discretion to either disbar or suspend a lawyer regardless of whether the sentence was fully probated. The Court today would allow language in Rule 8.05 concerning disbarment to confer discretion over suspension when the rule actually governing suspension leaves no room for such discretion. The more natural reading is

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[6] 877 S.W.2d at 751-52.

[7] 890 S.W.2d at 40-41 (emphasis in original).

[8] *Id.* at 41.

[9] 54 S.W.3d 305, 306-07 (Tex. 2001) (emphasis added).

that Rule 8.05 requires disbarment "unless" Rule 8.06 applies, at which point suspension is required. This construction comports with our analysis in *Sanchez*, *Ament*, and *Lock* and harmonizes the plain language of both rules.[10]

I understand the Court's desire to grant BODA flexibility, but my reading of the rules and our pertinent precedent compels me to respectfully dissent.

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Don R. Willett
Justice

OPINION DELIVERED: December 19, 2008

[10] The Court's decision also leads to a strange gap in discipline. *Ament* held that the suspension period for a fully probated sentence under Rule 8.06 is limited to the period of probation. 890 S.W.2d at 41. As the Court expresses no interest in disturbing the holding of *Ament*, I take it to hold today that BODA can now disbar an attorney receiving a short, fully probated sentence, such as the five-minute probated sentence at issue in *Ament*, or else impose a suspension limited to the term of probation. Meanwhile, a suspension longer than the term of probation, but nevertheless short of disbarment, is disallowed. I find this result strained and unnecessary under the language of the relevant rules.

IN THE SUPREME COURT OF TEXAS

NO. 07-0490

MANN FRANKFORT STEIN & LIPP ADVISORS, INC., MFSL GP, L.L.C., AND MFSL EMPLOYEE INVESTMENTS, LTD., PETITIONERS,

V.

BRENDAN J. FIELDING, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued November 13, 2008

JUSTICE JOHNSON delivered the opinion of the Court.

JUSTICE HECHT filed a concurring opinion.

In this case we determine whether a covenant not to compete in an at-will employment agreement is enforceable when the employee expressly promises not to disclose confidential information, but the employer makes no express return promise to provide confidential information. We hold that if the nature of the employment for which the employee is hired will reasonably require the employer to provide confidential information to the employee for the employee to accomplish the contemplated job duties, then the employer impliedly promises to provide confidential information and the covenant is enforceable so long as the other requirements of the Covenant Not to Compete Act are satisfied.

I. Background

Mann Frankfort Stein & Lipp Advisors, Inc., MFSL GP, L.L.C., and MFSL Employee Investments, Ltd. (collectively "Mann Frankfort") is an accounting and consulting firm. It hired Brendan Fielding, a certified public accountant, on January 6, 1992. Fielding worked as a staff accountant in Mann Frankfort's Tax Department. He resigned in 1995 but was rehired later that year as a senior manager in the Tax Department. As a condition of Fielding's re-employment in 1995, Mann Frankfort required him to sign one of its standard at-will employment agreements. The agreement contained the following "client purchase provision":

> 10. If at any time within one (1) year after the termination or expiration hereof, Employee directly or indirectly performs accounting services for remuneration for any party who is a client of Employer during the term of this Agreement, Employee shall immediately purchase from Employer and Employer shall sell to employee that portion of Employer's business associated with each such client.

The agreement listed and defined the types of "business" Fielding would have to purchase from Mann Frankfort and set the purchase price. By executing the agreement, Fielding also promised he would "not disclose or use at any time . . . any secret or confidential information or knowledge obtained by [Fielding] while employed . . . ." In the course of his employment, Fielding also signed a limited partnership agreement that included a similar client purchase provision.

On January 19, 2004, Fielding again resigned from Mann Frankfort. Soon after he resigned, Fielding opened an accounting firm with David Hardy. Fielding[1] then filed a declaratory judgment action seeking to have the client purchase provisions in his employment and limited partnership

[1] Hardy and Darlene Plumly, both former Mann Frankfort employees, were parties to the trial court proceedings. They are not parties to this appeal.

agreements declared unenforceable pursuant to Texas Business and Commerce Code section 15.50(a), which states in part:

> [A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

Mann Frankfort answered and filed a counterclaim, asserting, among other matters, a breach of contract claim. Fielding filed a motion for partial summary judgment on the grounds that the client purchase provisions in his employment and limited partnership agreements were unenforceable covenants not to compete. Mann Frankfort filed a motion for partial summary judgment on the grounds that Fielding had breached the agreements, the client purchase provisions were not restrictive covenants, and even if they were, the provisions were nevertheless enforceable. The trial court granted Fielding's motion and denied that of Mann Frankfort.

After prevailing in the declaratory judgment action, Fielding sought attorney's fees under both the Uniform Declaratory Judgments Act (UDJA), *see* TEX. CIV. PRAC. & REM. CODE § 37.009, and under his employment agreement. His employment agreement provided that the "prevailing party" in a suit between Mann Frankfort and Fielding was entitled to attorney's fees. The trial court refused to award Fielding attorney's fees under the UDJA. Fielding and Mann Frankfort filed competing motions for partial summary judgment on Fielding's entitlement to attorney's fees under his employment agreement. The trial court granted Mann Frankfort's motion and denied Fielding's. The court determined that Fielding's claim for attorney's fees under his employment agreement was preempted by Business and Commerce Code section 15.52, which states:

> The criteria for enforceability of a covenant not to compete provided by Section 15.50 of this code and the procedures and remedies in an action to enforce a covenant not to compete provided by Section 15.51 of this code are exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise.

Fielding appealed the trial court's denial of his motion for attorney's fees. 263 S.W.3d 232, 238-39. Mann Frankfort cross-appealed, arguing that the client purchase provisions were enforceable. *Id.* at 239. The court of appeals held the client purchase provisions were unenforceable covenants not to compete. *Id.* at 245-50. The appeals court held that the client purchase agreement was not ancillary to or part of an "otherwise enforceable agreement" as required by the Covenant Not to Compete Act (the Act). *Id.* at 247; TEX. BUS. & COM. CODE § 15.50(a). The court held that Mann Frankfort failed to provide any consideration because it made no promise to give Fielding access to confidential information. 263 S.W.3d at 247 (citing *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006), and *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642 (Tex. 1994)). The court of appeals reasoned that because Fielding never acknowledged that he had received or would receive confidential information and the employment agreement contained no representations that Fielding was to receive any consideration for agreeing to the client purchase or non-disclosure provisions, there was no implied promise on the part of Mann Frankfort to disclose confidential information. *Id.*

As to Fielding's entitlement to attorney's fees, the court of appeals determined that the trial court did not abuse its discretion in denying attorney's fees under the UDJA and did not reach the issue of whether the Act preempts an award of attorney's fees under the UDJA. *Id.* at 255 n.8. The

court did, however, hold that Fielding was entitled to attorney's fees under his employment agreement. *Id.* at 259. It held (1) the Act did not preempt Fielding's claim because the Act's preemption provision limits only actions to *enforce* covenants not to compete, not actions seeking to *prevent* enforcement, and (2) the unenforceable client purchase provision was severable from the remainder of the agreement. *Id.* at 256, 259; *see also* TEX. BUS. & COM. CODE § 15.52.

Here, Mann Frankfort contends (1) the client purchase provision in Fielding's employment agreement is enforceable because Mann Frankfort impliedly promised to provide confidential information; and (2) Fielding was not entitled to attorney's fees under his employment agreement because Business and Commerce Code section 15.52 preempts his claim and the attorney's fees provision in Fielding's employment agreement was not severable from the remainder of the agreement.[2] We agree the client purchase provision is an enforceable covenant not to compete because (1) in a situation such as this—where the nature of the contemplated employment will reasonably require the employer to furnish the employee with confidential information—the employer impliedly promises to provide the information; and (2) the summary judgment evidence shows that Mann Frankfort provided such information to Fielding. Because of our conclusion, we do not reach the issue of whether Fielding is entitled to attorney's fees under his employment agreement.

[2] The parties have narrowed the issues in this appeal: (1) Mann Frankfort does not challenge the court of appeals' holding that the limited partnership agreement contains an unenforceable covenant not to compete; (2) Fielding does not challenge the reasonableness of the restrictions in the client purchase agreement; (3) Fielding does not challenge the court of appeals' determination that he was not entitled to attorney's fees under the UDJA, thus Mann Frankfort does not urge that an award of attorney's fees under the UDJA is preempted by the Act; and (4) Mann Frankfort no longer asserts its entitlement to attorney's fees.

II. Standard of Review

We review a summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We review the evidence presented in the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 208 (Tex. 2002). The party moving for traditional summary judgment bears the burden of showing no genuine issue of material fact exists and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *see also Knott*, 128 S.W.3d at 216. When both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary judgment evidence presented by both sides and determine all questions presented. *Comm'rs Court of Titus County v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997). In such a situation, we render the judgment as the trial court should have rendered. *Id.*

III. Enforceability of the Covenant Not to Compete

The relevant part of the Act provides:

> [A] covenant not to compete is enforceable if it is *ancillary to or part of an otherwise enforceable agreement at the time the agreement is made* to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

TEX. BUS. & COM. CODE § 15.50(a) (emphasis added).

The enforceability of a covenant not to compete is a question of law. *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644 (Tex. 1994). The parties disagree whether the covenant not to

compete in this case was "ancillary to or part of an otherwise enforceable agreement at the time the agreement [was] made." We addressed these requirements in *Light* and *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006).

A. *Light* and *Sheshunoff*

Two initial inquiries must be made when determining whether an enforceable covenant not to compete has been created under section 15.50: (1) is there an "otherwise enforceable agreement," and (2) was the covenant not to compete "ancillary to or part of" that agreement at the time the otherwise enforceable agreement was made. *Light*, 883 S.W.2d at 644. We held in *Light* that "'otherwise enforceable agreements' can emanate from at-will employment so long as the consideration for any promise is not illusory." *Id.* at 645. In footnote six of the opinion, we explained that a unilateral contract could be formed if one promise is illusory and the return promise is non-illusory. *Id.* at 645 n.6. We concluded, however, that a unilateral contract would not satisfy section 15.50:

> If only one promise is illusory, a unilateral contract can still be formed; the non-illusory promise can serve as an offer, which the promisor who made the illusory promise can accept by performance. . . . But such unilateral contract, since it could be accepted only by future performance, could not support a covenant not to compete inasmuch as it was not an "otherwise enforceable agreement at the time the agreement is made" as required by § 15.50.

Id. Thus, we said that although an "otherwise enforceable agreement" could be created in the form of a unilateral contract, it could not support a covenant not to compete under the Act because the unilateral contract would not have been formed "at the time the agreement is made." *Id.*

As to the second inquiry—whether the covenant was "ancillary to or part of" the otherwise enforceable agreement at the time the otherwise enforceable agreement was made—we have derived two requirements for making the determination. *Id.* at 647; *Sheshunoff*, 209 S.W.3d at 648-49. First, the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing. *Sheshunoff*, 209 S.W.3d at 648-49; *Light*, 883 S.W.3d at 647. Second, the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement. *Sheshunoff*, 209 S.W.3d at 649; *Light*, 883 S.W.3d at 647. Unless both elements of the test are satisfied, the covenant is a naked restraint of trade and unenforceable. *Light*, 883 S.W.2d at 647.

In *Sheshunoff*, an employee signed an at-will employment agreement containing a covenant not to compete. 209 S.W.3d at 646. In the agreement, the employer promised to provide the employee access to confidential information and the employee promised not to disclose such information. *Id.* at 647. The employer then gave the employee access to confidential information throughout his employment. *Id.* We followed and confirmed our analysis in *Light*, with the exception of *Light*'s footnote six. *Id.* at 650-51 ("[W]e disagree with footnote six insofar as it precludes a unilateral contract made enforceable by performance from ever complying with the Act because it was not enforceable at the time it was made."). We concluded that under section 15.50, a covenant not to compete is not invalid simply because the otherwise enforceable agreement to which the covenant is ancillary is not enforceable at the time the agreement is made. *Id.* at 651. Rather, the covenant not to compete need only be "ancillary to or part of" the agreement at the time the agreement is made. *Id.* Thus, the requirement that there be an "otherwise enforceable

agreement" can be satisfied by the employer actually performing its illusory promise to provide an employee with confidential information. *Id.* at 655.

B. Implied Promise

This case differs from *Sheshunoff* because Mann Frankfort made no express promise to provide Fielding access to confidential information, although Fielding expressly promised not to disclose any confidential information. The court of appeals held, based on this lack of an express promise, that there was no "otherwise enforceable agreement." 263 S.W.3d at 247. Mann Frankfort claims it impliedly promised to provide Fielding confidential information during his employment. The court of appeals rejected this argument and held that in order for a promise to be implied in an "otherwise enforceable agreement," either (1) the employee must acknowledge that he or she had received or would receive confidential information, or (2) the agreement must contain a representation that the employee was receiving consideration in return for his or her promise. *Id.* at 247. We disagree. When the nature of the work the employee is hired to perform requires confidential information to be provided for the work to be performed by the employee, the employer impliedly promises confidential information will be provided.

The difference between contracts formed through express promises and those formed through implied promises is the means by which the contracts are formed. *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex. 1972) (stating that the terms of an express contract are recited by the parties, while an implied contract arises from the parties' acts and conduct); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a (1981) ("The distinction . . . lies merely in the mode of manifesting assent."). Regardless of whether a contract

is based on express or implied promises, mutual assent must be present. *Haws*, 480 S.W.2d at 609. In the case of an implied contract, however, mutual assent is inferred from the circumstances. *Id.* As one treatise states the rule: "[t]erms are implied not because they are just or reasonable, but rather for the reason that the parties must have intended them and have only failed to express them . . . or because they are necessary to give business efficacy to the contract as written." 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 5.27 (rev. ed. 1995); *see also* 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 31:7 (4th ed. 1999) ("[T]erms are to be implied in contract, not because they are reasonable, but because they are necessarily involved in the contractual relationship, such that the parties must have intended them and must have failed to express them only because of sheer inadvertence or because they are too obvious to need expression.").

Furthermore, if one party makes an express promise that cannot reasonably be performed absent some type of performance by the other party, courts may imply a return promise so the dealings of the parties can be construed to mean something rather than nothing at all. *Portland Gasoline Co. v. Superior Mktg. Co.*, 243 S.W.2d 823, 824-25 (Tex. 1951), *overruled on other grounds*, *N. Natural Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 608 (Tex. 1998). In *Portland*, we explained why mutual promises may be implied in this type of situation:

> Mutuality may result from an implied obligation on the part of one of the parties. Though a contract on its face and by its express terms may appear to be obligatory on one party only, if it is manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such a corresponding and correlative obligation will be implied, and the contract held to be

> mutual,—as where the act to be done by the party expressly binding himself can only be done upon a corresponding act being done or allowed by the other party.

Id. at 825. In other words, when it is clear that performance expressly promised by one party is such that it cannot be accomplished until a second party has first performed, the law will deem the second party to have impliedly promised to perform the necessary action.

C. Application

The circumstances surrounding Fielding's employment indicate that his employment necessarily involved the provision of confidential information by Mann Frankfort before Fielding could perform the work he was hired to do. As a certified public accountant, Fielding was required to use the tax and financial information of Mann Frankfort's clients to complete their tax returns. In order for Fielding to perform his duties, Mann Frankfort gave him access to its client database, which contains clients' names, billing information, and pertinent tax and financial information. This was confidential information which Mann Frankfort was interested in keeping confidential. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 684 (Tex. 1990) (stating that client lists are confidential information that may be protected by an agreement not to compete).

Mann Frankfort's summary judgment evidence shows it provided Fielding with confidential information either on his first day of work in 1995 or shortly after. In his affidavit, Fielding claims he was not provided confidential information on his first day of work, but he does not dispute Mann Frankfort's assertion that by his second day he was working on client files. Fielding testified in his deposition that his supervisors provided him with confidential tax and financial information that had been given to Mann Frankfort by its clients. Moreover, prior to being rehired in 1995, Fielding

worked for three years at Mann Frankfort and was given confidential information during that time. Thus, when Mann Frankfort rehired Fielding in 1995, it was clear that by the nature of his duties as a senior manager in the firm's Tax Department, Fielding would be required to have and use information confidential to the firm.

Additionally, Fielding could not have acted on his promise to refrain from disclosing confidential information unless Mann Frankfort provided him with it. *See Portland*, 243 S.W.2d at 825. Fielding expressly promised in his employment agreement to "not disclose or use at any time . . . any secret or confidential information or knowledge obtained by [Fielding] while employed . . . ." This promise, though, meant nothing without a correlative commitment by Mann Frankfort. *See id.* Neither party disputes that performing the function of a certified public accountant requires accessing and using confidential information and that Mann Frankfort actually provided Fielding with confidential information during his first employment with the firm. The summary judgment evidence shows conclusively that Mann Frankfort impliedly promised to supply confidential information to Fielding when the parties entered into the 1995 agreement.[3]

Mann Frankfort's implied promise to provide Fielding with confidential information when he was employed in 1995 was illusory because Mann Frankfort had the option of terminating Fielding's employment prior to giving him access to confidential information. *See Light*, 883 S.W.2d at 645. Nevertheless, the parties still formed an "otherwise enforceable agreement" as

[3] Fielding argues that Richard Stein, Mann Frankfort's corporate representative, admitted Mann Frankfort made no enforceable promise to provide its employees confidential information. Stein's deposition testimony that Fielding refers to, however, concerned Plumly's employment agreement. Additionally, Stein testified that, "as part of her employment, we did agree to give her confidential information."

contemplated by section 15.50 when Mann Frankfort performed its illusory promise by actually providing confidential information. *See Sheshunoff*, 209 S.W.3d at 651 ("[A] unilateral contract formed when the employer performs a promise that was illusory when made can satisfy the requirements of the Act.").

As was noted, for a covenant not to compete to be "ancillary to or part of" an otherwise enforceable agreement under section 15.50, (1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing, and (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement. *Id.* at 648-49; *Light*, 883 S.W.2d at 647. Here, Mann Frankfort's implied promise and its actual provision to Fielding of access to confidential information satisfied the first requirement because the promise and provision of confidential information generated Mann Frankfort's interest in preventing the disclosure of such information. *See Sheshunoff*, 209 S.W.3d at 648-49. In addition, Fielding's promise not to disclose any confidential information satisfied the second requirement because the client purchase provision was designed to hinder Fielding's ability to use the confidential information to compete against Mann Frankfort. *Id.* at 649. Therefore, the client purchase provision was "ancillary to or part of" the otherwise enforceable agreement when the otherwise enforceable contract was made, and the client purchase provision is enforceable under the Act.

IV. Attorney's Fees

Fielding's employment agreement contained the following provision regarding attorney's fees:

> 15. In the event of litigation between the parties hereto arising out of or connected with this Agreement, the prevailing party shall be entitled to recover all reasonable costs and expenses and all reasonable, actual attorney fees incurred by it or by him in the preparation for and conduct of such litigation.

The trial court and court of appeals determined the client purchase provision was unenforceable and Fielding was the "prevailing party." Because we hold the client purchase provision is enforceable, Fielding is not the prevailing party under the agreement and is not entitled to attorney's fees under it. We do not reach the issues of whether the Act preempts the agreement in regard to entitlement to attorney's fees or whether the client purchase provision was severable from the remainder of the agreement. *See* TEX. BUS. & COM. CODE § 15.52.

V. Conclusion

The client purchase provision in the 1995 employment agreement is enforceable. *See id.* § 15.50(a). We reverse the court of appeals' judgment and render judgment that Fielding take nothing.

Phil Johnson
Justice

OPINION DELIVERED: April 17, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0490

MANN FRANKFORT STEIN & LIPP ADVISORS, INC., MFSL GP, L.L.C., AND MFSL EMPLOYEE INVESTMENTS, LTD., PETITIONER,

v.

BRENDAN J. FIELDING, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

JUSTICE HECHT, concurring.

I join most of the Court's opinion with two additional observations.

I

We granted the petition for review in this case for the same reason we granted the petition for review several years ago in *Gage Van Horn & Associates, Inc. v. Tatom*:[1] to consider whether the Texas Covenants Not to Compete Act[2] controls the award of attorney fees to an employee suing for a declaratory judgment construing a covenant not to complete when the employer is also suing to enforce the covenant. Our review of the record in *Tatom* revealed that the issue was not preserved, and we therefore withdrew the order granting the petition as having been improvidently granted. The issue is preserved in the present case, but the Court does not reach it, concluding instead that the employee, Fielding, is not entitled to attorney fees on the only basis still asserted —

[1] 87 S.W.3d 536 (Tex. 2002) (per curiam) (order granting petition for review withdrawn as having been improvidently granted); *see also Perez v. Texas Disposal Sys., Inc.*, 103 S.W.3d 591, 592-594 (Tex. App.–San Antonio 2003, pet. denied) (holding that an employer is not entitled to recover attorney fees under TEX. CIV. PRAC. & REM. CODE § 38.001, because the remedies provided by the Covenants Not to Compete Act are exclusive under TEX. BUS. & COM. CODE § 15.52) (after remand from *Texas Disposal Sys., Inc., v. Perez*, 80 S.W.3d 593 (Tex. 2002) (per curiam)).

[2] TEX. BUS. & COM. CODE §§ 15.50-.52.

a provision of his employment agreement allowing attorney fees for a prevailing party in litigation over the agreement. I would hold that even if the agreement would allow Fielding attorney fees, the Act controls.

Section 15.52 of the Act states:

> The criteria for enforceability of a covenant not to compete provided by Section 15.50 of this code and the procedures and remedies in an action to enforce a covenant not to compete provided by Section 15.51 of this code are exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise.[3]

In *Tatom*, as in the present case, an employee sued for a declaration of his rights under a covenant not to compete he had given his former employer, and the employer sued to enforce the covenant.[4] In each case,[5] the trial court granted summary judgment holding the covenant unenforceable under section 15.50(a) of the Act.[6] The trial court in *Tatom* awarded the employee attorney fees, and the court of appeals affirmed.[7] The trial court in the present case did not award the employee attorney fees, but the court of appeals did.[8] In each case, the court of appeals held that suit by an employee

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[3] *Id.* § 15.52.

[4] *Gage Van Horn & Assocs., Inc. v. Tatom*, 26 S.W.3d 730, 732 (Tex. App.–Eastland 2000), *pet. denied*, 87 S.W.3d 536 (Tex. 2002) (per curiam); *Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc.*, 263 S.W.3d 232, 240 (Tex. App.–Houston [1st Dist.] 2007), *rev'd*, ___ S.W.3d ___ (Tex. 2009); *cf. Perez*, 103 S.W.3d at 592.

[5] *Tatom*, 26 S.W.3d at 732; *Hardy*, 263 S.W.3d at 240.

[6] TEX. BUS. & COM. CODE § 15.50(a) ("[A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.").

[7] *Tatom*, 26 S.W.3d at 732, 734.

[8] *Hardy*, 263 S.W.3d at 241, 259.

for a declaratory judgment construing a covenant not to compete is not an action to enforce the covenant to which section 15.52 applies.[9]

When the declaratory judgment raises only issues related to the covenant's enforceability, the court of appeals' construction of section 15.52 is clearly wrong. The statute preempts the enforceability requirements, procedures, and remedies afforded by any other law with respect to covenants not to compete. An employee's suit for a declaration of rights as they pertain to enforcement of a covenant (they almost always do) and an employer's suit for breach are opposite sides of the same coin. To apply one law to the employee's claims and a different law to the employer's would often be impossible. For example, although the basic standards for enforcement are the same under the Act as under the common law,[10] the Act imposes special requirements when

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[9] *Tatom*, 26 S.W.3d at 733 ("[T]he procedures and remedies set forth in the Covenants Not To Compete Act have preemptive effect only in an action to enforce a covenant not to compete. The declaratory judgment action filed by Tatom, which was the first claim filed in this matter and the claim on which summary judgment was granted, was not and could not be an action to enforce a covenant. By the plain language of the Act, the procedures and remedies, including attorney's fees, set forth in section 15.51 of the Covenants Not To Compete Act had no preemptive effect on Tatom's declaratory judgment action." (footnote omitted)); *Hardy*, 263 S.W.3d at 255-256 (following *Tatom*); *see also Contemporary Contractors, Inc. v. Strauser*, No. 05-04-00478-CV, 2005 Tex. App. LEXIS 5868, at *7, 2005 WL 1774983, at *2 (Tex. App.–Dallas July 28, 2005, no pet.) (mem. op.) (following *Tatom*).

[10] *Compare* TEX. BUS. & COM. CODE § 15.50(a), quoted *supra* note 6, *with DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 681-682 (Tex. 1990) ("The fundamental common law principles which govern the enforceability of covenants not to compete in Texas are relatively well established. An agreement not to compete is in restraint of trade and therefore unenforceable on grounds of public policy unless it is reasonable. An agreement not to compete is not a reasonable restraint of trade unless it meets each of three criteria. First, the agreement not to compete must be ancillary to an otherwise valid transaction or relationship. Such a restraint on competition is unreasonable unless it is part of and subsidiary to an otherwise valid transaction or relationship which gives rise to an interest worthy of protection. Such transactions or relationships include the purchase and sale of a business, and employment relationships. Second, the restraint created by the agreement not to compete must not be greater than necessary to protect the promisee's legitimate interest. Examples of legitimate, protectable interests include business goodwill, trade secrets, and other confidential or proprietary information. The extent of the agreement not to compete must accordingly be limited appropriately as to time, territory, and type of activity. An agreement not to compete which is not appropriately limited may be modified and enforced by a court of equity to the extent necessary to protect the promisee's legitimate interest, but may not be enforced by a court of law. Third, the promisee's need for the protection afforded by the agreement not to compete must not be outweighed by either the hardship to the promisor or any injury likely to the public. Before an agreement not to compete will be enforced, its benefits must be balanced against its burdens, both to the promisor and the public. Thus, such an agreement may, in a particular case, accomplish the salutary purpose of encouraging an employer to share confidential, proprietary information with an employee in furtherance of their common purpose, but must not also take unfair advantage of the disparity of bargaining power between them or too severely impair the employee's personal freedom and economic mobility. Whether an agreement not to compete is a reasonable restraint of trade is a question of law for the court." (citations and footnotes omitted)).

the employee is a physician licensed in Texas.[11] It would be impossible — or at least nonsense — to declare that, under the common law, the covenant limited the physician's right to compete with his former employer, while at the same time holding that, under the Act, the covenant was unenforceable. The common law and the Act could not both control the same issues without direct conflict.

There are other differences between the Act and the common law. The Act allocates the burden of persuasion in a case differently depending on whether the employment is primarily for rendition of personal services,[12] precludes a damages award for conduct prior to any necessary reformation of the scope of the covenant,[13] limits attorney fees awards to employers,[14] and does not

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[11] TEX. BUS. & COM. CODE § 15.50(b) ("A covenant not to compete is enforceable against a person licensed as a physician by the Texas State Board of Medical Examiners if such covenant complies with the following requirements: (1) the covenant must: (A) not deny the physician access to a list of his patients whom he had seen or treated within one year of termination of the contract or employment; (B) provide access to medical records of the physician's patients upon authorization of the patient and any copies of medical records for a reasonable fee as established by the Texas State Board of Medical Examiners under Section 159.008, Occupations Code; and (C) provide that any access to a list of patients or to patients' medical records after termination of the contract or employment shall not require such list or records to be provided in a format different than that by which such records are maintained except by mutual consent of the parties to the contract; (2) the covenant must provide for a buy out of the covenant by the physician at a reasonable price or, at the option of either party, as determined by a mutually agreed upon arbitrator or, in the case of an inability to agree, an arbitrator of the court whose decision shall be binding on the parties; and (3) the covenant must provide that the physician will not be prohibited from providing continuing care and treatment to a specific patient or patients during the course of an acute illness even after the contract or employment has been terminated.").

[12] *Id*. § 15.51(b) ("If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, for a term or at will, the promisee has the burden of establishing that the covenant meets the criteria specified by Section 15.50 of this code. If the agreement has a different primary purpose, the promisor has the burden of establishing that the covenant does not meet those criteria. For the purposes of this subsection, the 'burden of establishing' a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.").

[13] *Id*. § 15.51(c) ("If the covenant is found to be ancillary to or part of an otherwise enforceable agreement but contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee, the court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief.").

[14] *Id*. ("If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not contain limitations as to time, geographical area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than necessary to protect the goodwill or other business interest

provide for attorney fees awards to employees. The common law does not draw all of these distinctions. It would be inconsistent to declare under the common law that a covenant entitled an employer to damages or injunctive relief while denying such relief under the Act, or to declare that an employee was entitled to attorney fees that the Act would preempt.

The courts of appeals in this case and *Tatom* did not refuse to apply section 15.52's preemption because the declaratory judgment actions raised issues beyond enforcement of the covenants not to compete and therefore beyond the Act's scope. They refused to apply the statute simply because in each case the employee's action was for declaratory relief and therefore not "an action to enforce a covenant". But while the employees certainly sought to avoid enforcement, they were not the only parties to the actions. The employers sought enforcement. As a whole, the actions were to enforce, or not, covenants not to compete. I would hold that section 15.52 applied to the actions and to the employees' claims for attorney fees.

II

My second observation is this: in cases involving the enforceability of covenants not to compete, a shift in focus away from the reasonableness of the covenant's time, territory, and conduct restrictions toward issues of contract formation increases the risk that achieving what must in the end be an equitable result will cause a court to distort, confuse, or misstate contract law. Texas law has long been that unreasonable restrictions do not void a covenant not to compete but limit its enforcement.[15] Section 15.51(c) specifically requires a trial court to reform unreasonable

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of the promisee, and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.").

[15] *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 685 (Tex. 1973) ("[I]t can no longer be said that a covenant not to compete is void and unenforceable simply because it is not reasonably limited as to either time or area, and that a court of equity will nevertheless enforce the contract by granting an injunction restraining competition for a time and within an area that are reasonable under the circumstances."); *Weatherford Oil Tool Co. v. Campbell*, 340 S.W.2d 950, 952 (Tex. 1960) ("[A]lthough the territory or period stipulated by the parties may be unreasonable, a court of equity will nevertheless enforce the contract by granting an injunction restraining the defendant from competing for a time and within an area that are reasonable under the circumstances."); *Spinks v. Riebold*, 310 S.W.2d 668, 669 (Tex. Civ. App.–

restrictions.[16] In determining whether and how to enforce a covenant not to compete, a court must seek equity in reformation, not in the statement and application of general contract principles. The enforcement vehicle must be directed by steering, not by rebuilding the chassis.

Light v. Centel Cellular Co. of Texas[17] is a case in point. A concern in *Light* was that while an at-will employee could be held to a covenant not to compete, the employer should not be allowed to take advantage of the employee by requiring her to sign a broad covenant not to compete, terminating her soon afterward, and then enforcing the covenant as written.[18] The simple answer is that the court cannot enforce the restrictions beyond the limits reasonable to protect the employer's interest — in the example, perhaps not at all. Rather than focus on the reasonableness of the restrictions in *Light*, the Court concluded that a covenant is not enforceable at the time it is made if the only consideration given by the employer is a promise to provide training and confidential information in the future that is illusory because it is contingent on continued employment.[19] We have since withdrawn from that conclusion and held that a covenant not to compete must only be ancillary to another agreement at the time that agreement was made, even if that agreement is not

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El Paso 1958, writ ref'd) ("[C]ontracts of employment containing restrictive covenants . . . will not be declared void because said covenants are unreasonable as to time, or as to the extent of territory covered, or unreasonable as to both time and territory. . . . [This is] not making a new and different contract for the parties, but . . . it would hardly be doing violence to the established principles to hold that the restriction is merely void or unenforceable with respect to that portion of the time beyond what the court considers reasonable." (internal quotation marks omitted)); *Lewis v. Krueger, Hutchinson & Overton Clinic*, 269 S.W.2d 798, 799 (Tex. 1954) ("Merely because a limit has not been fixed for the duration of the restraint, the agreement will not be struck down but will be enforceable for such period of time as would appear to be reasonable under the circumstances."); *see also City Ice Delivery Co. v. Evans*, 275 S.W. 87, 90 (Tex. Civ. App.–Dallas 1925, no writ) (concluding that the trial court, instead of dissolving a temporary injunction, should have limited it to only the district assigned to the employee).

[16] TEX. BUS. & COM. CODE § 15.51(c), quoted *supra* note 13.

[17] 883 S.W.2d 642 (Tex. 1994).

[18] *Id.* at 646.

[19] *Id.* at 644-645.

yet enforceable because the promise of future action has not been performed.[20] Today we withdraw further and hold that the promise of future action need not be express but may be implied.[21]

The Court's estrangement from *Light* has not been over its result — its handling of the covenant not to compete — but over its seriously flawed statement of contract law. It is certainly true, as the *Restatement (Second) of Contracts* explains: "Words of promise which by their terms make performance entirely optional with the 'promisor' whatever may happen, or whatever course of conduct in other respects he may pursue, do not constitute a promise."[22] Such a "promise" — in reality no promise at all — is often said to be "illusory" and "is not consideration for a return promise."[23] Employment at will can be terminated by the employer or the employee at any time and for any reason; continuation of the employment relationship is entirely optional for each.[24] Thus, as we said in *Light*, "[a]ny promise made by either employer or employee that depends on an additional period of employment is illusory because it is conditioned upon something that is exclusively within the control of the promisor."[25]

What the Court should have added in *Light* is that courts have long been reluctant to invalidate a contract because a promise given in consideration was technically illusory. When the only consideration one party gives for a contract is a promise that is illusory, there is no "mutuality

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[20] *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson* 209 S.W.3d 644, 651 (Tex. 2006).

[21] *See ante* at ___.

[22] RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. e (1981).

[23] *Id.* § 77 cmt. a ("Where the apparent assurance of performance is illusory, it is not consideration for a return promise.").

[24] *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993) (per curiam) ("The long-standing rule in Texas provides for employment at will, terminable at any time by either party, with or without cause, absent an express agreement to the contrary.") (citing *Schroeder v. Texas Iron Works*, 813 S.W.2d 483, 489 (Tex. 1991), and *East Line & R.R.R. v. Scott*, 10 S.W. 99, 102 (Tex. 1888)).

[25] 883 S.W.2d at 645 n.5 (citing E. ALLAN FARNSWORTH, CONTRACTS 72-82 (1982)).

of obligation", sometimes said (though not entirely accurately) to be required for a contract.[26] Thirty-five years ago, in *Texas Gas Utilities Co. v. Barrett*, we wrote:

> It is presumed that when parties make an agreement they intend it to be effectual, not nugatory. *Portland Gasoline Co. v. Superior Marketing Co., Inc.*, 150 Tex. 533, 243 S.W.2d 823 (1951). A contract will be construed in favor of mutuality, *Carpenter Paper Co. v. Calcasieu Paper Co., Inc.*, 164 F.2d 653 (5th Cir. 1947). The modern decisional tendency is against lending the aid of courts to defeat contracts on technical grounds of want of mutuality. *Armstrong v. Southern Production Co., Inc.*, 182 F.2d 238 (5th Cir. 1950).[27]

To avoid invalidating a contract, section 77 of the *Restatement (Second) of Contracts* explains:

> Illusory and Alternative Promises
>
> A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless
>
> * * *
>
> (b) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.[28]

The same principles should be employed in construing and applying the Act, the purpose of which, after all, is to facilitate, not impede, enforcement of covenants not to compete. The parties to an employment agreement are presumed to have intended it to be effectual, and the agreement should not be denied enforceability on technical grounds of want of mutuality if that result can be avoided. The Act does not ground the enforceability of a covenant not to compete on the overly technical disputes that *Light* seems to have engendered over whether a covenant is ancillary to an

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[26] *Compare*, *e.g.*, *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997) ("A contract must be based upon a valid consideration, in other words, mutuality of obligation."), *with* RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981) ("If the requirement of consideration is met, there is no additional requirement of (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) 'mutuality of obligation.'") *and id.* cmt. a ("'[M]utuality of obligation' has been said to be essential to a contract. But experience has shown that [this is not an] essential element[] of a bargain or of an enforceable contract . . . .").

[27] 460 S.W.2d 409, 412 (Tex. 1970).

[28] RESTATEMENT (SECOND)OF CONTRACTS § 77 (1981).

otherwise enforceable agreement. Rather, the statute's core inquiry is whether the covenant "contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee".[29] Concerns that have driven disputes over whether a covenant is ancillary to an otherwise enforceable agreement — such as the amount of information an employee has received, its importance, its true degree of confidentiality, and the time period over which it is received — are better addressed in determining whether and to what extent a restraint on competition is justified.

There will certainly be covenant not to compete cases with important issues of contract formation, but the central concern will usually be the reasonableness of the restrictions. *Light* should not divert attention from the central focus of the Act.

Nathan L. Hecht
Justice

Opinion delivered: April 17, 2009

[29] TEX. BUS. & COM. CODE § 15.51(c).

IN THE SUPREME COURT OF TEXAS

NO. 07-0522

BENNY P. PHILLIPS, M.D., PETITIONER,

v.

DALE BRAMLETT, INDIVIDUALLY AND AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF VICKI BRAMLETT, DECEASED, SHANE FULLER, AND MICHAEL FULLER, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

Argued April 22, 2008

JUSTICE MEDINA delivered the opinion of the Court, in which JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE JOHNSON, AND JUSTICE WILLETT joined.

JUSTICE O'NEILL filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, AND JUSTICE GREEN joined.

We granted the petition for review in this case to consider the relationship between two provisions of the Medical Liability and Insurance Improvement Act of 1977, now repealed. *See* TEX. REV. CIV. STAT. art. 4590i.[1] The first provision caps the liability of physicians (and other health care providers) above a fixed amount, adjusted for inflation, while the second creates an exception to this

[1] Act of June 16, 1977, 65th Leg., R.S., ch. 817, § 11.02, 1977 Tex. Gen. Laws 2039, 2052 (formerly TEX. REV. CIV. STAT. art. 4590i). Article 4590i was repealed by Act of June 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

cap when the physician's insurer has negligently failed to settle within the meaning of the Stowers Doctrine, that is, has negligently failed to settle a claim within the limits of the physician's liability policy.

The trial court here applied the Stowers exception to permit the rendition of a judgment against the physician in excess of the statutory cap. The court of appeals, in a divided decision, affirmed, concluding that the excess judgment was permissible because there was evidence that the insurer negligently failed to settle the claim against its insured, the physician. 258 S.W.3d 158. In other words, the court concluded that the statutory Stowers exception waived the liability cap for both the insurer and the insured physician. We disagree that this exception applies to the physician and accordingly reverse the court of appeals' judgment and remand the case to the trial court.

I

Vicki Bramlett, a healthy 36-year-old mother of two, died from post-operative complications following a hysterectomy. The procedure was performed at Covenant Medical Center in Lubbock by Dr. Benny Phillips. Bramlett's survivors sued Dr. Phillips and the medical center, alleging negligence in her care and treatment. The medical center settled for $2.3 million; the case against the doctor proceeded to trial.

A jury found the doctor and medical center negligent, awarding $11 million in damages and apportioning responsibility, seventy-five percent to the doctor and twenty-five percent to the medical center. The jury also found the doctor grossly negligent, awarding $3 million in punitive damages. The trial court rendered judgment against the doctor after crediting the medical center's settlement.

The trial court also denied the doctor's request to limit his liability under the Medical Liability and Insurance Improvement Act of 1977, formerly article 4590i of the revised civil statutes.

The court of appeals vacated the punitive damages award and suggested a remittitur of certain future damages, but otherwise affirmed the trial court's judgment. 258 S.W.3d at 182-83. One justice disagreed in part, opining that the doctor's liability should have been capped under former article 4590i. *Id*. at 183 (Campbell, J., dissenting). The doctor brings this issue forward, along with another complaint about certain improprieties during closing argument.

II

Article 4590i limits the liability of physicians (and other health care providers) to $500,000, adjusted for inflation after 1977.[2] Section 11.02(a) of the statute sets out the cap, providing:

> In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed $500,000.

TEX. REV. CIV. STAT. art. 4590i, § 11.02(a).[3] Section 11.02(c) then explains that the cap does not "limit the liability of any insurer" under certain circumstances:

> This section shall not limit the liability of any insurer where facts exist that would enable a party to invoke the common law theory of recovery commonly known in Texas as the "Stowers Doctrine."

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[2] This limit on liability is not only adjusted for fluctuations in the consumer price index but also excludes medical, hospital, and custodial care expenses. TEX. REV. CIV. STAT. art. 4590i, §§ 11.02(b), 11.04.

[3] Article 4590i was repealed shortly after the filing of this case. *See* n.1 *supra*. Similar medical liability legislation is presently codified in Chapter 74 of the Texas Civil Practice and Remedies Code for actions filed on or after September 1, 2003. *See* TEX. CIV. PRAC. & REM. CODE §§ 74.301-.303. Because this case was filed before that date, we apply former article 4590i here.

Id. § 11.02(c). On their face, the two provisions do not conflict. One caps the physician's liability, while the other excepts the physician's insurer from the benefit of the cap when Stowers-like circumstances exist. It is only when one considers the common law's requirements for Stowers liability that the relationship between the two becomes more troublesome.

The common law imposes a duty on liability insurers to settle third-party claims against their insureds when reasonably prudent to do so. *See G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. 1929). For the duty to arise, there must be coverage for the third-party's claim, a settlement demand within policy limits, and reasonable terms "such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment." *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994). When these conditions coincide and the insurer's negligent failure to settle results in an excess judgment against the insured, the insurer is liable under the Stowers Doctrine for the entire amount of the judgment, including that part exceeding the insured's policy limits. *G.A. Stowers Furniture Co.*, 15 S.W.2d at 548.

Thus, the Stowers Doctrine and the statutory cap both shield the insured physician from excess liability: the first from liability in excess of policy limits, the latter from liability in excess of the legislatively fixed cap. But because the cap limits damages without regard to insurance coverage, its application will always affect Stowers liability to some degree. When the cap is above the amount of insurance coverage, it will simply restrict Stowers liability. When the cap falls below the amount of the policy, however, the cap will eliminate the possibility of any excess liability against the insured and, with that, any common-law claim under the Stowers Doctrine.

Because Stowers is concerned with insurance coverage, and the cap is not, this disconnect between the two creates the following conundrum: the cap does not apply to insurers if Stowers facts exist, but the cap prevents one critical element of Stowers, excess liability, from arising in whole or in part. The two courts of appeals that have considered this conundrum are of different minds about the Legislature's purpose in enacting section 11.02(c)'s Stowers exception. *Compare Welch v. McLean*, 191 S.W.3d 147, 166-71 (Tex. App.–Fort Worth 2005, no pet.) *with Phillips v. Bramlett*, 258 S.W.3d 158, 177-81 (Tex. App.–Amarillo 2007, pet. granted). The parties arguments in this case mirror the contrasting views of these two courts.

In *Welch*, the Fort Worth Court of Appeals, espousing a plain meaning approach, observed that section 11.02(a)'s damages cap applied expressly to physicians and that section 11.02(c)'s Stowers exception applied expressly to insurers. The court then, however, strayed from plain meaning to conclude that the cap also protected the insurer by implication because it placed a ceiling on any excess liability to which Stowers might apply. Thus, in *Welch*'s view, the potential liability of the insurer cannot exceed the cap, although the insurer's liability may exceed its policy limits if those limits are below the cap, and Stowers facts exist. *Id*. at 168-171. According to *Welch* then, the Stowers exception applies only when the physician's policy limits are below the statutory cap and only to any excess up to the limit of the statutory cap. *Id*. at 171.

In contrast to *Welch*'s plain meaning approach, the Amarillo Court of Appeals here concludes that section 11.02(c)'s exception to the cap applies not only to the insurer, which is clearly identified in the subsection, but also to the insured physician, who is not mentioned. 258 S.W.3d at 178. The court deduces this from section 11.02(c)'s opening reference to "[t]his section" which it interprets

to include subsection (a)'s liability cap. *Id*. at 178. The court thus "construe[s] section 11.02(c) to preclude any application of [the cap in] section 11.02(a) in a manner that would limit the liability of an insurer in a subsequent 'Stowers' claim." *Id*. at 178-79.

Neither case gives due regard both to the cap and its exception. The analysis in *Welch* deprives section 11.02(c) of any meaning, extending the cap to insurers when Stowers facts exist. But the court of appeals here goes to the other extreme, reading subsection (c)'s Stowers exception to defeat the cap generally, despite its internal limitations.[4]

The Dissent adopts *Welch*'s view, concluding that the Stowers exception to the cap was meant only to clarify the continued, but limited, application of the Stowers Doctrine to claims governed by article 4590i. Thus, the Dissent would limit the exception in section 11.02(c) to cases involving insurance policies falling below the cap and would not apply it to other policies. But a Stowers claim, as limited by the cap, would be available to the insured physician, even if section 11.02(c) were not a part of the statute, and thus the Dissent, like *Welch*, attributes no meaning to the Stowers exception. By doing this, the Dissent is able to disregard section 11.02(c)'s principal purpose: that the cap "not limit the liability of any insurer" when Stowers facts exist. TEX. REV. CIV. STAT. art. 4590i, § 11.02(c). The Dissent instead opts for a more circular interpretation: that the cap does "not limit the liability of any insurer" except when it does. And it does, according to the

[4] Although the exception only mentions insurers, the court of appeals here applies it generally to health care providers as well, waiving the cap to insurer and insured alike whenever Stowers facts exist. The court thereby compromises subsection (a)'s cap to accommodate Stowers, apparently assuming that the Legislature intended to meld the common-law doctrine entirely into the statute through subsection (c).

Dissent, whenever the cap applies to limit the liability of the insured.[5] As aforesaid, this interpretation renders the provision meaningless.

When construing a statute, we begin with its language, drawing the Legislature's intent from the words chosen when possible. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). If a statute's meaning is unclear, we "read the statute as a whole and interpret it to give effect to every part." *Jones v. Fowler,* 969 S.W.2d 429, 432 (Tex. 1998). We further try to give effect to all the words of a statute, treating none of its language as surplusage when reasonably possible. *Sultan v. Mathew*, 178 S.W.3d 747, 751 (Tex. 2005).

From section 11.02's language, the Legislature's intention to do two things is unmistakable. First, it intended to cap the liability of a physician or other health care provider according to the statutory formula. TEX. REV. CIV. STAT. art. 4590i, § 11.02(a). Second, it intended that the cap should not benefit any insurer when Stowers facts exist. *Id*. § 11.02(c). Neither the court of appeals' decision in this case nor *Welch* accomplishes both. The court of appeals analysis here is flawed because it fails to leave the damage cap in place as to physicians, when Stowers facts exist. 258

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[5] The Medical Liability Insurance Improvement Act, article 4590i of the revised civil statutes, was repealed by the 78th Legislature in 2003, after the filing of this lawsuit. The cap in section 11.02 was, however, carried forward in section 74.303(a) of the Texas Civil Practice and Remedies Code. The Stowers exception in section 11.02(c) was not carried forward, but rather replaced by section 74.303(d) which expressly provides that the insurer can now use the cap to limit its liability:

> (d) The liability of any insurer under the common law theory of recovery commonly known in Texas as the "Stowers Doctrine" shall not exceed the liability of the insured.

TEX. CIV. PRAC. & REM. CODE § 74.303(d). We view this as a substantive change. The Dissent apparently does not.

S.W.3d at 181. Similarly, the analysis in *Welch* is flawed because it extends the cap's benefit to insurers without regard to whether Stowers facts exist.[6] 191 S.W.3d at 169. Both courts rely on legislative history to support their contrasting views. *Compare Welch*, 191 S.W.3d at 168-69 *with Phillips*, 258 S.W.3d at 179-80.

During the debate on medical liability, the 65th Legislature had under consideration two different versions of the Stowers exception. The House version extended the exception to physicians and other health care providers, while the Senate version limited the exception to insurers. *See Phillips*, 258 S.W.3d at 179-80; *Welch*, 191 S.W.3d at 168 nn. 22-25. The differences went to a conference committee which adopted the Senate version, thereby limiting the exception to insurers. *See Welch*, 292 S.W.3d at 168 n.23.

The House version would have more nearly preserved a common-law Stowers claim, however, by waiving the cap as to the insured physician, thereby preserving the possibility of excess liability, a necessary element under the Stowers Doctrine. By settling on the Senate version, the Legislature chose not to include a common-law Stowers claim per se as part of the statutory scheme. The court of appeals here, however, views the legislative history differently, concluding "that the legislature intended for the 'Stowers Doctrine' to retain its common law form" and finding "[t]his

[6] Part of our disagreement with the Dissent is about what the statute means by the existence of "facts . . . that would enable a party to invoke . . . the 'Stowers Doctrine.'" Our understanding is that this refers to the facts as found in the case, which in this case is the jury's verdict. The Dissent, on the other hand, argues that the only operative Stowers fact to be gleaned from the underlying third party liability suit is whether the judgment, capping the damages found by jury, actually exceeds the amount of insurance in the case. Thus, the Dissent views the legal effect of that verdict as the operative Stowers fact rather than the underlying fact itself. Because the Stowers exception begins with the admonition that the cap is not to limit the liability of the insurer, using the cap as part of the operative Stowers fact leads to the circular reasoning previously discussed.

intent is most evident in the discussion of how the 'Stowers Doctrine' encourages insurers to bargain in good faith during the negotiation phase of a medical malpractice case." 258 S.W.3d at 180.

Indeed, the common-law Stowers Doctrine encourages prompt and reasonable settlements by eliminating a potential for conflict between insurer and insured in cases involving damage claims exceeding policy limits. In such cases, when the insured's liability is reasonably certain, an insurer, motivated by self-interest, may be tempted to resist reasonable settlement offers, assuming that any adverse judgment will exhaust policy limits and that proceeding to trial will put only the insured's money at risk. Stowers penalizes this type of self-interest by raising the stakes for the insurer should it act unreasonably when presented with an opportunity to settle within policy limits. *See generally* 1 JAMES B. SALES AND J. HADLEY EDGAR, TEXAS TORTS AND REMEDIES § 71.09[b] (2008) (discussing Stowers actions). Article 4590i's medical liability cap, however, introduces a new element into the Stowers equation.

Capping the insured physician's liability at a fixed amount eliminates any potential for conflict between insurer and insured beyond that amount, but does nothing to encourage settlement. In fact, it may have the opposite effect in the most serious cases, that is, in cases where liability is reasonably certain to exceed the cap. The statutory Stowers exception, however, ameliorates that potential effect. *See* TEX. REV. CIV. STAT. art. 4590i, § 11.02(c) (cap "shall not limit the liability of the insurer [when Stowers facts exist]"). Thus, although we do not accept the notion that the Legislature intended to preserve a common-law Stowers claim as part of the statute, we recognize that the debate surrounding the Stowers exception included concerns about how the cap might adversely impact settlement negotiations. *See Welch*, 191 S.W.3d at 169 & n.25 (discussing

legislative debate mentioning Stowers' purpose of encouraging good faith in the settlement process); *Phillips*, 258 S.W.3d at 179 (same).

We considered a similar problem in *American Centennial Insurance Co. v. Canal Insurance Co.*, 843 S.W.2d 480 (Tex. 1992), where the insured's purchase of an excess insurance policy operated like the cap here to potentially skew the primary insurer's duty to settle with reasonable care. In *Canal*, we held that the excess insurer, who actually suffered the loss, might maintain an action against the primary liability insurer for its wrongful refusal to settle the insured's claim within the limits of the primary policy. *Id.* at 483. We concluded that in this situation the insured, who was fully protected from liability by the excess policy, would have little incentive to enforce the primary carrier's duties and that the excess carrier should therefore be permitted to do so through equitable subrogation. *Id.* We noted further that allowing the party actually suffering the loss to enforce the insurer's duty to settle served the public interest "in fair and reasonable settlements of lawsuits by discouraging primary carriers from 'gambling' with the excess carrier's money when potential judgments approach the primary insurer's policy limits." *Id*. at 483 (quoting *Commercial Union Ins. Co. v. Med. Protective Co.*, 393 N.W.2d 479, 483 (Mich. 1986). Similarly, the Stowers exception to the cap is like this right to equitable subrogation. It puts the injured third party in the shoes of the insured to the extent the cap eliminates the insured's incentive to enforce the insurer's duty to settle with reasonable care.

Thus, we conclude that both the statutory cap and its exception can be applied as written by conforming the judgment against the physician to section 11.02(a)'s cap and reserving for another case any suit against the insurer under section 11.02(c)'s Stowers exception. When insurance

coverage is below the cap, this Stowers-exception claim may be shared by the insured physician and the injured third party because both will potentially have excess claims when the damages finding exceeds the cap. When insurance coverage is above the cap, however, the physician is fully protected, and only the injured third party has incentive to pursue the statutory Stowers exception. In any event, the judgment here against the physician on the underlying health care liability claim may not exceed the statutory cap, and the court of appeals accordingly erred in affirming the excess judgment in this case.

III

The doctor also argues that the judgment against him should be reversed and a new trial ordered because of improper argument at the end of the trial. During final argument, plaintiffs' counsel stated: "For years, in this very conservative community, juries have been very liberal with the doctors, very liberal. What I mean is: Their verdicts didn't send much of a message at all." The doctor's counsel immediately objected with the following: "Judge, I object to any testimony about the propriety of other trials and the verdicts reached by other juries in Lubbock." The trial court responded: "This is his argument, and it is not testimony." The doctor's counsel did not offer any further explanation of his objection, and plaintiffs' counsel thereafter continued to argue that the jury needed to send a message to the doctors of Lubbock without further objection.

Appellate complaints of improper jury argument must ordinarily be preserved by timely objection and request for an instruction that the jury disregard the improper remark. TEX. R. APP. P. 33.1; *see also Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839-41 (Tex. 1979). The court of appeals here concluded that the asserted error was not preserved because the trial court's response

indicated that it did not understand the objection, and counsel made no further attempt to clarify the court's understanding or obtain a ruling on his objection. 258 S.W.3d at 170. We agree that this objection, without more, did not preserve error in this case.

The doctor argues in the alternative, however, that no objection was required because the comment's prejudice could not have been cured by instruction. A complaint of incurable argument may be asserted and preserved in a motion for new trial, even without a complaint and ruling during the trial. TEX. R. CIV. P. 324(b)(5). Incurable jury argument is rare, however, because "[t]ypically, retraction of the argument or instruction from the court can cure any probable harm . . ." *See Living Ctrs. of Texas, Inc. v. Penalver*, 256 S.W.3d 678, 680 (Tex. 2008) (per curiam). The party claiming incurable harm must persuade the court that, based on the record as a whole, the offensive argument was so extreme that a "juror of ordinary intelligence could have been persuaded by that argument to agree to a verdict contrary to that to which he would have agreed but for such argument." *Goforth v. Alvey*, 271 S.W.2d 404, 404 (Tex. 1954); *see generally* 8 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 120C.06[7][a][i] (2008).

The court of appeals agreed that counsel's argument here was improper. The court observed, however, that cases finding incurable harm typically involved unsubstantiated attacks on the integrity or veracity of a party or counsel, appeals to racial prejudice, or the like. 258 S.W.3d at 170-71. The court concluded that counsel's plea to send a message to the doctors was not of this same class of impropriety, and, considering the record as a whole, not so extreme as to be incapable or cure. We agree. As we recently observed, incurable argument is that which strikes at the very core of the judicial process. *Living Ctrs. of Texas, Inc.,* 256 S.W.3d at 681-82.

* * *

In summary, we conclude that the Stowers exception of article 4590i, section 11.02(c), expressly applies to insurers only and does not waive the liability cap of section 11.02(a) generally. We further conclude that any probable harm caused by the asserted improper remarks in this case could have been cured by an instruction or retraction. No ruling, however, was requested or obtained, and the party's objection was not alone sufficient to preserve the alleged error.

The court of appeals' judgment is reversed and the cause is remanded to the trial court for it to apply the cap and render judgment consistent with our opinion.

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David M. Medina
Justice

Opinion delivered: March 6, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0522

BENNY P. PHILLIPS, M.D., PETITIONER,

v.

DALE BRAMLETT, INDIVIDUALLY AND AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF VICKI BRAMLETT, DECEASED, SHANE FULLER AND MICHAEL FULLER, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

Argued April 22, 2008

JUSTICE O'NEILL, joined by CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, and JUSTICE GREEN, dissenting.

I agree with the Court that section 11.02(a) of the Medical Liability Act plainly caps the physician's liability in this case, and that section 11.02(c), in denying insurers the Act's liability limitations in a *Stowers* action, does not operate to abolish that protection. *See* Act of June 16, 1977, 65th Leg., R.S., ch. 817, §§ 11.02(a), (c), 11.04, 1977 Tex. Gen. Laws 2039, 2052, *repealed by* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884 [hereinafter TEX. REV. CIV. STAT. art. 4590i]. To this extent, I join the Court's opinion. The Court's analysis, however, ventures further and extends *Stowers* well beyond its common law mooring. The *Stowers*

doctrine was crafted to afford the insured a safe harbor should its insurer unreasonably refuse to settle a claim within policy limits and the insured thereafter suffer an excess judgment. By extending *Stowers* protection beyond the actual peril to which the insured is exposed, the Court ventures into uncharted waters with no footing in the statutory text or the common law. In my view, section 11.02(c) merely clarifies that section 11.02(a) does not cap the amount an insured may recover from its insurer in a future *Stowers* action; it does not pin that potential recovery on a hypothetical judgment for which the insured is not liable. It may be true, although not in this case, that nonsettling insurers whose policy limits reach or exceed the statutory cap face minimal *Stowers* exposure when a jury awards damages exceeding the cap. But there is nothing to indicate the Legislature intended section 11.02(c) to afford insureds a windfall beyond the damages actually suffered. The Court avoids such an untenable result by construing the statute to grant the plaintiff in the underlying malpractice suit a claim for equitable subrogation against the insurer who is negligent in refusing to settle. But the plaintiff cannot be equitably subrogated to a cause of action that does not exist, and what exists is a *Stowers* claim for the amount by which the judgment exceeds policy limits. Because the Court's interpretation subjects insurers to liability beyond that which *Stowers* would allow, I respectfully dissent. Rather than remand the case for further proceedings, I would render judgment for the plaintiff pursuant to the statute.

In construing a statute, our goal is to give effect to the Legislature's intent. TEX. GOV'T CODE § 312.005; *Kroger Co. v. Keng*, 23 S.W.3d 347, 349 (Tex. 2000). To discern that intent, we look first to the statute's plain language. *Cont'l Cas. Co. v. Downs*, 81 S.W.3d 803, 805 (Tex. 2002). We must consider the statute as a whole, and not its provisions in isolation. *Id.* Section

11.02(a) limits physicians' liability for noneconomic damages to $500,000, as adjusted by the Consumer Price Index. TEX. REV. CIV. STAT. art. 4590i, §§ 11.02(a), 11.04. Section 11.02(c) provides that the statute's limitation of liability does not extend to an insurer when facts exist that would support a *Stowers* claim. *Id*. at § 11.02(c). In crafting subsection (c), the Legislature clearly indicated it did not intend the subsection (a) damage cap for physicians to limit the liability of an insurer who negligently rejects a reasonable settlement demand within policy limits. But that does not mean the Legislature intended to extend insurers' potential liability beyond the limits of the *Stowers* doctrine itself. *See G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved). To the contrary, subsection (c) only applies "where facts exist that would enable a party to invoke the common law theory of recovery commonly known in Texas as the 'Stowers Doctrine.'" TEX. REV. CIV. STAT. art. 4590i, § 11.02(c). We must begin, then, with the parameters of the *Stowers* doctrine and the recovery it affords, for subsection (c) lifts the statutory cap only to the extent that damages would be available under *Stowers*.

Stowers liability is designed to compensate *the insured* for damages suffered as a result of its insurer's unreasonable refusal to settle. *See Hernandez v. Great Am. Ins. Co. of N.Y.*, 464 S.W.2d 91, 94 (Tex. 1971) ("[T]he Stowers action lies to repair the harm to the insured. The tort of the insurer in mismanaging the defense of the insured in the first case is harmful to the insured alone."). For the *Stowers* duty to arise, there must be policy coverage for the claim, a settlement demand within policy limits, and the demand must be reasonable "such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to *an excess judgment*." *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994) (emphasis

added). When the *Stowers* duty is breached, the insured is afforded "the *Stowers* remedy of shifting the risk of *an excess judgment* onto the insurer." *Id.* (emphasis added). Accordingly, a *judgment* against the insured that exceeds policy limits is the *sine qua non* of a *Stowers* claim.

The Court goes astray in presuming, incorrectly, that the section 11.02(a) damage cap "prevents one critical element of *Stowers*, excess liability, from arising in whole or in part," and from that premise concludes the Legislature must have intended to tie *Stowers* liability against physicians' insurers to the jury's verdict rather than the court's judgment. The Court's premise is flawed in a number of respects. First, the Court presupposes that nearly all physicians will insure themselves to the full extent of the statutory cap, which would substantially diminish the potential for excess liability. However, one need look no further than this case to see the fallacy of the Court's supposition. Taking into account the statutory adjustment for fluctuations in the Consumer Price Index, and excluding economic damages which are not subject to the cap, section 11.02(a) operated in this case to reduce the jury's $9,196,364.50 award against Dr. Phillips to $1,585,365.85. 258 S.W.3d 158, 176–77; TEX. REV. CIV. STAT. art. 4590i, §§ 11.02(a), (b), 11.04. Dr. Phillips, however, was insured under his professional liability insurance policy for only $200,000. Accordingly, Dr. Phillips faces nearly $1.4 million in personal exposure on the capped judgment in excess of his policy limits, for which he may pursue a *Stowers* claim against his insurer. It is simply not true, as the Court posits, that the statutory cap eliminates the possibility of liability in excess of $500,000 against insurers who unreasonably refuse to settle.

Second, the Court concludes that my view, which comports with that of the court's in *Welch v. McLean*, 191 S.W.3d 147, 166–71 (Tex. App.—Fort Worth 2005, no pet.), deprives section

11.02(c) of any meaning because it extends the cap to insurers when *Stowers* would not. However, it is not the statutory cap that operates to limit an insurer's excess liability but the *Stowers* doctrine itself, which ties that liability to the judgment against the insured. The Court apparently believes the damage cap's potential to cabin insurers' *Stowers* exposure is undesirable, as reasonable and timely settlements will thereby be discouraged. But the Court's approach of pinning *Stowers* liability under section 11.02(c) to a hypothetical judgment based on the jury's verdict exposes insurers to liability far exceeding that which *Stowers* would allow and, more importantly, undermines the Medical Liability Act's overarching purpose to reduce the cost of insurance in order to alleviate what the Legislature determined to be a health care liability crisis in Texas. *See* TEX. REV. CIV. STAT. art. 4590i, § 1.02(a)(4). Finally, even if it were true, as the Court presumes, that nearly all physicians are fully insured in every case up to the statutory cap (which is not as easy as it sounds considering the cap's variability), insurers remain subject to liability for special and consequential damages that their negligent failure to settle caused their insureds, which section 11.02(c) makes clear is not subject to the section 11.02(a) damage cap. *See Ranger County Mut. Ins. Co. v. Guin*, 723 S.W.2d 656, 660 (Tex. 1987) (noting that in a *Stowers* action, the insurer is alleged to have breached its agency relationship, so tort damages will be available). And even if the Court's fears are true that the statutory cap makes insurers more likely to unreasonably refuse settlement offers because little is at risk in a subsequent *Stowers* action (which I consider unlikely considering the costs involved in protracted litigation), this is a function of the cap itself and not of the insurer-insured relationship, as physicians who might be uninsured would presumably have the same predilection. Removing the cap only when an *insurer* refuses to settle for more creates a kind of reverse-*Stowers* problem

whereby insurers are encouraged to settle for more than an uninsured physician would. In my view, the Legislature's intent in enacting 11.02(c) was likely much less complicated than what the Court imagines.

To the extent the Court's interpretation of section 11.02(c) exposes insurers to liability in excess of that which *Stowers* would permit, I respectfully dissent. I would render judgment based on what the parties seem to agree the cap allows: $1,585,365.85 in favor of the plaintiff.

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Harriet O'Neill
Justice

OPINION DELIVERED: March 6, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0548

THE STATE OF TEXAS,
PETITIONER,

v.

DAWMAR PARTNERS, LTD., A TEXAS LIMITED PARTNERSHIP, AND HOWARD WAYNE GRUETZNER AND BEVERLY ANN GRUETZNER (A/K/A BEVERLY G. SHAW), CO-INDEPENDENT EXECUTORS OF THE ESTATE OF MARTHA LILLIAN ATTAWAY GRUETZNER (A/K/A MARTHA LILLIAN ATTAWAY GRUETSNER),
RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

PER CURIAM

In this condemnation case, the State of Texas challenges both the amount awarded for land taken as part of a highway improvement project and the compensability of severance damages to the remainder. The principal issue is whether the landowners are entitled to severance damages resulting from permanent denial of direct access to the highway if the restrictions on access changed the "highest and best use" of the property from commercial to residential. We hold that the landowners are not entitled to compensation for diminished value of the remainder because they have not suffered a material and substantial impairment of access. We therefore reverse the portion of the court of appeals' judgment awarding severance damages and remand that claim to the trial court for further proceedings. The portion of the judgment awarding damages for the land taken is affirmed.

As part of a project to widen and elevate FM 1695, the State instituted condemnation proceedings to acquire approximately 12.89 acres of an unimproved 79.546 acre tract of land in Hewitt, Texas owned by Dawmar Partners, Ltd., LP and Howard Wayne and Beverly Ann Gruetzner, co-independent executors of the estate of Martha Lillian Attaway Gruetzner (collectively "the landowners").[1] The taking divided the larger tract into a 3.671 acre northern remainder and a 62.981 acre southern remainder, and the only dispute in the condemnation proceeding was the amount of compensation owed to the landowners for the land taken and damage to the southern remainder. The landowners sought severance damages to the southern remainder because safety concerns related to the highway project necessitated eliminating all direct access to FM 1695 and its frontage roads from that portion of the tract, which reportedly changed the highest and best use of the property from commercial use to residential use despite the existence and extent of direct access to two other public roads.

The landowners objected to the special commissioners' award of $267,000.00 for the taking and severance damages, and the case proceeded to trial. *See* TEX. PROP. CODE § 21.018(a). At trial, the highest and best use of the property before condemnation was the central issue and was hotly contested. The landowners introduced evidence that the highest and best use of the property was to hold it for subsequent commercial development. There was also evidence that the loss of direct access to FM 1695 made the remainder suitable only for residential development. Although there was considerable conflicting evidence regarding the highest and best use of the property before and

[1] While the condemnation petition was pending, Martha Lillian Attaway Gruetzner passed away, and her estate was substituted as a party.

after the taking, the salient facts about the condition of the property, the degree of impaired access, remaining access points, and the status of development plans were undisputed.

The State argued that (1) diminished value resulting exclusively from restrictions on access is not compensable unless access is materially and substantially impaired, (2) the landowners retain sufficient access to the remainder property and FM 1695 via two other public roads, and (3) expert testimony regarding the market value of the condemned land and damages to the remainder was unreliable. The trial court entered judgment on a jury verdict awarding $561,662.64 in damages for the condemned land and $402,616.80 in severance damages, and the court of appeals affirmed. __ S.W.3d at __.

The focus of this appeal is the compensability of severance damages. The landowners claim that the restrictions on access lowered the total value of the property by changing the highest and best use of a separate economic unit from commercial to residential. The arguments in favor of compensability, as we perceive them, are: (1) diminished value resulting from a change in a property's highest and best use is independently compensable or (2) an impairment of access that changes a property's highest and best use is necessarily material and substantial or (3) the reasonableness of access must be evaluated in light of a property's highest and best use.

We have long held that a change in a property's use due to condemnation is relevant to the fair market value of the property, but that does not mean all diminished value is compensable. *See County of Bexar v. Santikos*, 144 S.W.3d 455, 459 (Tex. 2004) ("Damages to remainder property are generally calculated by the difference between the market value of the remainder property immediately before and after the condemnation, considering the nature of any improvements and the

use of the land taken.") (citing references omitted). To the contrary, diminished value is compensable only when it derives from a constitutionally cognizable injury. *See Felts v. Harris County*, 915 S.W.2d 482, 484 (Tex. 1996) (citing *State v. Schmidt*, 867 S.W.2d 769, 774 (Tex. 1993)). The injury the landowners in this case have identified is a loss of value resulting exclusively from the denial of direct access to FM 1695 and its frontage roads.

It is well settled that diminished value resulting from impaired access is compensable only when access is materially and substantially impaired. *City of Waco v. Texland Corp.*, 446 S.W.2d 1, 2 (Tex. 1969). Whether access has been materially and substantially impaired is a threshold question of law reviewed *de novo*. *City of San Antonio v. TPLP Office Park Props., L.P.*, 218 S.W.3d 60, 66 (Tex. 2007) (citing *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996)).

The landowners apparently argue that access is materially and substantially impaired, as a matter of law, when loss of access changes the highest and best use of the property. If we were to accept this proposition, it would be a rare case in which a reduction of access would not have some impact on the value of property, and the "material and substantial" limitation would be effectively eliminated in the vast majority of cases, contrary to our body of impaired access law. *See, e.g.*, *Schmidt*, 867 S.W.2d at 773-74; *Archenhold Auto. Supply Co. v. City of Waco*, 396 S.W.2d 111, 114 (Tex. 1965); *Texland Corp.*, 446 S.W.2d at 2; *see also Heal*, 917 S.W.2d at 11 (absent a material and substantial impairment of access, the landowners were not entitled to compensation "even if the remainder of their property has lost some degree of value"). We reject an analysis that would effect such a result. This is not to say that a change in the highest and best use of property is irrelevant to the *amount* of damages, but the threshold legal issue that must be resolved before the jury can

properly consider evidence of an alleged change in value is whether there has been a material and substantial impairment of access, a matter to which we now turn.

In determining whether diminished value due to impaired access is compensable, we first look to whether other access points remain after the taking and whether those access points are reasonable. *See, e.g., Archenhold*, 396 S.W.2d at 114 (holding that access was not materially and substantially impaired when one access point was closed but another access point on a public street remained unaffected). The question presented by this case is *how* the remaining access should be evaluated. We have implicitly rejected the proposition that the degree of impairment of access must be evaluated in light of a property's highest and best use. *See City of Houston v. Fox*, 419 S.W.2d 819, 819-20 (Tex. 1967) (reversing a court of appeals opinion that held: "It is our opinion that a material consideration in determining the [question] of reasonable access is the highest and best use of the property"); *see also Schmidt*, 867 S.W.2d at 774 (characterizing the Court's holding in *Fox* as having "rejected" highest and best use as a material consideration in an impairment of access inquiry). Moreover, we have typically analyzed remaining access in light of the actual or intended uses of remainder property as reflected by existing uses and improvements and applicable zoning. *See, e.g.*, *Texland*, 446 S.W.2d at 4 (holding that access was impaired, even though normal access remained reasonably available, because access for which the property was specifically intended was rendered unreasonably deficient).

In contrast, we have rejected impairment of access claims based on speculative or hypothetical uses of remainder property. *See Santikos*, 144 S.W.3d at 460–61 (holding that access was not impaired simply because installing driveways in conjunction with hypothetical development

plans of unimproved property would be more difficult and expensive after condemnation); *State v. Delany*, 197 S.W.3d 297, 300 (Tex. 2006) (same). In *Santikos*, we held that the landowner could not recover severance damages based on "diminished market perception," reasoning that "noncompensable damages . . . cannot be transmuted to compensable ones by asserting them under a pseudonym." *Santikos*, 144 S.W.3d at 462. We then held that the landowner's characterization of its claim as one for "'reduced physical adaptability' (i.e., development will be less extensive and more expensive)," was "immaterial" because "[t]he sole reason alleged for having to alter development plans is because of impaired access." *Id.* at 461. In terms of the remaining access, we held that the landowner could not recover damages because "it is hard to find any effects on access here, as the tract has no businesses, homes, driveways, or other improvements of any kind." *Id.* at 460.

We also rejected a similar claim for severance damages in another case involving diminished access to raw land. *Delany*, 197 S.W.3d at 300. In *Delany*, we held that "while condemned property may be appraised at its highest and best use, remaining property on which there are no improvements and to which reasonable access remains, is not damaged simply because hypothetical development plans may have to be modified." *Id.* (citation omitted); *see also Schmidt*, 867 S.W.2d at 773 ("'Evidence [regarding severance damages] should be excluded relating to remote, speculative, and conjectural uses, as well as injuries, which are not reflected in the present market value of the property.'" (quoting *State v. Carpenter*, 89 S.W.2d 194, 200 (Tex. 1936)).

This case similarly lacks evidence of a material and substantial impairment of access. Although the southern remainder no longer has direct access to FM 1695 and its frontage roads, the

remainder retains 2,165 feet of access to Old Ritchie Road and will acquire 1,827 feet of access to New Ritchie Road.[2] New Ritchie Road is a two-lane road with a center turn lane, curbs, and gutters. Both roads are public roads that run virtually the entire length of the southern remainder, and both intersect FM 1695 at or near the point where the remainder fronts the highway. In addition, the property at issue is unimproved, and there is no evidence of existing driveways or drainage systems that would make access to the available roads impossible or impracticable. Furthermore, the property is zoned for residential use, and there is no evidence of a pending request for a zoning change, existing commercial development plans, or a contract for commercial use.

The restrictions on access in this case have resulted only in increased circuity of travel, which this Court has repeatedly held is not compensable. *See, e.g.*, *State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988). Moreover, we recently reaffirmed in *TPLP Office Park* that access is not materially and substantially impaired merely because other access points are significantly less convenient. 218 S.W.3d at 66–67 (holding that closure of the primary access point, which was used by eighty-percent of the tenants, did not impair access because at least six other points of ingress and egress remained, even though tenants had to travel an additional two miles to reach the property). Here, there are no existing structures to limit access to the more than 3,992 feet of access points along Old and New Ritchie Roads. In light of the considerable amount of remaining access to and from the property, we could not conclude that there is a material and substantial impairment of access in this case without imposing a requirement that there be some degree of direct access to the

[2] In the record, the names of these roads are spelled both as "Richie" and "Ritchie". It is unclear which is the correct spelling, but the City of Hewitt website uses the spelling we have adopted in this opinion. *See* http://www.cityofhewitt.com (accessed September 23, 2008).

highway. While the degree of residual access to an arterial road was integral to our determinations in *Santikos* and *Delany* that access was not materially and substantially impaired, we neither held nor implied that lack of access to an arterial road established impairment of access as a matter of law. We decline to impose such a requirement because it would be inconsistent with our well-developed case law regarding circuity of travel.

For the foregoing reasons, we conclude that access to the southern remainder is not materially and substantially impaired and the landowners are not entitled to severance damages as a matter of law. It was therefore error to allow evidence of diminished value to the remainder resulting from a change in the property's highest and best use. We need not consider in this case the extent to which remaining access can ever be properly evaluated in light of reasonably foreseeable future uses because any future commercial development of the southern remainder is purely speculative. *Cf. Santikos*, 144 S.W.3d at 461 (noting that "[t]his case might be quite different if driveways or other improvements were in place"); *State v. Allen*, 870 S.W.2d 1, 2 (Tex. 1994) ("[A] change in the best use due to [a] taking can create compensable damages to the remainder in some cases . . . ."); *cf. also* 4A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 14.02[2][b][ii], at 14-10 (3d ed. 2004) ("The determination of the highest and best use . . . considers 'the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably foreseeable future.'" (quoting *Olson v. U.S.*, 292 U.S. 246, 255 (1934))).

The State also challenges the amount awarded for the land taken, arguing that two of the landowners' witnesses, Randy Reid and Howard Gruetzner, were not qualified to offer opinions on its value. The State contends that the erroneous admission of this testimony probably caused the

rendition of an improper judgment as evidenced by the fact that the jury awarded the same amount to which these witnesses testified. *See* TEX. R. APP. P. 61.1(a)(1). We conclude that Reid's and Gruetzner's testimony was cumulative of substantially similar evidence from another expert, David Bolton, whose testimony has not been challenged on appeal. *Cf.* TEX. R. APP. P. 53.2(f). Therefore, any error in admitting Reid's and Gruetzner's testimony was harmless. *See Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989) ("The erroneous admission of testimony that is merely cumulative of properly admitted testimony is harmless error.").

Because the jury's award included noncompensable damages to the remainder, the State argues that we must remand the entire case for a new trial. *See Interstate Northborough P'Ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001) ("When a condemnation-damages award is based on evidence of both compensable and noncompensable injuries, the harmed party is entitled to a new trial."). In this case, however, the compensation questions submitted to the jury were segregated between the compensable and noncompensable damages. As a result, a new trial is not necessary to remedy the erroneous award of severance damages. *Cf. id.* at 218 (noting that the jury answered only a single damages question); *cf. also Santikos*, 144 S.W.3d at 458, 464 (suggesting that the jury answered a single broad-form damages issue). However, because the State seeks only a remand from this Court, we must remand the severance damages issue to the trial court even though the record would otherwise support a rendition of a judgment in the State's favor on that claim. *See State v. Heal*, 917 S.W.2d 6, 11 n.2 (Tex. 1996).

Accordingly, without hearing oral argument, we affirm the portion of the judgment awarding compensation for the condemned land, but we reverse the portion of the judgment awarding severance damages and remand that part of the case to the trial court for further proceedings consistent with this opinion. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: September 26, 2008

IN THE SUPREME COURT OF TEXAS

NO. 07-0572

GAIL ASHLEY, PETITIONER,

v.

DORIS D. HAWKINS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued December 11, 2008

JUSTICE GREEN delivered the opinion of the Court.

In this case, we consider whether section 16.063 of the Texas Civil Practice and Remedies Code tolls the limitations period when a defendant leaves Texas following a motor vehicle collision, but is otherwise amenable to out-of-state service. We hold, consistent with our recent decision in *Kerlin v. Sauceda*, 263 S.W.3d 920 (Tex. 2008), that section 16.063 does not apply in these circumstances, and we also overrule our decision in *Vaughn v. Deitz*, 430 S.W.2d 487 (Tex. 1968). We, therefore, reverse the court of appeals' judgment and reinstate the trial court's grant of summary judgment.

I

On May 31, 2003, Gail Ashley and Doris Hawkins were involved in a motor vehicle collision in Montgomery County, Texas. After the wreck, sometime in 2004, Ashley moved to California, leaving behind no forwarding address. On April 1, 2005, approximately sixty days prior to the expiration of the two-year limitations period, Hawkins sued Ashley, alleging personal injuries and damages related to the wreck. Although Hawkins made attempts to serve Ashley, she was not actually served until May 10, 2006, by a Sacramento County sheriff, almost one year after the limitations period expired. Ashley sought summary judgment on a statute-of-limitations affirmative defense, arguing that Hawkins failed to exercise diligence in serving her. *See* TEX. CIV. PRAC. & REM. CODE § 16.003(a) (setting a two-year limitations period for personal injury actions). In response, Hawkins argued that she exercised diligence in attempting to serve Ashley, and that, regardless, Ashley's absence from the state tolled the limitations period under section 16.063 of the Texas Civil Practice and Remedies Code. The trial court granted Ashley's motion, but the court of appeals reversed, holding that section 16.063 tolled the limitations period while Ashley was outside Texas. ___ S.W.3d ___. We reverse.

II

Ashley argues that the court of appeals erred in applying section 16.063 because (1) the statute is unconstitutional under the Commerce Clause, as it burdens Ashley's right to interstate travel; and (2) alternatively, even if constitutional, the statute should apply only in very narrow circumstances, as it is inconsistent with Texas's out-of-state service provisions. Section 16.063 provides:

> Temporary Absence From State. The absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person's absence.

TEX. CIV. PRAC. & REM. CODE § 16.063. We recently held in *Kerlin v. Sauceda*, that: "[I]f a nonresident is amenable to service of process under the longarm statute and has contacts with the state sufficient to afford personal jurisdiction . . . then we can discern no reason why a nonresident's 'presence' in this state would not be established for purposes of the tolling statute." 263 S.W.3d at 927. Under the general longarm statute, a nonresident party is amenable to service through the Secretary of State, if he or she "engages in business in this state" and the proceeding at issue "arises out of the business done in this state and to which the nonresident is a party." TEX. CIV. PRAC. & REM. CODE § 17.044(b). A nonresident defendant engages in business in this state, "if, among other acts . . . the nonresident *commits a tort in whole or in part in this state*." *Kerlin*, 263 S.W.3d at 927 (citing TEX. CIV. PRAC. & REM. CODE § 17.042) (emphasis added). Thus, according to *Kerlin*, if a party engages in business in this state, then the party's presence is established, and the tolling statute does not apply. *Id*. In her petition, Hawkins alleged that Ashley committed a tort in Montgomery County, Texas. Therefore, Ashley was present in Texas and amenable to service under the longarm statute.[1]

Unlike in *Kerlin*, however, we are now squarely presented with the issue of whether we should overrule our decision in *Vaughn v. Deitz*, 430 S.W.2d 487 (Tex. 1968). In *Deitz*, we held that the tolling statute, which preceded section 16.063 of the Civil Practice and Remedies Code, applied

[1] Ashley has not alleged she does not have "contacts with the state sufficient to afford personal jurisdiction." *Kerlin*, 263 S.W.3d at 927.

to an out-of-state defendant, despite the existence of former article 2039a (now codified as TEX. CIV. PRAC. & REM. CODE § 17.062),[2] which provided for out-of-state service through the Chairman of the State Highway Commission. 430 S.W.2d at 490. In *Kerlin*, we recognized that *Deitz* did not address the effect of the general longarm statute, only the impact of amenability to service through the Chairman of the State Highway Commission (now the Chairman of the Texas Transportation Commission). 263 S.W.3d at 927; *see also* TEX. CIV. PRAC. & REM. CODE § 17.062.[3] The general longarm statute not only provides for substituted service, but also establishes a nonresident's presence in the state for purposes of personal jurisdiction. *Kerlin*, 263 S.W.3d at 927. Former article 2039a, the statute addressed in *Deitz*, and current section 17.062, provide only for substitute service, but do not define a defendant's "presence." *Id*.

Kerlin did not involve an automobile accident, so substituted service through the Texas Transportation Commission was not possible. Here, although Hawkins did not choose to pursue these options, Ashley was amenable to service under both section 17.062 (service on the Chairman of the Transportation Commission) and section 17.044 (service on the Secretary of State) of the Civil

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[2] Act of May 8, 1959, 56th Leg., R.S., ch. 502, § 1, 1959 Tex. Gen. Laws 1103, 1103–04 (now codified at TEX. CIV. PRAC. & REM. CODE § 17.062).

[3] This section provides:

> **Substituted Service On Chairman of Texas Transportation Commission**
> (a) The chairman of the Texas Transportation Commission is an agent for service of process on a person who is a nonresident or an agent of a nonresident in any suit against the person or agent that grows out of a collision or accident in which the person or his agent is involved while operating a motor vehicle in this state.
>
> (b) Process may be served on the chairman in accordance with this section for a nonresident who was a resident at the time the cause of action accrued but has subsequently moved from the state.

TEX. CIV. PRAC. & REM. CODE § 17.062.

Practice and Remedies Code. Thus, we are presented with a conflict: *Deitz* says a defendant is not "present" in Texas for purposes of the tolling statute, even if amenable to service through the Chairman of the Highway (Transportation) Commission, whereas *Kerlin* says a defendant is "present" if amenable to service under the general longarm statute. *Compare Kerlin*, 263 S.W.3d at 927, *with Deitz*, 430 S.W.2d at 490. These differing standards are unworkable and inefficient, and will only serve to create confusion when litigants attempt to determine if the tolling statute applies to their cases. *Cf. Sw. Bell Tel. Co., L.P. v. Mitchell*, 276 S.W.3d 443, 447 (Tex. 2008). ("We adhere to our precedents for reasons of efficiency, fairness, and legitimacy . . . ." (internal quotations omitted)).[4] Therefore, we overrule *Deitz* and hold, as we did in *Kerlin*, that a defendant is "present" in Texas, for purposes of the tolling statute, if he or she is amenable to service under the general longarm statute, as long as the defendant has "contacts with the state sufficient to afford personal jurisdiction." *Kerlin*, 263 S.W.3d at 927. In most cases, the general longarm statute will establish this "presence," as its "broad doing-business language 'allows the statute to reach as far as the federal constitutional requirements of due process will allow.'" *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009) (quoting *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex. 2007)).

Because we hold that section 16.063 does not toll the limitations period, Hawkins was required to file suit and serve Ashley by May 31, 2005. She failed to serve Ashley by this date, so

[4] *Deitz*'s continuing application may also pose constitutional problems. *See, e.g.*, *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 892–94 (1988) (holding that states cannot condition limitations statutes on requirement that nonresidents appoint a local agent for service); *see also Key Western Life Ins. Co. v. State Bd. of Ins.*, 350 S.W.2d 839, 849 (Tex. 1961) ("[I]f possible, it is the duty of the courts to construe a statute in such a way as to avoid repugnancy to the Constitution.").

we must consider whether Hawkins exercised due diligence in pursuing service after the limitations period expired.[5]

III

If a party files its petition within the limitations period, service outside the limitations period may still be valid if the plaintiff exercises diligence in procuring service on the defendant. *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990) (per curiam) (citing *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 890 (Tex. 1975) (per curiam)). When a defendant has affirmatively pleaded the defense of limitations, and shown that service was not timely, the burden shifts to the plaintiff to prove diligence. *Proulx v. Wells*, 235 S.W.3d 213, 216 (Tex. 2007) (per curiam) (citing *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 830 (Tex. 1990)). Diligence is determined by asking "whether the plaintiff acted as an ordinarily prudent person would have acted under the same or similar circumstances and was diligent up until the time the defendant was served." *Id*. at 216. Although a fact question, a plaintiff's explanation may demonstrate a lack of diligence as a matter of law, "when one or more lapses between service efforts are unexplained or patently unreasonable." *Id*. Thus, Hawkins has the burden to "present evidence regarding the efforts that were made to serve the defendant, and to explain every lapse in effort or period of delay." *Id*.

Hawkins alleges the collision occurred on May 31, 2003, setting May 31, 2005, as the date the two-year limitations period expired. TEX. CIV. PRAC. & REM. CODE § 16.003(a) (setting a two-year limitations period for personal injury actions). In her motion for summary judgment, Ashley

[5] Because we hold that section 16.063 does not apply in this instance, we do not reach Ashley's constitutional argument. Nor do we consider whether the constitutional argument was waived by Ashley's failure to specifically present it at the court of appeals or in her petition for review.

pointed out that she was not served until May 10, 2006, almost a year after the limitations period expired. Therefore, the burden shifted to Hawkins to explain how she was diligent in attempting to serve Ashley. *See Proulx*, 235 S.W.3d at 216. The record reflects that Hawkins filed suit on April 1, 2005, and the clerk first mailed service to Ashley in Conroe, Texas, at an address found on Ashley's Texas drivers license and on the accident report. This citation was returned unclaimed. Then, on June 7, 2005, Hawkins requested, and the clerk mailed, service to an address in Sacramento, California. This was returned on July 27, 2005. No other service was attempted until March 17, 2006, at which time Hawkins provided the clerk with a new address in Rio Linda, California. Almost two months later, a Sacramento County sheriff personally served Ashley at that address. However, a period of almost eight months lapsed between July 27, 2005 and March 17, 2006. During this time, the record reflects that the trial court twice set the case for dismissal based on a want of prosecution, dismissing it on January 17, 2006, only to reinstate it following a motion by Hawkins. In her response to the motion for summary judgment, Hawkins asserted that she made a diligent effort to serve Ashley, citing the two attempts at service in April and June of 2005, and also explaining:

> Counsel for [Hawkins] and his assistants have spent approximately twenty (20) hours searching for [Ashley's] whereabouts. Many search engines, including Zabasearch, Google, DCS Information Systems (a reliable intelligence source for business), People Search, Intelius, and other sources have been utilized. Counsel for [Hawkins] personally went to the last known address of [Ashley] and canvassed the apartment project where she once resided. Although [Ashley] moved to California many months before she was finally served, she never changed her address on her driver's license.
>
> [Ashley] was finally located at a different address in Rio Linda, California and served with citation.

Hawkins also attached an affidavit from her counsel, stating that he was a licensed private investigator for over fifteen years, that he is "acquainted with the resources utilized by private investigators in skip tracing," and that he utilized those resources in attempting to locate Ashley. In addition to the methods listed in the motion, the affidavit listed other websites and public records he searched. She also contended that the Montgomery County Voter Registration Database listed Ashley's address in Conroe, Texas.[6]

We agree with the trial court and hold that, as a matter of law, Hawkins' responses do not create a fact issue as to diligence, as this eight-month gap in time is left unexplained. *See, e.g.*, *Gant*, 786 S.W.2d at 260. Hawkins stated that she spent approximately twenty hours searching for Ashley, although she does not specify when this time was spent. Either these twenty hours were expended early on, in which case, the diligence of the search later ceased; or, these hours were spread over eight months, in which case the search was never diligent. Either way, Hawkins failed to meet her burden.

As a comparison, in *Proulx*, we held that a plaintiff's thirty-seven attempts at five different addresses over the course of nine months exhibited continuing diligence to preclude summary judgment. 235 S.W.3d at 217. After numerous unsuccessful attempts at effectuating service, the plaintiff in *Proulx* sought substitute service because it was clear the defendant was attempting to

[6] Hawkins also incorporated, by reference, her earlier motion to reinstate her dismissed case, filed January 31, 2006. This motion is almost verbatim to the response to the motion for summary judgment, and also includes the argument that twenty hours had been expended on searching for Ashley, and that she had been located in Rio Linda, California. So it is clear from this motion that no additional time was expended between January 31, 2006, and March 17, 2006. In fact, this motion makes clear that Hawkins was aware of Ashley's location almost two months prior to actually serving her. While an almost two-month delay would not amount to a lack of diligence as a matter of law under many circumstances, Hawkins's effort here, coupled with the almost five months of unexplained gap from July of 2005 to January of 2006, amounts to a lack of diligence as a matter of law.

evade service by "moving from relative to relative and doing his best to avoid service from the courts and creditors." *Id*. In *Gant*, however, we held that a plaintiff was not diligent as a matter of law where no explanation was offered for gaps in service for three different periods ranging from six to twenty months. 786 S.W.2d at 260 (citing cases with seventeen, ten, six, seven, and three month gaps). These cases clarify that, while the time period is important, it is not necessarily determinative of the question of diligence. Rather, we must consider the overall effort expended over the gap in service, and whether the search ceased to be reasonable, especially when other methods of service were available. *See Proulx*, 235 S.W.3d at 217; *Gant*, 786 S.W.2d at 260.

Notably, the record does not indicate that Hawkins attempted any form of service other than service by mail or delivery. If Hawkins was unable to locate Ashley, or if Hawkins thought Ashley was evading service, other methods of service were available. In particular, no substitute service such as service by publication was attempted. *See* TEX. R. CIV. P. 109 (providing for service by publication when defendant's residence is unknown, the defendant is transient, or the defendant is absent or is a nonresident of the state); *see also Parmer v. DeJulian*, No. 12-07-00479-CV, 2008 WL 4225994, *6 (Tex. App.—Tyler Sept. 17, 2008, no pet.) (mem. op., not designated for publication) (finding lack of diligence as a matter of law where plaintiff relied on its own efforts only to locate defendant over a one-year period, rather than resorting to other methods such as hiring a private investigator or process server, or performing citation by publication); *Hodge v. Smith*, 856 S.W.2d 212, 215–17 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (finding diligence was not lacking as a matter of law where plaintiff requested service by publication, four months after suit was filed and after other attempts to locate the defendant). Hawkins recognized its availability by stating, in

her October 11, 2005, motion to retain the case on the court's docket, that she "utilized various investigative resources to no avail" and that she "would like additional time to locate [Ashley] before resorting to service by publication[,] which is expensive." But from the time of that motion, an additional five months lapsed before service was attempted and seven months lapsed until service was achieved. Although service by publication should not be a first resort, when a plaintiff is continuously unable to locate a defendant, its availability should not be overlooked. *See Wood v. Brown*, 819 S.W.2d 799, 800 (Tex. 1991) (per curiam) (noting that service by publication is to be used only if the requirements of Rule 109 of the Texas Rules of Civil Procedure are met); *see also Carter v. MacFadyen*, 93 S.W.3d 307, 314–15 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) ("A flurry of ineffective activity does not constitute due diligence if easily available and more effective alternatives are ignored.").

IV

For these reasons, we reverse the court of appeals' judgment and reinstate the trial court's grant of summary judgment in favor of Ashley.

_____

Paul W. Green
Justice

OPINION DELIVERED: June 26, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0581

IN RE HAROLD R. SCHMITZ, ET AL., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued April 2, 2008

JUSTICE BRISTER delivered the opinion of the Court.

CHIEF JUSTICE JEFFERSON did not participate in the decision.

Texas law has recognized shareholder derivative suits for more than a century.[1] As such suits are nominally brought on a corporation's behalf, we have long required that a shareholder first demand that the corporation bring the suit itself, unless such a demand would be futile.[2] But it does not appear we have ever specified what such a demand must include.

In 1997, the Legislature amended the Texas Business Corporation Act to require such demands in all cases (even if it is futile), and that the demand be made "with particularity." The question here is whether a two-sentence demand was inadequate because it failed to state a

[1] *See, e.g.*, *Becker v. Dirs. of Gulf City St. Ry. & Real Estate Co.*, 15 S.W. 1094 (Tex. 1891); *Evans v. Brandon*, 53 Tex. 56 (1880).

[2] *See Becker*, 15 S.W. at 1097; *Evans*, 53 Tex. at 60.

shareholder's name or state the claim with particularity. The courts below held it was not; we disagree, and thus grant mandamus relief.

I. Background

Lancer Corporation, a Texas corporation headquartered in San Antonio, manufactured beverage dispensers. In October 2005, Lancer agreed to a buyout by Hoshizaki America, Inc., with Lancer's shareholders to receive $22 per share. Two months later (and about a month before the merger was to close), a law firm faxed a letter to Lancer's board insisting that the merger be cancelled within 24 hours "in light of a superior offer" of $23 per share. Three days later, the same firm filed this derivative suit on behalf of shareholder Virginie Dillingham seeking an injunction to halt the merger and declaratory relief against the board members.

Lancer's shareholders overwhelmingly approved the merger in January 2006, and on February 2nd Lancer merged into Hoshizaki and ceased to exist. Dillingham never sought a hearing on her injunction request, and after the merger amended her petition to seek rescission of the merger, damages on behalf of Lancer, and attorneys' fees.

The Defendants — all eight former directors of Lancer — filed a motion to dismiss this suit for failure to send a proper presuit demand. After the trial court and court of appeals denied relief,[3] the Defendants sought mandamus relief in this Court.

[3] ___ S.W.3d ___.

II. Is Abatement Required?

As an initial matter, we must decide whether this case should be abated for reconsideration by a successor judge. The motion to dismiss here concerns a suit filed in the 288th District Court in Bexar County. After oral arguments in this Court, Judge Sol Casseb III replaced Judge Lori Massey as judge of that court. Normally, this would require abatement for reconsideration, as "[m]andamus will not issue against a new judge for what a former one did."[4]

But Judge Massey never heard the relators' motion. Under Bexar County's central docket system, pretrial motions are generally heard by a presiding judge — one of the county's 13 civil district judges who rotate monthly in that position.[5] The motion here was actually heard and denied by Judge Gloria Saldaña, who remains in office. The question is whether to abate this case for reconsideration when the judge who ceased to hold office never ruled on the motion, and the judge who did rule on it is still in office.

We hold that abatement is not required in these circumstances. The proper respondent in a mandamus action is "the person against whom relief is sought."[6] For judicial orders, that should generally be the judge who made the ruling. For example, in *Remington Arms Co., Inc. v. Caldwell*, we held the proper respondent in a challenge to a discovery sanction was the assigned judge who issued it rather than the presiding judge of the court in which the case was filed.[7]

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[4] *In re Baylor Med. Ctr. at Garland*, ___ S.W.3d ___, ___ (Tex. 2008); *see* TEX. R. APP. P. 7.2(b).

[5] BEXAR COUNTY CIV. DIST. CT. LOC. R. 2, 3(A).

[6] TEX. R. APP. P. 52.2.

[7] 850 S.W.2d 167, 168 n.1 (Tex. 1993).

But the courts of appeals have split on this issue. Some have held that the respondent in a mandamus proceeding should be the presiding judge rather than the judge who signed the challenged order.[8] Others have held the opposite — that the respondent should be the judge who signed the order rather than the presiding judge.[9] One has simply addressed the writ to both.[10]

The only reason stated in any of these cases for naming a judge other than the one who signed the order is that the presiding judge alone has authority to sit in the case in the future.[11] But it is never entirely predictable who will preside over a case when it returns to a trial court, as Texas law allows judges to sit for one another whenever they choose.[12] This is especially true in counties with a central docket like Bexar County, as the presiding judge hearing pretrial matters changes monthly.

Generally, of course, the respondent is not critical in mandamus proceedings, as only the real party in interest actually appears, argues, and is affected by the outcome. Indeed, on at least two occasions we have changed the respondent on our own motion in a final opinion conditionally

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[8] *See, e.g.*, *In re Balawajder*, No 01–03–0002–CV, 2003 WL 21470397, at *1 (Tex. App.—Houston [1st Dist.] June 19, 2003, orig. proceeding) (mem. op.); *In re Dilley Indep. Sch. Dist*., 23 S.W.3d 189, 190 n.1 (Tex. App.—San Antonio 2000, orig. proceeding); *In re Acevedo*, 956 S.W.2d 770, 772 (Tex. App.—San Antonio 1997, orig. proceeding); *Humana Hosp. Corp. v. Casseb*, 809 S.W.2d 543, 548 (Tex. App.—San Antonio 1991, orig. proceeding); *Hoggard v. Snodgrass*, 770 S.W.2d 577, 588 (Tex. App.—Dallas 1989, orig. proceeding).

[9] *See In re McDaniel*, No. 10–04–00166–CV, 2006 WL 408397, at *1 (Tex. App.—Waco Feb. 22, 2006, orig. proceeding); *In re Alsenz*, 152 S.W.3d 617, 623 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding).

[10] *See Dal-Briar Corp. v. Baskette*, 833 S.W.2d 612, 614 n.1 (Tex. App.—El Paso 1992, orig. proceeding).

[11] *See Hoggard*, 770 S.W.2d at 588.

[12] *See* TEX. CONST. art. V, § 11; TEX. R. CIV. P. 330(e); *see, e.g.*, *In re Houston Lighting & Power Co.*, 976 S.W.2d 671, 673 (Tex. 1998).

granting the writ.[13] Of course, the writ must be directed to someone, but in the final analysis *any* judge sitting in the case after mandamus relief is granted would be compelled to obey it.[14] Accordingly, we adhere to the more practical rule treating the judge who signed the order as the respondent. As the judge who signed the order here has not left office, the abatement rule does not apply.

III. The Demand Requirement In Texas Derivative Actions

The contours of the demand requirement in Texas law have always been somewhat unclear, in part because shareholder derivative suits have been relatively rare.[15] The original 1941 rules of civil procedure imposed a demand requirement in derivative suits, but that provision was repealed four months after it became effective.[16] It reappeared in 1973 in article 5.14 of the Texas Business Corporation Act, which required that an initial pleading state "[w]ith particularity, the efforts of the

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[13] *See Rios v. Calhoon*, 889 S.W.2d 257, 258 n.1 (Tex. 1994) (noting that court on its own motion changed respondent from appellate court to trial judge); *Loftin v. Martin*, 776 S.W.2d 145, 145–46 n.1 (Tex. 1989) (same).

[14] *See Loram Maint. of Way, Inc. v. Ianni*, 210 S.W.3d 593, 596 (Tex. 2006) (describing law-of-the-case doctrine as "that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages"); *In re K.M.S.*, 91 S.W.3d 331, 331 (Tex. 2002) (noting that lower courts cannot "decline to follow" rulings of higher court).

[15] *See* Robert K. Wise, *Demand Futility in Shareholder-Derivative Litigation Under Texas Law*, 28 TEX. TECH. L. REV. 59, 60 (1997) ("Surprisingly, there are very few cases, treatises, or articles that discuss demand futility under Texas law, and none provide more than a cursory analysis of it."); M. Marvin Katz, *Shareholder's Derivative Suits in Texas: Possible Restrictions On Their Abuse*, 36 TEX. L. REV. 641, 641 n.2 (1958) (noting a "scarcity of reported Texas cases").

[16] TEX. R. CIV. P. 42(b) (1941, amended 1941) ("The complaint shall set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."). A similar provision reappeared in Rule 42 in 1984, only to be discarded again in 2003 as "redundant of Article 5.14." TEX. R. CIV. P. 42 (1984, amended 2003); *see* TEX. R. CIV. P. 42 cmt. (2003).

plaintiff to have suit brought for the corporation by the board of directors, or the reasons for not making any such efforts."[17]

In 1997, the Legislature extensively revised the Texas Business Corporation Act "to provide Texas with modern and flexible business laws which should make Texas a more attractive jurisdiction in which to incorporate."[18] Included were changes to article 5.14 to conform Texas derivative actions to the Model Business Corporation Act. Article 5.14(C) now provides that "[n]o shareholder may commence a derivative proceeding until . . . a written demand is filed with the corporation setting forth with particularity the act, omission, or other matter that is the subject of the claim or challenge and requesting that the corporation take suitable action." Unlike Texas law for a century before, the new provision requires presuit demand in all cases; a shareholder can no longer avoid a demand by proving it would have been futile.[19]

IV. Was This Demand Adequate?

The demand letter at issue here was directed to Lancer's board, and stated in its entirety as follows:

> We write to insist that you confirm to us, in writing, no later than noon on Wednesday, December 21, 2005, that, in light of a superior offer having been received for the Lancer Corporation ("Lancer" or the "Company") at $23 per share, you are taking no further steps to consummate or in any way facilitate the previously announced sale to Hoshizaki America, Inc. ("Hoshizaki") at $22 per share. Your fiduciary obligations require that you fully and fairly consider all potential offers and

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[17] Acts of 1973, 63rd Leg., R.S., ch. 545, § 37, 1973 Tex. Gen. Laws 1486, 1508.

[18] House Comm. on Bus. & Indus., Bill Analysis, Tex. H.B. 1104, 75th Leg., R.S. (1997).

[19] *Pace v. Jordan*, 999 S.W.2d 615, 621 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) ("Under the amended article [5.14], demand futility is no longer an option.").

> that you disclose to shareholders all of your analysis that leads to your recommendation regarding the pending sale to Hoshizaki or any other offers made.

The Defendants assert the demand was insufficient because it failed to (1) state the name of a shareholder, or (2) describe the subject of the claim with particularity. We address each in turn.

A. Must a Demand Identify a Shareholder?

Article 5.14 does not expressly state that a presuit demand must list the name of a shareholder. But because parts of the article and most of its purposes would be defeated otherwise, we hold that a demand cannot be made anonymously.

The statute here provides that "[n]o shareholder may commence a derivative proceeding until . . . a written demand is filed."[20] It expressly limits standing to shareholders who owned stock "at the time of the act or omission complained of."[21] It requires that the demand state the "the subject of the claim or challenge" that forms the basis of the suit.[22] And it tolls limitations for 90 days after a written demand is filed.[23] Given the interrelation between the demand and the subsequent suit, it is hard to see how or why the demand could be made by anyone other than the shareholder who will file the suit.

Of course, requiring the demand to come from the putative plaintiff is not the same as requiring that it state the plaintiff's name. But for several reasons we believe it must.

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[20] Tex. Bus. Corp. Act art. 5.14, § C.

[21] *Id*. art. 5.14, § B.

[22] *Id*. art. 5.14, § C(1).

[23] *Id*. art. 5.14, § E.

First, article 5.14 presumes that a corporation knows the identity of the shareholder making the demand. The article prohibits filing suit until 90 days after the demand "unless the shareholder has earlier been notified that the demand has been rejected."[24] The tolling provision suspends limitations for the shorter of 90 days or "30 days after the corporation advises the shareholder that the demand has been rejected."[25] For a corporation to "notify" or "advise" the shareholder of rejection, it must know who the shareholder is.

Second, the identity of the shareholder may play an important role in how the corporation responds to a demand. "The identity of the complaining shareholder may shed light on the veracity or significance of the facts alleged in the demand letter, and the Board might properly take a different course of action depending on the shareholder's identity."[26] In other words, a demand from Warren Buffett may have different implications than one from Jimmy Buffett.

Third, a corporation cannot be expected to incur the time and expense involved in fully investigating a demand without verifying that it comes from a valid source. Article 5.14 sets out a procedure for independent and disinterested directors to conduct an investigation and decide whether the derivative claim is in the best interests of the corporation.[27] If they determine in good faith that it is not, the court must dismiss the suit over the plaintiff's objection.[28] It would be hard to imagine

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[24] *Id*. art. 5.14, § C(2).

[25] *Id*. art. 5.14, § E.

[26] *Potter v. Hughes*, 546 F.3d 1051, 1057-58 (9th Cir. 2008).

[27] Tex. Bus. Corp. Act art. 5.14, § F.

[28] *Id*.

requiring these procedures, especially in cases like this one involving an imminent corporation merger, at the instance of someone who could in no event file suit.

Finally, we are concerned with the potential for abuse if demands can be sent without identifying any shareholder. The letter here was on the letterhead of a California law firm whose principal prosecuted hundreds of stockholder derivative actions,[29] and later pleaded guilty to paying kickbacks to shareholders recruited for that purpose.[30] His actions have been described by one federal court as the cause of much of the criticism about derivative suits:

> A direct target of Congress, singled out for much of the criticism of lawyers who manipulate the securities laws to serve their own interest, was Milberg Weiss Bershad Hynes & Lerach ("Milberg"), whose name partner, William Lerach, known as the "King of Strike Suits," had boasted, "I have the greatest practice in the world because I have no clients. I bring the case. I hire the plaintiff. I do not have some client telling me what to do. I decide what to do."[31]

There are no such allegations in this case, but it would be unwise to wait for them to occur before taking the possibility into account.

We agree with Dillingham that by writing article 5.14's demand requirement in the passive tense (barring suit until "a written demand *is filed*"), the Legislature did not require that shareholders send the demand personally, as opposed to having someone do so on their behalf. But requiring the demand to state a shareholder's name costs nothing; typing a name into the demand is not expensive

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[29] *In re Dynegy, Inc. Secs. Litig.*, 226 F.R.D. 263, 280 (S.D. Tex. 2005) (quoting resume of William Lerach of Lerach Coughlin Stoia Geller Rudman & Robbins L.L.P. that "he has prosecuted hundreds of securities class and stockholder derivative actions that have yielded billions of dollars in recoveries").

[30] *See* James P. McDonald, *Milberg's Monopoly: Restoring Honesty and Competition to the Plaintiffs' Bar*, 58 DUKE L.J. 507, 524, 531 (2008).

[31] *In re Network Assocs., Secs. Litig.*, 76 F.Supp. 2d 1017, 1032 (N.D. Cal. 1999).

and can cause no delay, assuming a shareholder exists who is entitled to make the claim. Construing article 5.14 as a whole, we hold that the demand required by the article must name the shareholder on whose behalf it is made.[32] Because the demand here did not do so, and did not even purport to be made on behalf of any shareholder, it was inadequate.

B. Was This Demand Stated "With Particularity"?

Article 5.14 is based largely on the Model Business Corporation Act, whose eight sections all appear among the 12 sections of article 5.14. But one of the notable differences between the two is that the Model Act requires only that a presuit demand be in writing, while article 5.14 requires a written demand "setting forth with particularity the act, omission, or other matter that is the subject of the claim or challenge and requesting that the corporation take suitable action." Given this deliberate insertion, the demand letter here cannot be what the Legislature had in mind.

The only complaint and demand for action listed in this letter was that the Board stop the Hoshizaki merger "in light of a superior offer . . . at $23 per share." The demand gives no reason why the Hoshikazi offer was inferior other than what one can imply from the $1 difference in price. All other things being equal, shareholders should of course prefer $1 more rather than $1 less. But in comparing competing offers for a merger, all other things are rarely equal.

A large number of variables may affect the inherent value of competing offers for corporate stock. A cash offer may prove more or less valuable than an offer of stock currently valued at the same amount. Competing bidders may be more or less capable of funding the offers they tender, or

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[32] *Accord, Potter v. Hughes*, 546 F.3d 1051, 1058 (9th Cir. 2008); *Smachlo v. Birkelo*, 576 F. Supp. 1439, 1444 (D. Del. 1983).

completing the transaction without antitrust or other obstacles. Competitors may attach conditions that make an offer more or less attractive in the short or long run.

In a merger like this involving several hundred million dollars, one cannot say whether the $23 offer was superior to the $22 offer without knowing a lot more. A rule requiring that a corporation always accept nominally higher offers, in addition to sometimes harming shareholders, would replace the business judgment that Texas law requires a board of directors to exercise.[33] As a result, a board cannot analyze a shareholder's complaint about a higher competing offer without knowing the basis of that complaint. As this demand said nothing about that, it was not stated "with particularity" as required by article 5.14.[34]

The second sentence of the demand here added that the Board should "fully and fairly consider all potential offers" and "disclose to shareholders all of your analysis" for recommending the Hosizaki sale. This bland statement of a corporate board's duties could be sent to any board at any time on any issue. The demand did not suggest how the board had failed to consider other offers, or what information it might be withholding. Thus, it gives no direction about what Lancer's board should have done here.

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[33] Tex. Bus. Corp. Act art. 2.31; *Cates v. Sparkman*, 11 S.W.846, 849 (1889); *Pace v. Jordan*, 999 S.W.2d 615, 623 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

[34] We also note that the letter does not specify why accepting $22 rather than $23 per share would harm the corporation as opposed to the shareholders. *See Eye Site, Inc. v. Blackburn*, 796 S.W.2d 160, 161 (Tex. 1990) (noting that only corporation rather than shareholder personally is entitled to recover in derivative suits); *see also Marron ex rel. Stewart & Stevenson Servs., Inc. v. Ream*, No. CIVAH–06–1394, 2006 WL 2734267, at *7 (S.D. Tex. May 5, 2006) (questioning whether claim that board should have accepted offer for $35.50 rather than offer for $35.00 per share was derivative claim belonging to corporation).

On appeal, Dillingham alleges further details of the Hoshizaki merger that she says show Lancer's board chose this merger because of the benefits it gave them personally rather than the corporation. We agree a derivative suit can serve as one important means of preventing a corporate board from enriching themselves at the shareholders' expense. But the demand letter here said nothing about any of that.

We do not attempt today to explore all the ways in which a demand might or might not meet article 5.14's "with particularity" requirement. Whether a demand is specific enough will depend on the circumstances of the corporation, the board, and the transaction involved in the complaint. But given the size of this corporation and the nature of this transaction, this demand was clearly inadequate.

V. Is Mandamus Available?

If a trial court fails to enforce the demand requirements of article 5.14, there is no interlocutory appeal.[35] But that of course does not preclude mandamus review.[36] Mandamus may be available upon a showing that (1) a trial court clearly abused its discretion by failing to correctly apply the law, and (2) the benefits and detriments of mandamus render appeal inadequate.[37]

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[35] *See Stary v. DeBord*, 967 S.W.2d 352, 354 (Tex. 1998) (holding shareholder derivative suit did not fall within statute providing for interlocutory appeal or class certification orders).

[36] *In re Gulf Exploration*, ___ S.W.3d ___, ___ (Tex. 2009).

[37] *In re Poly-America, L.P.*, 262 S.W.3d 337, 347 (Tex. 2008); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004).

Dillingham concedes that if her demand was inadequate, dismissal was the appropriate remedy.[38] Thus, the only remaining question is whether an appeal could adequately address the error.

In balancing the benefits and detriments of delaying or interrupting a particular proceeding, we must consider the purposes the Legislature was trying to accomplish.[39] Article 5.14 was adopted to preserve the principle that a corporation should be run by its board of directors, not a disgruntled shareholder or the courts.[40] In some cases, this goal will not be defeated merely because a trial court proceeds with a shareholder derivative suit despite an inadequate demand.

For example, if one shareholder is entitled to proceed with a derivative action based on a proper demand, a board gains little by mandamus review of an improper demand by someone else. The parties in a closely-held corporation may have various claims between them that require litigation, regardless of whether a derivative claim is added to the mix.[41] And a corporation's interests may be adequately protected by article 5.14's provision for recovery of expenses if a shareholder suit is prosecuted "without reasonable cause or for an improper purpose."[42]

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[38] *Cf. Hines v. Hash*, 843 S.W.2d 464, 469 (Tex. 1992) (holding that with respect to DTPA presuit notice requirement, "abatement of the action for the statutory notice period is more consistent with the purpose of notice than dismissal").

[39] *In re Gulf Exploration*, ___ S.W.3d at ___ ("[O]ur place in a government of separated powers requires us to consider also the priorities of the other branches of Texas government."); *In re McAllen Med. Ctr.*, 275 S.W.3d 458, 461 (Tex. 2008).

[40] *See, e.g.*, *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101 (1991) (noting that "the demand requirement implements the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders").

[41] *See, e.g.*, *Willis v. Donnelly*, 199 S.W.3d 262 (Tex. 2006).

[42] Tex. Bus. Corp. Act art. 5.14, § J.

But this case involves a multi-million dollar merger proceeding on an expedited schedule. As the merger has now been completed, Lancer Corporation no longer exists. It is thus too late for its board to entertain a new analysis of the competing merger offers, or authorize an inquiry by independent and disinterested directors. Assuming as we must that the board would have given proper consideration to this matter had it received a proper demand, that possibility is now foreclosed because the demand fell so woefully short.

"The most frequent use we have made of mandamus relief involves cases in which the very act of proceeding to trial — regardless of the outcome — would defeat the substantive right involved."[43] Allowing this case to proceed to trial would effectively allow a shareholder to sue for damages connected with a merger without giving the corporation's board an opportunity to make such a decision for itself. As that would defeat the substantive right the Legislature sought to protect, we hold mandamus relief is warranted.

Accordingly, we conditionally grant the writ of mandamus and order the respondent to vacate its order and enter a new order dismissing the plaintiff's suit. We are confident the trial court will comply, and our writ will issue only if it does not.

Scott Brister
Justice

OPINION DELIVERED: May 22, 2009

[43] *In re McAllen Med. Ctr.*, 275 S.W.3d at 465.

IN THE SUPREME COURT OF TEXAS

NO. 07-0599

RETAMCO OPERATING, INC., PETITIONER,

v.

REPUBLIC DRILLING COMPANY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued September 11, 2008

JUSTICE GREEN delivered the opinion of the Court.

In this case, we decide whether a Texas court has personal jurisdiction over an out-of-state company accused of violating the Uniform Fraudulent Transfer Act (UFTA) by acting as the transferee of Texas oil and gas interests. We hold that, under the facts of this case, the defendant is subject to the jurisdiction of the Texas courts and, therefore, reverse the court of appeals' judgment and remand for trial.

I

Retamco Operating, Inc. (ROI), a Texas corporation, sued Paradigm Oil, Inc. (Paradigm), another Texas corporation, in a Texas district court, over unpaid royalties related to oil and gas interests in several Texas counties. After a finding of discovery abuse, sanctions were assessed

against Paradigm and the trial court entered a $16 million default judgment against Paradigm.[1] Following this interlocutory judgment, ROI amended its petition to include a claim against Republic Drilling Company (Republic), a California corporation, for violation of the Uniform Fraudulent Transfer Act. *See* TEX. BUS. & COM. CODE § 24.001–.013. ROI claimed that during the pendency of the litigation, Paradigm assigned to Republic[2] a 72% interest in Paradigm's oil and gas wells and leases in Fayette County and a 72% interest in an option to acquire an interest in a lease in Dimmit and Webb Counties.[3] ROI alleged that these transfers were fraudulent, and that they led to Paradigm's insolvency, rendering it unable to satisfy ROI's claims.

In response to the amended petition, Republic filed a special appearance, arguing that it does not have minimum contacts with Texas, and that even if it did, ROI's cause of action did not arise

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[1] Numerous appeals have been spawned by the *ROI v. Paradigm* litigation. First, the "death penalty" discovery sanctions against Paradigm were upheld on appeal, but the court of appeals remanded the case for a determination of unliquidated damages. *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 161 S.W.3d 531, 540 (Tex. App.—San Antonio 2004, pet. denied). The trial court then found actual damages of $5.6 million, as well as, attorney's fees and exemplary damages. *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 242 S.W.3d 67, 70 (Tex. App.—San Antonio 2007, pet. denied). Next, the court of appeals reversed this finding due to insufficient evidence and remanded for another hearing on unliquidated damages. *Id*. at 75. ROI also originally sued Finley Oilwell Service, but the claim was severed. The result was the same. *Finley Oilwell Service, Inc. v. Retamco Operating, Inc.*, 248 S.W.3d 314, 317 (Tex. App.—San Antonio 2007, pet. denied). Following a default judgment, the trial court entered actual damages of $5.6 million, along with attorney's fees and exemplary damages. *Id*. The court of appeals reversed this due to insufficient evidence. *Id*. Finally, one other case arising from this litigation involved a severed claim against the alleged alter ego of Paradigm and Finley. *See Carone v. Retamco Operating, Inc.*, 138 S.W.3d 1, 15 (Tex. App.—San Antonio 2004, no pet.) (dismissing claim against alleged alter ego of companies due to lack of personal jurisdiction).

[2] Paradigm and Republic are affiliated, but the record is unclear as to the extent and structure of that affiliation.

[3] ROI also sued Douglas McCallum, LLC (DMLLC), a Colorado limited liability company, alleging fraudulent transfer. DMLLC was the recipient of the remaining 28% of the assignment of interests and options. DMLLC also filed a special appearance, which was granted following the court of appeals holding in this case. DMLLC's special appearance ruling was then appealed and affirmed. *Retamco Operating, Inc. v. McCallum*, 2008 WL 939196, *5 (Tex. App.—San Antonio 2008). ROI has appealed this ruling to the Court as well. These two cases pose almost identical issues, as DMLLC argues it is not subject to personal jurisdiction because the contract to assign the oil and gas interests was signed in Colorado. *See Retamco Operating, Inc. v. McCallum*, ___ S.W.3d ___ (Tex. 2009) (per curiam).

from or relate to those contacts. It also argued that the trial court's assertion of jurisdiction offended traditional notions of fair play and substantial justice. Specifically, Republic argued that because the allegedly fraudulent assignment of the Texas leases occurred entirely outside of Texas—in California—the Texas court did not have personal jurisdiction over Republic. Following a hearing, the trial court denied Republic's special appearance, making no findings of fact or conclusions of law. Republic then filed an interlocutory appeal with the court of appeals. The court of appeals reversed, holding that Republic is not subject to personal jurisdiction in Texas. 2007 WL 913206, *6–7. Because we conclude that by its actions Republic subjected itself to the jurisdiction of Texas courts, we reverse the court of appeals' judgment.

II

Under the Texas long-arm statute, the plaintiff has the initial burden to plead sufficient allegations to confer jurisdiction. *American Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 807 (Tex. 2002). The defendant seeking to avoid being sued in Texas then has the burden to negate all potential bases for jurisdiction pled by the plaintiff. *Id*. When, as here, the trial court does not make findings of fact and conclusions of law in support of its ruling, "all facts necessary to support the judgment and supported by the evidence are implied." *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) (citations omitted). Here, ROI has pled that Republic is subject to personal jurisdiction because it is the fraudulent transferee of Texas real property—oil and gas interests. Republic does not dispute that the property at issue is located in Texas or that it was transferred from Paradigm to Republic. However, Republic argues that because the transaction

causing the transfer occurred in California, jurisdiction is negated. For the reasons discussed below, we disagree.

Personal jurisdiction is a question of law which we review *de novo*. *Id*. at 794. "Texas courts may assert *in personam* jurisdiction over a nonresident if (1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees." *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007).

(1) The Long Arm Statute

As an initial matter, Republic argues that ROI "never fulfilled its initial pleading burden to bring Republic within the reach of the long-arm statute," because ROI alleged no acts that constitute "doing business" under the long-arm statute. But the Texas long-arm statute's broad doing-business language "allows the statute to reach as far as the federal constitutional requirements of due process will allow." *Id*. at 575 (citations omitted); *accord Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 788 (Tex. 2005).[4] Therefore, we only analyze whether Republic's acts would bring Republic within Texas' jurisdiction consistent with constitutional due process requirements. *See*

[4] The Texas long-arm statute provides:

"In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident:

(1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state;

(2) commits a tort in whole or in part in this state; or

(3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state."

TEX. CIV. PRAC. & REM. CODE §17.042.

Moki Mac, 221 S.W.3d at 575 (citations omitted); *Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991).[5]

(2) Due Process Constraints

Under constitutional due-process analysis, personal jurisdiction is achieved when (1) the non-resident defendant has established minimum contacts with the forum state, and (2) the assertion of jurisdiction complies with "traditional notions of fair play and substantial justice." *Moki Mac*, 221 S.W.3d at 575 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). We focus on the defendant's activities and expectations when deciding whether it is proper to call the defendant before a Texas court. *Int'l Shoe Co.*, 326 U.S. at 316.

(A) Minimum Contacts

A defendant establishes minimum contacts with a state when it "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citing *Int'l Shoe Co.*, 326 U.S. at 319). "The defendant's activities, whether they consist of direct acts within Texas or conduct outside Texas, must justify a conclusion that the defendant could reasonably anticipate being called

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[5] Republic also argues that the business certification waiver provision of section 8.01B(13) of the Texas Business Corporation Act limits jurisdiction. TEX. BUS. CORP. ACT § 8.01B(13) ("a foreign corporation shall not be considered to be transacting business in this state . . . by reason of . . . acquiring, in transactions outside of Texas, royalties and other non-operating mineral interests"). The certification provisions of the Business Corporation Act do not limit the scope of the Texas long-arm statute. *Moki Mac*, 221 S.W.3d at 575 ("the long-arm statute's broad doing-business language allows the statute to 'reach as far as the federal constitutional requirements of due process will allow'"). Thus, the Act has no bearing on constitutional due-process analysis. *See Amer. Type Culture Collection*, 83 S.W.3d at 806 ("We rely on precedent from the United States Supreme Court as well as our own state's decisions in determining whether a nonresident defendant has met its burden to negate all bases of jurisdiction.") Further, the business certification requirements do not act as a definitive list of those out-of-state defendants that would or would not have a reasonable expectation of being called into a Texas courtroom.

into a Texas court." *Am. Type Culture Collection*, 83 S.W.3d at 806 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). A nonresident's contacts can give rise to either specific or general jurisdiction. *Am. Type Culture Collection*, 83 S.W.3d at 806. General jurisdiction arises when the defendant's contacts with the forum are continuous and systematic. *Id.* at 807. Specific jurisdiction, which is alleged here, arises when (1) the defendant purposefully avails itself of conducting activities in the forum state, and (2) the cause of action arises from or is related to those contacts or activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 774 (Tex. 1995). In a specific jurisdiction analysis, "we focus . . . on the 'relationship among the defendant, the forum [,] and the litigation.'" *Moki Mac*, 221 S.W.3d at 575–76 (citing *Guardian Royal*, 815 S.W.2d at 228).

1. Purposeful Availment

We consider three issues in determining whether a defendant purposefully availed itself of the privilege of conducting activities in Texas:

> First, only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person. Second, the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated. Thus, sellers who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to the jurisdiction of the latter in suits based on their activities. Finally, the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction.

Moki Mac, 221 S.W.3d at 575 (internal citations and quotations omitted). Additionally, the minimum-contacts analysis is focused on the quality and nature of the defendant's contacts, rather than their number. *Am. Type Culture Collection*, 83 S.W.3d at 806. Here, these considerations lead

us to conclude that Republic purposefully availed itself of the privilege of conducting activities in Texas.

Republic's contacts with Texas were purposeful, not random, fortuitous, or attenuated. Oil and gas interests are real property interests. *Renwar Oil Corp. v. Lancaster*, 276 S.W.2d 774, 776 (Tex. 1955); *State v. Quintana Petroleum Co.*, 133 S.W.2d 112, 115 (Tex. 1939) (citing *Sheffield v. Hogg*, 77 S.W.2d 1021, 1030 (Tex. 1934)). Republic was aware that the oil and gas interests it received were located in Fayette, Dimmit, and Webb Counties, Texas. Thus, Republic purposefully took assignment of Texas real property. And while Republic may not have actually entered the state to purchase this real property, "[j]urisdiction . . . may not be avoided merely because the defendant did not physically enter the forum state." *Burger King*, 471 U.S. at 476 ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."). Republic, by taking assignment of Texas real property, reached out and created a continuing relationship in Texas. Under the assignment, it is liable for obligations and expenses related to the interests. This ownership also allows Republic to "enjoy . . . the benefits and protection of [Texas laws.]" *Michiana*, 168 S.W.3d at 787 (citing *Int'l Shoe*, 326 U.S. at 319). Unlike personal property, Republic's real property will always be in Texas, which leaves no doubt of the continuing relationship that this ownership creates.

We noted in *Michiana* that "in some circumstances a single *contract* may meet the purposeful-availment standard, but not when it involves a single *contact* taking place outside the forum state." *Id*. at 787. (emphasis in original) (holding that an Indiana RV dealer did not have

minimum contacts with Texas where the dealer's only contact with Texas was the Texas resident's decision to place an order from Texas). But the purchase of real property in Texas does not establish a single contact like that of the sale of the recreational vehicle in *Michiana*. *See id*. Rather, the purchase and ownership of real property could "involve[] many contacts over a long period of time," which would carry with it certain continuing obligations; *e.g.*, valuation and tax issues, and potential expenses of maintaining the interest. *See id*. In *Michiana*, we found it "hard to imagine what possible benefits and protection Michiana enjoyed from Texas law." *Id*. at 787, 794. To the RV dealer, the destination of the RV was fortuitous. Here, the location of the transferred asset is not fortuitous; the property's location is fixed in this state. This case, then, is different from *Michiana*, and we have no difficulty imagining just how Republic would benefit from the processes and protections of Texas law. Should Republic ever wish to enforce rights under its interest in Texas oil and gas leases and wells, it is this state where those rights can be enforced, not California.

Republic's contacts with Texas were also not the result of the unilateral actions of a third party. Republic was a willing participant in a transaction with an affiliated Texas company to purchase Texas real property. Unlike in *Michiana*, where the contacts with Texas and the sale at issue was "initiated entirely by [the plaintiff]," 168 S.W.3d at 784, Republic here went well beyond answering a phone call from a Texas resident or shipping goods to Texas. Where a phone call originates or where a shipment ends up may be random or fortuitous, but when purchasing real property, the location matters.

Lastly, Republic has sought a "benefit, advantage or profit" in Texas. *Id*. at 785. The assignment gave Republic valuable assets in Texas, including the right to enforce warranties and

covenants related to the real property. Republic's additional conduct since the transfer also indicates that Republic sought a benefit from the transaction. *See Moki Mac*, 221 S.W.3d at 577 ("In determining whether the defendant purposefully directed action towards Texas, we may look to conduct beyond a particular business transaction at issue . . . ."). Republic has reaped benefits from the property in the amount of approximately $1.2 million in revenues, and has sold some of the property.

We have said that "a nonresident may purposefully avoid a particular jurisdiction by structuring its transactions so as to neither profit from the forum's laws nor be subject to its jurisdiction." *Michiana*, 168 S.W.3d at 785. Certainly this is true in some transactions, such as the purchase of personal property or out-of-state services. *See*, *e.g.*, *BMC Software Belgium*, 83 S.W.3d at 793 (finding no personal jurisdiction where details of a personal services contract were discussed in Texas); *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 763 (Tex. 1977) (finding no personal jurisdiction over Oklahoma defendant where the contract for installation of highway advertisement signs by Texas company was signed and performed in Oklahoma). But we have found that, even in instances where a contract was signed in another state, an out-of-state company with no physical ties to Texas still has minimum contacts with Texas when it is clear the company purposefully directed its activities towards Texas. *See, e.g.*, *Zac Smith & Co., Inc. v. Otis Elevator Co.*, 734 S.W.2d 662, 665–66 (Tex. 1987) (finding personal jurisdiction where out-of-state contract was formed "for the sole purpose of building a hotel in Texas"); *Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 437 (Tex. 1982) (finding personal jurisdiction where enrollment for out-of-state school was "actively and successfully solicited" in Texas even though the defendant signed the contract in Arizona).

Here, we find the same. Republic, by purchasing Texas real property, has purposefully availed itself of the privilege of conducting activities in Texas. *See Michiana*, 168 S.W.3d at 784–85.

2. Arise From or Related to

"[P]urposeful availment alone will not support an exercise of specific jurisdiction . . . unless the defendant's liability arises from or relates to the forum contacts." *Moki Mac*, 221 S.W.3d at 579. We look for a "substantial connection between [the defendant's forum] contacts and the operative facts of the litigation." *Id*. at 585. Thus, we must consider the claims involved in the litigation to determine the operative facts. ROI alleges that Republic is the transferee of a fraudulent transfer in violation of the UFTA. The UFTA provides, in part, that "[a] transfer . . . is fraudulent . . . if the debtor made the transfer . . . with actual intent to hinder, delay, or defraud any creditor of the debtor; or without receiving a reasonably equivalent value in exchange for the transfer or obligation." TEX. BUS. & COM. CODE § 24.005(a)(1), (2); *Trigeant Holdings, Ltd. v. Jones*, 183 S.W.3d 717, 726 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (noting that "the UFTA not only creates liability against 'the person for whose benefit the transfer was made,' such as the debtor, but also against 'the first transferee of the asset,' or any 'subsequent transferee'").

Republic argues that the focus of the litigation will be on the assignment that took place in California because the operative facts involved will be whether reasonably equivalent value was given for the property and whether the leases were taken in good faith. *See* TEX. BUS. & COM. CODE §§ 24.005(a)(2), .006, .009. We agree that the assignment will be an operative fact, but the real property itself will also be an operative fact, or at the very least, will have a substantial connection to the operative facts. Without an asset, no fraudulent transfer can occur under the UFTA. *See id.*

§24.002(12) ("'Transfer' means . . . disposing of or parting *with an asset or an interest in an asset* . . . .") (emphasis added). Here, the Texas oil and gas interests are the assets. Proof that these assets were transferred and an assessment of their value will be essential to the UFTA analysis; without that proof, the UFTA claim fails.

Republic is alleged to have received transfer of Texas real property from a Texas resident, during the pendency of a Texas suit, for the purpose of defrauding a Texas resident. As a result of this transaction, assets ROI may have recovered from Paradigm are now in the possession of Republic. These contacts are sufficient to demonstrate that this alleged tort occurred at least, in part, in Texas. *See* TEX. CIV. PRAC. & REM. CODE §17.042 ("a nonresident does business in this state if the nonresident . . . commits a tort in whole or in part in this state"); *see also In re Tex. Am. Express, Inc.*, 190 S.W.3d 720, 725 (Tex. App.—Dallas, no pet.) (noting that a fraudulent transfer under the UFTA is a tort).

(B) Traditional Notions of Fair Play and Substantial Justice

Having determined that Republic has minimum contacts with Texas sufficient to support specific jurisdiction, we must determine whether an assertion of jurisdiction over Republic comports with "traditional notions of fair play and substantial justice." *Guardian Royal*, 815 S.W.2d at 228. "Only in rare cases, however, will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state." *Id*. at 231 (citing *Burger King*, 471 U.S. at 477). Nonetheless, we still consider: (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate

judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several States in furthering fundamental substantive social policies. *Guardian Royal*, 815 S.W.2d at 228, 231 (citing *Burger King*, 471 U.S. at 477–78). These factors weigh heavily in ROI's favor. ROI has an interest in resolving this controversy in Texas because that is where the litigation began. Texas has an interest in resolving controversies involving real property within its borders and, given that the prior litigation deals with this property, it is most efficient to continue to use Texas as the forum to resolve the dispute. Moreover, California has much less of an interest in resolving Texas real property disputes than does Texas. Republic may be burdened by litigating outside its home state, but these other factors weigh heavily against this burden.

III

Republic has established minimum contacts with Texas, and the trial court's assertion of jurisdiction over Republic does not offend traditional notions of fair play and substantial justice. *See Guardian Royal*, 815 S.W.2d at 228. Therefore, we reverse the court of appeals' judgment and remand to the trial court for further proceeding consistent with this opinion.

_____
Paul W. Green
Justice

OPINION DELIVERED: February 27, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0608

IN RE TRANSCONTINENTAL REALTY INVESTORS, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

The question here is whether an amendment to the permissive-venue statute in the 1980s should be interpreted to eliminate businesses from every venue statute that refers to where a party "resides." We hold that it should not, and thus the defendant corporation here is entitled to be sued in Dallas County where it "resides."

North Texas Municipal Water District filed this suit in Kaufman County to condemn a 30-foot easement for a pipeline across land owned by Transcontinental Realty Investors, Inc. The land is located partly in Dallas County and partly in Kaufman County. Section 21.013 of the Property Code requires condemnation suits to be brought where the owner resides if the property is at least partly in that county:

> The venue of a condemnation proceeding is the county in which the owner of the property being condemned resides if the owner resides in a county in which part of the property is located. Otherwise, the venue of a condemnation proceeding is any county in which at least part of the property is located.

TEX. PROP. CODE § 21.013(a).

Claiming to reside in Dallas County, Transcontinental moved to transfer venue there. The trial court denied the motion, and the court of appeals denied mandamus relief in a brief memorandum opinion. Transcontinental then sought relief in this Court.

Section 21.013 is a mandatory venue statute, so it is enforceable by mandamus. TEX. CIV. PRAC. & REM. CODE §§ 15.016, 15.0642; *In re Texas Dep't of Transp.*, 218 S.W.3d 74, 76 (Tex. 2007). No showing is required that appeal is an inadequate remedy. *Id*. The only issue is the legal question whether the trial court properly interpreted section 21.013. *In re Texas Ass'n of Sch. Bds., Inc.*, 169 S.W.3d 653, 656 (Tex. 2005).

It is undisputed that Transcontinental's principal place of business is in Dallas County, and that it has no offices in Kaufman County. The District's petition requested service on Transcontinental's registered agent in Dallas County. Under the Texas Business Corporation Act, that must also be Transcontinental's registered office. TEX. BUS. CORP. ACT, arts. 2.09, 8.08.

The District argues that Transcontinental does not "reside" in Dallas County (as required by section 21.013) because corporations have no "residence." We held otherwise in *Ward v. Fairway Operating Co.*, stating that the registered office and agent required by the Business Corporation Act "shall constitute a statutory place of residence of the corporation." 364 S.W.2d 194, 195 (Tex. 1963). *Ward* was one of a long line of cases trying to define a corporation's "domicile" — the general term that governed Texas venue law (with numerous exceptions) from 1836 until 1983. *See* Dan R. Price, *New Texas Venue Statute: Legislative History*, 15 ST. MARY'S L.J. 855, 857–58 (1984).

The District argues that *Ward* no longer applies because the Legislature amended the permissive-venue statute in 1983 to limit "residence" to natural persons:

> Except as otherwise provided by this Subchapter or Subchapter B or C, all lawsuits shall be brought:
>
> (1) in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;
>
> (2) in the county of defendant's residence at the time the cause of action accrued if defendant is a natural person;
>
> (3) in the county of the defendant's principal office in this state, if the defendant is not a natural person; or
>
> (4) if Subdivisions (1), (2), and (3) do not apply, in the county in which the plaintiff resided at the time of the accrual of the cause of action.

TEX. CIV. PRAC. & REM. CODE § 15.002(a). The District argues that the distinction between natural and nonnatural persons in paragraphs (2) and (3) reflects a legislative determination that corporations no longer have a "residence" for any purpose.

We agree the Legislature certainly intended to change "domicile" into something more specific, but that does not mean it intended to eliminate corporations from every other statute referring to "residence." Many venue statutes continue to refer to "residence" without limiting that term to natural persons. *See id.* §§ 15.033, 15.035(b), 15.082, 15.087, 15.088, 15.092(c), 15.098. Indeed, the permissive-venue statute itself provides that if sections (1) through (3) do not apply, then venue is proper where the plaintiff "resided" when the action accrued. *Id.* § 15.02(4). If the District is correct that this cannot include corporations, then when the defendant resides and all events occur out of state, a plaintiff corporation cannot bring the suit *anywhere* in Texas.

While section 21.013 does not define "owner," two other sections of the Property Code do: section 73.001(a)(3) as "a person who has an ownership interest," and section 209.002(6) as "a person who holds record title to property." In construing statutes, the word "person" includes corporations and other legal entities unless the context indicates otherwise. TEX. GOV'T CODE § 311.005(2).

In addition to these, many other statutes refer to "persons" who "reside" in Texas. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE §§ 16.066(b), 64.003, 64.093; TEX. INS. CODE §§ 462.202, 463.003(10); TEX. TAX CODE § 111.0043. Given the general rule that "persons" includes corporations, we do not think amendment of the permissive-venue statute was intended to change all of these.

In sum, when the Legislature amended the permissive-venue statute to distinguish between a natural person's "residence" and a business's "principal office," we do not think it intended to eliminate corporations and other legal entities from all statutes that refer to a place where one "resides." Undoubtedly, the Legislature could exclude corporations from section 21.013. But until it does so, we hold that landowners who are businesses — just like landowners who are individuals — can insist on venue where they reside if the condemned property is partly located there.

Accordingly, without hearing oral argument we conditionally grant mandamus relief and direct the trial court to transfer venue of this case to Dallas County. TEX. R. APP. P. 52.8(c). We are confident the trial court will comply, and our writ will issue only if it does not.

OPINION DELIVERED: November 14, 2008

IN THE SUPREME COURT OF TEXAS

NO. 07-0642

TEXAS DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER,

v.

OLIVER OKOLI, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

PER CURIAM

Oliver Okoli sued the Texas Department of Health and Human Services (TDHS) under the Texas Whistleblower Act, alleging that he was terminated for reporting to a program manager that his immediate supervisor "engaged the unit in falsifying dates and documents to avoid delinquencies in the handling of clients' cases." TDHS filed a plea to the jurisdiction based on immunity from suit, claiming that the trial court lacked subject-matter jurisdiction because Okoli failed to make a good faith report of a violation of law to an appropriate law enforcement authority. *See* TEX. GOV'T CODE § 554.002(a). The trial court denied the plea to the jurisdiction and TDHS appealed. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (permitting appeal from an interlocutory order that denies a plea to the jurisdiction by a governmental unit). The court of appeals agreed with the trial court, holding that whether Okoli actually reported the alleged violation to an appropriate law enforcement

authority could not be considered a "jurisdictional prerequisite to suit," though it dismissed the appeal on other grounds. 263 S.W.3d 275, 282–83; *see also* TEX. GOV'T CODE § 554.0035. However, in *State v. Lueck*, ___ S.W.3d ___, ___ (Tex. 2009), we held that "the elements of section 554.002(a) can be considered to determine both jurisdiction and liability." Accordingly, whether Okoli's report to a program manager was a good faith report of a violation of law to an appropriate law enforcement authority is a jurisdictional question. Therefore, without hearing oral argument, TEX. R. APP. P. 59.1, and for the reasons explained in *Lueck*, we reverse and remand to the court of appeals to determine whether Okoli has alleged a violation under the Act. *See* TEX. GOV'T CODE § 554.002(a).

OPINION DELIVERED: August 28, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0665

IN RE MORGAN STANLEY & CO., INC.,
SUCCESSOR TO MORGAN STANLEY DW, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued October 15, 2008

JUSTICE MEDINA delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE WILLETT joined.

JUSTICE BRISTER filed a concurring opinion.

JUSTICE WILLETT filed a concurring opinion.

JUSTICE HECHT filed a dissenting opinion.

JUSTICE O'NEILL did not participate in the decision.

In this original mandamus proceeding, the relator seeks to compel arbitration in accordance with its agreement in the underlying case. The other putative party to the agreement resists arbitration on the ground that she lacked the mental capacity to assent to the contract. The question here is whether the court or the arbitrator should decide this issue of capacity. The trial court concluded that it was the proper forum. We agree and, accordingly, deny the petition for writ of mandamus.

I

Helen Taylor's estate was worth several million dollars in 1999, the year in which she was diagnosed with dementia. That year, she also transferred several of her securities accounts to Morgan Stanley. Each account agreement with Morgan Stanley included an arbitration clause.[1] Over the next few years, Taylor also signed a durable power of attorney in favor of her granddaughter, Kathryn Albers, and a trust agreement, naming Albers as trustee. During this period, Albers made gifts to her mother, her sister, and herself from Taylor's estate.

In 2004, a Dallas probate court appointed Nathan Griffin as guardian of Taylor's estate. By this time, the value of her estate had been significantly reduced. In May 2005, the guardian sued Taylor's granddaughters and others for violation of the Texas Uniform Fraudulent Transfer Act, civil theft, conversion, and for the imposition of a constructive trust. About a year later, Taylor's guardian added Morgan Stanley as a defendant, asserting breach of fiduciary duty, negligence and malpractice, unsuitability of investments, violations of the Texas Security Act, and breach of contract. Morgan Stanley moved to compel arbitration of the dispute. The guardian resisted the motion, arguing that Taylor lacked the mental capacity to contract when she signed the account agreements with arbitration clauses and that it was for the court, not an arbitrator, to decide this issue of capacity.

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[1] The arbitration provisions in the new account agreements stated:

> ARBITRATION OF CONTROVERSIES
>
> You agree that all controversies between you or your principals or agents and Morgan Stanley Dean Witter or its agents (including affiliated corporations) arising out of or concerning any of your accounts, orders or transactions, or the construction, performance, or breach of this or any other agreement between us ... shall be determined by arbitration only ....

Taylor's guardian also subsequently nonsuited the breach of contract claim.[2] The trial court refused to compel arbitration.

Morgan Stanley petitioned the court of appeals for mandamus relief, but the court also declined to order the matter to arbitration. *In re Morgan Stanley & Co.,* 2007 Tex. App. LEXIS 5582, 2007 WL 2035128 (Tex. App.—Dallas July 17, 2007, orig. proceeding) (mem. op.). Morgan Stanley then petitioned this Court. We set the case for argument to consider whether a court or an arbitrator should determine the issue of mental capacity to contract.

II

The Federal Arbitration Act ("FAA") generally governs arbitration provisions in contracts involving interstate commerce. *See* 9 U.S.C. § 2; *see also In re L & L Kempwood Assocs., L.P.*, 9 S.W.3d 125, 127 (Tex. 1999). Where the FAA ostensibly controls, as it does here, an agreement to

[2] Although the breach of contract claim has been nonsuited, the doctrine of direct benefits equitable estoppel may apply to compel the arbitration of other claims. A person who has not agreed to arbitrate may nevertheless be compelled to do so when the person "seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 741 (Tex. 2005); *see also In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131 (Tex. 2005). Equitable estoppel is inapplicable, however, when the benefit is merely indirect; that is, when the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law. *In re Kellogg Brown & Root,* 166 S.W.3d at 740-41; *see, e.g., R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n,* 384 F.3d 157, 162, 164 (4th Cir. 2004) (refusing signatory's request to apply equitable estoppel and compel arbitration against another signatory; the legal duties the signatory builder allegedly violated did not depend on the terms of the contract but arose from the common law and statute and thus signatory resisting arbitration was not seeking a direct benefit of the contract); *Intergen N.V. v. Grina*, 344 F.3d 134, 140, 145 (1st Cir. 2003) (refusing signatory's request to apply equitable estoppel to compel nonsignatory to arbitration because nonsignatory had relied upon misleading and inaccurate extra-contractual assurances and sustained losses; nonsignatory alleged state-law causes of action apart from the contract, including intentional deceit, negligent deceit, unfair trade practices, promissory estoppel, tortious interference with advantageous relations, and quantum meruit); *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002) (refusing nonsignatory's request to apply equitable estoppel to compel signatory to arbitration where that signatory's suit did not rely upon the terms of its shareholder agreement or seek to enforce any duty created by the agreement); *see also Mohamed v. Auto Nation USA Corp.,* 89 S.W.3d 830, 837 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (refusing nonsignatory's request to apply equitable estoppel and compel arbitration where suit against nonsignatory did not rely on employment contract to assert claims for race discrimination, intentional infliction of emotional distress, or negligent hiring, supervision, and retention); *cf. Fridl v. Cook*, 908 S.W.2d 507, 513 (Tex. App.—El Paso 1995, writ dism'd w.o.j.) (refusing to compel arbitration where signatory party resisting arbitration had alleged fraud claim independent of the contract).

arbitrate is valid except on grounds as exist at law or in equity to revoke the contract. 9 U.S.C. § 2. Section 2 of the FAA provides that courts shall compel arbitration on issues subject to an arbitration agreement. *Id.* Section 4 of the FAA provides that a court may consider only issues relating to the making and performance of the agreement to arbitrate. 9 U.S.C. § 4. Thus, once a party seeking to compel arbitration has established that there is a valid agreement to arbitrate and that the plaintiff's claims are within the agreement's scope, the trial court must compel arbitration. *Id.*; *In re Oakwood Mobile Homes, Inc.,* 987 S.W.2d 571, 573 (Tex. 1999) (per curiam).

Before 1967, however, courts often reasoned that any defense that would render the entire contract unenforceable or void was for the court to decide because if the underlying contract was invalid so too was the agreement to arbitrate. *See generally* Katherine V.W. Stone, ARBITRATION LAW at 242 (2003). The United States Supreme Court rejected that reasoning in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395, 404 (1967).

The issue in *Prima Paint* was whether the court or an arbitrator should decide a claim of fraud in the inducement of the entire contract. *Id.* at 402. Relying on section 4 of the FAA, the Supreme Court held that a claim of fraud in the inducement of a contract generally, as opposed to the arbitration clause specifically, was for the arbitrator, not the court, to decide. *Id*. at 404 ("a federal court may consider only issues relating to the making and performance of the agreement to arbitrate"). *Prima Paint* thereby established the "separability" doctrine, explaining that an arbitration provision was separable from the rest of a contract under section 4 and that the issue of the contract's validity was to be determined by the arbitrator unless the challenge was to the agreement to arbitrate itself. *Id*. at 402-04.

Since *Prima Paint*, we have dutifully followed the separability doctrine that presumptively favors arbitration. *See Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (holding that federal arbitration law created by the FAA applies in state courts). We have held that defenses attacking the validity of a contract as a whole, and not specifically aimed at the agreement to arbitrate, are for the arbitrator, not the court. *See In re RLS Legal Solutions, LLC*, 221 S.W.3d 629, 631-32 (Tex. 2007). But we have also recognized that the presumption favoring arbitration arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). We have not, however, previously considered whether the defense of mental incapacity is an attack on the validity of the contract as a whole and therefore a matter for the arbitrator, as Morgan Stanley argues , or a gateway matter concerning the existence of an agreement that must be proven to the satisfaction of the court, as Taylor's guardian argues.

There is some disagreement about what *Prima Paint* requires in this situation. The Fifth Circuit in *Primerica Life Insurance Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002), has concluded that the arbitrator should decide a defense of mental incapacity because it is not a specific challenge to the arbitration clause but rather goes to the entire agreement. The Tenth Circuit reached the opposite result in *Spahr v. Secco*, 330 F.3d 1266 (10th Cir. 2003), concluding that the "mental incapacity defense naturally goes to *both* the entire contract and the specific agreement to arbitrate in the contract." *Id.* at 1273. Thus, under the Tenth Circuit's view, the mental incapacity defense places the "making" of the arbitration agreement at issue under Section 4 of the FAA, giving the court authority to determine whether the parties have actually agreed to arbitration. *Id.* The Supreme

Court has not yet settled this conflict but rather expressly reserved the question in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006).

Buckeye concerned the defense of illegality. The plaintiffs there claimed that the defendant's check cashing agreement "violated various Florida lending and consumer-protection laws," and was therefore void and illegal ab initio. *Id*. at 443. Applying Florida law, the Florida Supreme Court agreed that the contract was illegal and void, and refused to compel arbitration. *Id*. at 443, 446. Applying *Prima Paint'*s doctrine of separability, the U.S. Supreme Court reversed the Florida Supreme Court. *Id.* at 449.

As it had done in *Prima Paint*, the Supreme Court rejected the notion that the enforceability of the arbitration agreement depended on the distinction between void and voidable contracts. *Id*. at 448. Instead, the Court reiterated three controlling principles of federal arbitration law. First, that an arbitration provision is severable from the remainder of the contract. *Id*. at 445. Second, that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Id*. at 445-46. Third, that federal arbitration law applies in state and federal courts. *Id*. at 446. The Court concluded that because the plaintiffs challenged "the [a]greement, but not specifically its arbitration provisions," the rule of separability applied, and the arbitration provisions were enforceable "apart from the remainder of the contract." *Id*. at 446.

Most importantly to our present case, however, was the distinction the Supreme Court drew between issues of validity and issues of contract formation. The Court noted that an illegality defense, raising the issue of the contract's validity, was different from a formation defense, raising

the issue of whether a contract was ever concluded:

> The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to . . . whether the alleged obligor ever signed the contract, *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (C.A.11 1992), whether the signor lacked authority to commit the alleged principal, *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (C.A. 3 2000); *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (C.A.7 2001), and whether the signor lacked the mental capacity to assent, *Spahr v. Secco*, 330 F.3d 1266 (C.A.10 2003).

Id. at 444 n.1. The Court thus excluded from its analysis several contract-formation-defense issues, including the defense in this case, that the signor lacked the mental capacity to assent.

Although the Supreme Court in *Buckeye* grouped illegality with fraudulent inducement for purposes of *Prima Paint*'s separability doctrine and expressly excluded the issue of mental capacity along with other contract-formation issues from that analysis, the Dissent here concludes that mental capacity is really more like fraudulent inducement, suggesting that the Supreme Court was wrong to include it with the other contract-formation issues. *Compare* ___ S.W.3d at ___ (Hecht, J., dissenting) ("seems to me, lack of capacity is closer to fraudulent inducement"), *with Buckeye*, 546 U.S. at 444, n.1. The Dissent reasons that incapacity is different from the other contract-formation issues distinguished in *Buckeye* because a contract signed by an incapacitated person exists subject to ratification or avoidance by the incapacitated person. ___ S.W.3d at ___. But the Dissent's analysis begs the question of whether a contract exists. As the Fifth Circuit has observed, "where the 'very existence of a contract' containing the relevant arbitration agreement is called into question, the federal courts have authority and responsibility to decide the matter." *Banc One Acceptance Corp. v. Hill,* 367 F.3d 426, 429 (5th Cir. 2004). And, when the issue of mental capacity is raised,

the "very existence of a contract" is at issue. *Id.* Because the Supreme Court has grouped mental capacity with the other issues of contract formation, we do so as well.

III

Several courts have read *Buckeye* to add a third discrete category to the *Prima Paint* analysis, which includes: (1) a challenge to the validity of the contract as a whole, (2) a challenge to the validity of the arbitration provision itself, and (3) a challenge to whether any agreement was ever concluded. *Prima Paint* reserves the first category for the arbitrator and the second category for the court. *Buckeye*, 546 U.S. at 446. Since *Buckeye*, the federal courts,[3] a state supreme court,[4] and other state appellate courts[5] have generally concluded that the third category involves a threshold

[3] *See Sanford v. Memberworks, Inc.*, 483 F.3d 956, 962-64 (9th Cir. 2007) (holding that challenges to whether a contract was concluded must be determined by the court prior to arbitration); *Krutchik v. Chase Bank USA, N.A.*, 531 F. Supp. 2d 1359, 1363 (S.D. Fla. 2008) (holding that it is for the court to decide where "the initial formation or existence of a contract, including a disputed arbitration clause is legitimately called into question"); *Toledano v. O'Connor*, 501 F. Supp. 2d 127, 140 (D.D.C. 2007) ("[This circuit has not addressed] the propriety of district-court adjudication of challenges to the formation of a contract containing an arbitration provision (as opposed to challenges to the formation of the arbitration provision itself). [But, we have] long treated disputes over the formation of an agreement to arbitrate—i.e., whether the parties ever agreed to submit anything to arbitration in the first place—as properly before the district court.") (internal quotation marks omitted); *Foss v. Circuit City Stores, Inc.*, 477 F. Supp. 2d 230, 234-35 (D. Me. 2007) ("The distinction first articulated in *Prima Paint Corp.* regarding the appropriate role for the court and the arbitrator is not determinative on questions regarding the very formation of a contract. . . . [A] challenge to whether a contract was ever validly concluded is for the court, and not the arbitrator, to decide."); *Larson v. Speetjens*, NO. C 05-3176 SBA, 2006 U.S. Dist. LEXIS 66459, at *11-12, 2006 WL 2567873, at *3 (N.D. Cal. Sept. 5, 2006) ("The Supreme Court has distinguished between three categories of challenges to arbitration provisions . . . . First, if a challenge is to the contract as a whole, it must be decided by the arbitrator. Second, if a challenge is specifically to the arbitration provision, it must be decided by a court. Finally, if a challenge is to a party's signatory power to the contract, it must be decided by a court.") (internal citations omitted); *see also Fox Int'l Relations v. Fiserv Sec., Inc.*, 418 F. Supp. 2d 718, 723-24 (E.D. Pa. 2006) (concluding that "after the Supreme Court's *Buckeye* decision, it appears that there are three categories of challenges to arbitration provisions" and that a challenge to a party's signatory power falls under the third category and thus must be decided by a court).

[4] *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls*, 185 P.3d 332, 338 (Mont. 2008) ("the court is the proper body to hear a challenge to the existence of a contract containing an arbitration provision").

[5] *See Bruni v. Didion*, 73 Cal. Rptr. 3d 395, 406 (Cal. Ct. App. 2008) ("A court, however, still must consider one type of challenge to the overall contract: a claim that the party resisting arbitration never actually agreed to be bound."); *Operis Group, Corp. v. E.I. at Doral, LLC*, 973 So. 2d 485, 488 (Fla. Dist. Ct. App. 2007) ("A challenge to the very existence of any agreement between the parties is thus distinguishable from a challenge to the validity of a

inquiry for the court. Even before *Buckeye*'s comment about contract formation, virtually every court refused to compel arbitration absent the existence of an agreement to arbitrate.[6]

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presumptively existing, signed document."); *Rowe Enters. LLC v. Int'l Sys. & Elecs. Corp.*, 932 So. 2d 537, 538-41 (Fla. Dist. Ct. App. 2006) (stating trial court is required to hold hearing on defendant's motion to compel arbitration when plaintiff's principal claimed that he had never seen document containing arbitration clause, and that his signature on that document had been forged); *Rhymer v. 21st Mortgage Corp.,*No. E006-00742-COA-R3-CV, 2006 Tenn. App. LEXIS 800, at *9, 2006 WL 3731937, at *3 (Tenn. Ct. App. Dec. 19, 2006) (holding that trial court is required to decide mental capacity challenge because federal courts "have generally reasoned that there is a difference between challenging a contract on the basis of a party's status (i.e. mental incapacity) and challenging a contract based on behavior/conduct of a party (i.e. fraudulent inducement)").

[6] *See Banc One Acceptance Corp. v. Hill,* 367 F.3d 426, 429-30 (5th Cir. 2004)(holding that federal courts have the authority and responsibility to decide matters where the challenge concerns the "very existence of a contract" or whether a contract with an arbitration clause was concluded) (internal quotation marks omitted); *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 218 (5th Cir. 2003)(holding that "[w]here the very existence of any agreement is disputed, it is for the courts to decide at the outset whether an agreement was reached"); *Spahr v. Secco*, 330 F.3d 1266, 1268, 1272-73 (10th Cir. 2003) (holding that courts hear a party's challenge to the whole contract based on the claim that the signor did not have mental capacity to sign); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) ("[A]s arbitration depends on a valid contract[,] an argument that the contract does not exist can't logically be resolved by the arbitrator . . . ."); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 100-01 (3d Cir. 2000) (refusing to compel arbitration where the party seeking arbitration asserted that "the agent who signed the agreement on its behalf lacked authority to do so" because *Prima Paint* presumes an underlying existent agreement); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992) (stating that *"Prima Paint* has never been extended to require arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract *never existed at all*"); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1136-42 (9th Cir. 1991) (refusing to compel arbitration where the plaintiffs claimed individual who signed the agreement lacked the authority to bind the plaintiffs because *Prima Paint* was "limited to challenges seeking to *avoid* or *rescind* a contract" and was inapplicable to "challenges going to the very existence of a contract that a party claims never to have agreed to"); *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 761 (D.C. Cir. 1988) ("if the parties disagree as to whether they ever entered into any arbitration agreement at all, the court must resolve that dispute") (internal citation omitted); *I.S. Joseph Co. v. Mich. Sugar Co.*, 803 F.2d 396, 400 (8th Cir. 1986) (holding that *Prima Paint* does not apply when a party challenges the whole contract based on the claim that the assignee cannot enforce the contract); *A.T. Massey Coal Co. v. Int'l Union, United Mine Workers of Am.*, 799 F.2d 142, 146 (4th Cir. 1986) (refusing to compel arbitration until district court decided question of existence of a contract to arbitrate); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 55 (3d Cir. 1980) ("A party may, in an effort to avoid arbitration, contend that it did not intend to enter into the agreement which contained an arbitration clause."); *Interocean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 462 F.2d 673, 676-77 (2d Cir. 1972) (holding that a party's assertion that it never entered into the contract containing the arbitration clause should be decided by the trial court); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003) (stating that if a "party resists arbitration, the trial court must determine whether a valid agreement to arbitrate exists"); *Am. Med. Techs., Inc. v. Miller*, 149 S.W.3d 265, 270 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding) (stating that when a party seeks to compel arbitration, a trial court must first determine the existence of a valid agreement to arbitrate); *see also Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 53-54 (1st Cir. 2002) (reviewing cases "involving allegations that the contract with the arbitration clause *never* existed"); *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002) (holding that federal policy favoring arbitration does not apply to the determination of whether there is an agreement to arbitrate); *but see Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002) (holding that the *Prima Paint* rule does apply to mental capacity defenses).

The Fifth Circuit's decision in *Primerica*, that the defense of mental incapacity is an issue for the arbitrator, not the court, because it is an attack on the whole contract, stands in stark contrast to these authorities. Moreover, *Primerica* has been roundly criticized,[7] and we aware of no other court that has followed its reasoning, including the Fifth Circuit. Several months after *Primerica*, the Fifth Circuit, in fact, reached a decidedly different result in another case involving the issue of a contract-formation defense to an arbitration clause.

In *Will-Drill Resources, Inc. v. Samson Resources*, *Co.*, 352 F.3d 211 (5th Cir. 2003), Samson resisted arbitration on the grounds that all parties had not signed the agreement containing the arbitration clause. The case involved several sellers of mineral leases. *Id.* at 213. Some of the sellers had agreed to arbitrate any dispute, and some had never signed the underlying contract. *Id.* at 215. The Fifth Circuit concluded that whether the sellers had signed the agreement went directly to the "making" of the agreement and the party's consent to arbitrate. Noting that arbitration could not be forced upon a party "absent its consent," the court wrote:

> [W]here the very existence of an agreement is challenged, ordering arbitration could result in an arbitrator deciding that no agreement was ever formed. Such an outcome would be a statement that the arbitrator *never* had any authority to decide the issue. A presumption that a signed document represents an agreement could lead to this untenable result. We therefore conclude that where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute.

352 F.3d at 219 (internal citation omitted). Similarly, we have concluded that whether an arbitration

[7] *See, e.g.,* Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit: Round IV*, 39 TEX. TECH L. REV. 463, 476 (2007) (disapproving *Primerica* as not "sensible" for ignoring the distinction between contract defenses and contract formation); Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 15-16 (2003) (criticizing *Primerica* as a "bizarre and inexplicable" misreading of the separability doctrine).

agreement binds a nonsignatory is a gateway matter to be determined by the court, rather than the arbitrator, unless the parties clearly and unmistakably provide otherwise. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005); *see also In re Labatt Food Serv.*, *L.P.*, 279 S.W.3d. 640, 643 (Tex. 2009) (when "arbitration agreement is silent about who is to determine whether particular persons are bound by the agreement, courts, rather than the arbitrator, should determine the issue").

When deciding federal questions of first impression, we anticipate how the U.S. Supreme Court would decide the issue. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 658–59 (Tex. 1994). This analysis often draws on the precedents of other federal courts, or state courts, to determine the appropriate answer. Given the overwhelming weight of authority, it is apparent to us that the formation defenses identified in *Buckeye* are matters that go to the very existence of an agreement to arbitrate and, as such, are matters for the court, not the arbitrator. Although the Fifth Circuit reached a different conclusion in *Primerica*, we are not obligated to follow that decision. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) ("While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are *obligated* to follow only higher Texas courts and the United States Supreme Court."). Instead, we agree that *Primerica* misapplies *Prima Paint*'s separability doctrine:

> Despite casual assumptions to the contrary, *Prima Paint* does not merely preserve for the courts challenges that are "restricted" or "limited" to "just" the arbitration clause alone—this would be senseless; *it preserves for the courts any claim at all that necessarily calls an agreement to arbitrate into question.* To send a dispute to arbitration where "not only" the arbitration clause itself, but "also," in addition, the "entire" agreement is subject to challenge, is to lose sight of the only important question—which is the existence of a legally enforceable assent to submit to

> arbitration. Someone lacking the requisite mental capacity to contract cannot, I dare say, assent to arbitrate anything at all.

Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 17 (2003). We agree that *Prima Paint* reserves to the court issues like the one here, that the signor lacked the mental capacity to assent. Accordingly, the trial court did not abuse its discretion in declining to yield the question to the arbitrator.

Relator's petition for writ of mandamus is denied.

David M. Medina
Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0665

IN RE MORGAN STANLEY & CO., INC.,
SUCCESSOR TO MORGAN STANLEY DW, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued October 15, 2008

JUSTICE BRISTER, concurring.

Whether a person can avoid an arbitration clause by claiming she was mentally incompetent raises many difficult problems. As the Court notes, the federal courts cannot even agree whether judges or arbitrators should answer the question. I would not try to guess (as the Court does) how the United States Supreme Court may resolve this difficult issue because equitable estoppel renders it irrelevant in this case.

A person "cannot both have his contract and defeat it too."[1] Even those who had nothing to do with an arbitration agreement are bound by it if they seek to gain the benefits of the larger contract in which it is contained.[2] Accordingly, it is irrelevant whether Helen Taylor was mentally

[1] *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005).

[2] *Id.* at 131; *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 755 (Tex. 2001).

incompetent; even if she was, she is still bound to arbitrate because her legal guardian's suit depends entirely on account agreements that contain arbitration clauses.

Every claim Taylor asserts against Morgan Stanley (breach of fiduciary duty, negligence, malpractice, and violations of securities law) has no basis unless Morgan Stanley was her broker. Every legal duty Morgan Stanley owed Taylor arises from the account agreements. Because Taylor's guardian insists that Morgan Stanley violated duties it owed her as a client, he cannot "turn [his] back on the portions of the contract, such as an arbitration clause, that [he] finds distasteful."[3]

It is true that in response to the motion to compel arbitration, Taylor's guardian asserted for the first time that *all* her agreements with Morgan Stanley were unenforceable, not just the arbitration clauses. But that is not what her pleadings said either before or after the hearing. The only declaratory judgment she sought in her First Amended Petition is "that any and all *arbitration* agreements entered into by or on behalf of Helen Taylor are void and not enforceable." She did not seek rescission, which is her only remedy if the entire account agreements are invalid due to incompetence.[4] To the contrary, she seeks exemplary damages, statutory damages, and attorney's fees — relief not available with equitable remedies like rescission.

The question whether mental competence is an issue for courts or arbitrators is not as "straightforward" as JUSTICE WILLETT suggests. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the United States Supreme Court held that a fraudulent inducement claim

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[3] *Weekley*, 180 S.W.3d at 135 (internal punctuation omitted) (citing *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001)).

[4] *See, e.g.*, *Oram v. Gen. Am. Oil Co. of Tex.*, 513 S.W.2d 533, 534 (Tex. 1974).

specifically directed at an arbitration clause is "an issue which goes to the 'making' of the agreement to arbitrate."[5] In *Buckeye Check Cashing, Inc. v. Cardegna*, the Court affirmed *Prima Paint*, describing it as a case involving a contract's validity rather than contract formation.[6] Because both contract formation and validity fall within "the making of the agreement for arbitration" in section 4 of the Federal Arbitration Act,[7] that section alone gives no definitive answer. For better or worse, there has been so much "judicial parsing or sprucing" in this area that there is no easy answer.

As the arbitration clauses here were embedded in each Morgan Stanley contract, Taylor cannot possibly have been incompetent as to one part but competent as to the rest. As her suit clearly relies on the contracts as a whole, she should have to comply with the arbitration clauses too.

I concede that Morgan Stanley did not assert direct-benefits estoppel in the trial court or on appeal. But of course nothing prevents it from doing so now. Arbitration can be waived by substantial litigation conduct, but there is a strong presumption against waiver and we have never suggested it occurs by initially asserting the wrong grounds.[8] As this case can be decided on clear estoppel lines rather than the murkier line between contract formation and contract validity, I would

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[5] 388 U.S. 395, 403-04 (1967)("Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it.").

[6] 546 U.S. 440, 445-46 (2006).

[7] *See id.* at 444 n.1.

[8] *See Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008).

not hazard a guess that we may have to retract later. Instead, I would deny the petition and remand to the district court for reconsideration.

Scott Brister
Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0665

IN RE MORGAN STANLEY & CO., INC.,
SUCCESSOR TO MORGAN STANLEY DW, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued October 15, 2008

JUSTICE WILLETT, concurring.

Like the Court, I believe the Federal Arbitration Act (FAA) reserves signatory-power issues like this to judges, not to arbitrators. A mental-incapacity defense goes to whether the parties reached an agreement in the first place, while defenses like fraudulent inducement attack the validity of an agreement actually made. That is, the former says no agreement exists; the latter concedes existence but contests enforcement.

Like JUSTICE BRISTER, I dislike the murky line between contract formation and contract validity.[1] And while I have no quarrel with the Court's application of the relevant caselaw, I wish such a discussion were unnecessary. Judicial decisions often embroider statutory text with more complexity than is necessary. Sometimes legislative language is clear enough on its own and leaves no room for judicial parsing or sprucing. This case is governed by the Federal Arbitration Act, and

[1] __ S.W.3d __ (Brister, J., concurring).

Section 4 provides a rather straightforward answer, declaring that disputes relating to the "making" of an arbitration agreement are gateway matters for the court.[2]

Since a mental-incapacity defense goes to whether an agreement was made, the court must decide it. (Indeed, it's difficult to see how an incompetent person can "make" a contract since a "meeting of the minds" cannot happen if one of the minds is incapable of meeting.) The statute is free of nuance and merits a nuance-free interpretation: The FAA itself declares this issue a judicial one.

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Don R. Willett
Justice

OPINION DELIVERED: July 3, 2009

[2] 9 U.S.C. § 4 (the court shall order the parties to arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue").

IN THE SUPREME COURT OF TEXAS

NO. 07-0665

IN RE MORGAN STANLEY & CO., INC.,
SUCCESSOR TO MORGAN STANLEY DW, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued October 15, 2008

JUSTICE HECHT, dissenting.

Before a court can compel arbitration under the Federal Arbitration Act,[1] it must be "satisfied that the making of the agreement for arbitration . . . is not in issue".[2] A challenge to the validity of a contract containing an arbitration provision does not put the making of the arbitration provision itself in issue; "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."[3] A challenge to the validity of the arbitration provision itself is for the court to decide; but "when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court."[4] Thus for example, whether the contract was fraudulently induced,[5] or whether it is usurious and therefore illegal,[6] are issues for arbitration.

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[1] 9 U.S.C. §§ 1-16.

[2] *Id.* § 4 ("The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.").

[3] *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-446 (2006).

[4] *Preston v. Ferrer*, 552 U.S. ___, ___ (2008).

[5] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967).

[6] *Buckeye*, 546 U.S. at 446.

But what if the challenge to the contract is that it never came into being? Since "arbitration is a matter of contract",[7] the issue must be one for the court to decide. Otherwise, an arbitrator would be put in the position of deciding whether he was authorized to decide the parties' dispute, concluding either that he was not authorized, a logical circularity, or that he was, and raising himself by his own bootstraps.[8] Thus, whether a person is bound by a contract he never signed is an issue for the court.[9] So, too, would seem to be issues whether a person's signature on a contract was forged,[10] whether a person's agent was authorized to sign,[11] and whether an offer was withdrawn before a contract was signed.[12]

The issue whether a party who executed a contract lacked the mental capacity to do so is different. The rule in Texas[13] and most other jurisdictions[14] is that the contract exists and can be ratified or avoided. That distinguishes the issue of capacity from issues of signature or authorization. A person who did not sign a contract or authorize its execution cannot enforce it; a person who lacks mental capacity to sign it can. Thus, it seems to me, lack of capacity is closer to fraudulent

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[7] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("This court has determined that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960))).

[8] *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 219 (5th Cir. 2003) ("[W]here the very existence of an agreement is challenged, ordering arbitration could result in an arbitrator deciding that no agreement was ever formed. Such an outcome would be a statement that the arbitrator *never* had any authority to decide the issue."); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.,* 256 F.3d 587, 591 (7th Cir. 2001) ("[A]s arbitration depends on a valid contract an argument that the contract does not exist can't logically be resolved by the arbitrator (unless the parties agree to arbitrate this issue after the dispute arises).").

[9] *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995).

[10] *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992).

[11] *Sphere Drake*, 256 F.3d at 591.

[12] *Will-Drill*, 352 F.3d at 219.

[13] *See Neill v. Pure Oil Co.*, 101 S.W.2d 402, 404 (Tex. Civ. App.–Dallas 1937, writ ref'd) ("It is the settled law in this state, we think, that a deed executed by a person of unsound mind is not void but voidable. Hence, as a voidable deed, it effectually accomplishes the thing sought to be accomplished, until set aside in a suit for rescission or cancellation." (citations omitted)).

[14] 53 AM. JUR. 2d *Mentally Impaired Persons* § 150 (2006); 17A C.J.S. *Contracts* § 145 (1999); 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 10:3 (4th ed. 1993); RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981); 1 E. ALLAN FARNSWORTH, CONTRACTS § 4.7 (3d ed. 2004).

inducement than to lack of signature or authorization and therefore an issue for the arbitrator rather than the judge. The issue is not "the making of the agreement"; an agreement with a person lacking capacity exists — it happened. Rather, the issue is whether the agreement is valid and enforceable.

The Court reaches the opposite conclusion for two reasons, neither of which is compelling. First, the Court notes that the Supreme Court, in a footnote distinguishing "[t]he issue of the contract's validity . . . from the issue whether any agreement . . . was ever concluded", listed four cases that had been cited to it involving forgery, authorization, and mental capacity.[15] But the Supreme Court expressed no opinion on any of these issues and did not note the important difference under some states' laws that mental incapacity does not preclude an agreement. I think the Court overreads the footnote, though of course, one cannot be sure. As Professor Ware has observed:

> Incapacity has long been a defense to the enforcement of a contract formed by a minor or mentally incompetent person. Such incapacity does not prevent the formation of a contract. So under the Supreme Court's distinction between a contract's formation ("whether any agreement . . . was ever concluded") and defenses to enforcement ("the contract's validity"), incapacity plainly falls in the latter category and thus should be resolved by arbitrators rather than courts. Yet the Supreme Court in *Buckeye* grouped incapacity together with lack of assent and agency, both of which fall into the former category (formation) and both of which, *First Options* held, are resolved by courts rather than arbitrators. So it is possible that — when presented with an incapacity case — the Court will continue to group incapacity with lack of assent and agency and treat them all as questions for courts, rather than arbitrators . . . . Time will tell.[16]

Second, as between the two cases on the issue before us, the Tenth Circuit's decision in *Spahr v. Secco,*[17] and the Fifth Circuit's decision in *Primerica Life Ins. Co. v. Brown,*[18] the Court

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[15] *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006) ("The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (C.A.11 1992), whether the signor lacked authority to commit the alleged principal, *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (C.A.3 2000); *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (C.A.7 2001), and whether the signor lacked the mental capacity to assent, *Spahr v. Secco*, 330 F.3d 1266 (C.A.10 2003).").

[16] Stephen J. Ware, *Arbitration Law's Separability Doctrine after* Buckeye Check Cashing, Inc. v. Cardegna, 8 NEV. L.J. 107, 118-119 (2007) (footnotes omitted).

[17] 330 F.3d 1266 (10th Cir. 2003).

[18] 304 F.3d 469, 471 (5th Cir. 2002).

picks *Spahr* because the Fifth Circuit reached "a decidedly different result" in *Will-Drill Resources, Inc. v. Samson Resources Co.*[19] and *Primerica* has been criticized for misapplying the separability doctrine. But *Will-Drill* repeatedly cites *Primerica* and discusses it approvingly,[20] and the results in the two cases are entirely consistent. Primerica holds that the issue whether a contract, though made, is invalid is for the arbitrator; *Will-Drill* holds that the issue whether a contract was ever made is for the court. And even if *Primerica* was mistaken in concluding that capacity was an issue for arbitration *simply because* it was a challenge to a contract as a whole, that does not mean that the result was incorrect. Again, Professor Ware summarizes:

> [C]ourts would hear questions about mutual assent, consideration, and authority to assent on behalf of others, while sending to arbitrators questions about misrepresentation (fraud in the inducement), mistake, duress, undue influence, incapacity, unconscionability, impracticability, frustration of purpose, the statute of frauds, the statute of limitations, illegality (or "public policy"), and expiration or termination. However, these latter issues are sent to the arbitrator only if they are challenges to the container contract as a whole; if they are "directed to the arbitration clause itself," then they are heard by courts.[21]

Apart from the merits of the issue, there is another reason to hold that mental incapacity is for the arbitrator: the Fifth Circuit has done so. This Court has emphasized in the past that "it is important for federal and state law to be as consistent as possible in [applying the FAA], because federal and state courts have concurrent jurisdiction to enforce the FAA."[22] Federal courts in Texas must follow the Fifth Circuit, and state courts must follow this Court. After today, whether an issue of mental capacity is for the court or arbitrator in the first instance will depend on whether arbitration is sought in state or federal court. Today's decision encourages the forum-shopping the Court has tried hard to avoid.

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[19] 352 F.3d 211, 219 (5th Cir. 2003).

[20] *Id*. at 214-215, 218 n.41-42.

[21] Ware, *supra* note 16, at 115-116 (footnotes omitted).

[22] *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005).

As JUSTICE BRISTER points out, the matter may end up being a small one. Helen Taylor's guardian initially sued for breach of her contract with Morgan Stanley, then dropped that claim when he realized he could not stand on the contract and disavow the arbitration provision at the same time. The guardian now sues Morgan Stanley for breach of fiduciary duty arising out of the relationship between Taylor and Morgan Stanley, for recommending unsuitable transactions in violation of state securities laws, and for negligence. But the relationship between Taylor and Morgan Stanley was created and defined by their contract. If the guardian proves the contract was invalid, and Taylor and Morgan Stanley were simply strangers, it is not clear what duty Morgan Stanley owed or breached. The Court goes out of its way to work the guardian through the problems he has made for himself,[23] but in repudiating any contract to avoid arbitration, he may well have cut off his arbitration nose to spite his litigation face.

I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: July 3, 2009

[23] *Ante* at ___.

IN THE SUPREME COURT OF TEXAS

NO. 07-0697

PAUL H. SMITH, ET AL., PETITIONERS,

v.

THOMAS O'DONNELL, EXECUTOR OF THE ESTATE OF CORWIN DENNEY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued September 10, 2008

JUSTICE O'NEILL delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE BRISTER, JUSTICE MEDINA, and JUSTICE JOHNSON joined.

JUSTICE WILLETT filed a dissenting opinion, in which JUSTICE WAINWRIGHT joined.

JUSTICE HECHT and JUSTICE GREEN did not participate in the decision.

Thomas O'Donnell, as executor of the estate of Corwin Denney, sued Cox & Smith, Corwin's attorneys, for legal malpractice, breach of fiduciary duty, and gross negligence/malice arising out of advice the attorneys gave Corwin while he was serving as executor of his wife's estate. The trial court granted summary judgment for the attorneys on all claims. The court of appeals reversed the summary judgment on the legal malpractice claim based on our holding in *Belt v. Oppenheimer*, *Blend*, *Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006). 234 S.W.3d 135, 138.

In *Belt*, we held that an executor was in privity with the decedent's attorneys and could sue them for estate-planning malpractice. 192 S.W.3d at 787. A prior case, *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996), barred estate-planning legal malpractice claims brought by third-party beneficiaries of the estate. This case asks us to consider whether an executor may bring suit against a decedent's attorneys for malpractice committed outside the estate-planning context. We hold that the executor should not be prevented from bringing the decedent's survivable claims on behalf of the estate, and affirm the court of appeals' judgment.

I. Background

When Corwin Denney's wife, Des Cygne, died, Corwin served as executor of her estate. He retained Cox & Smith to advise him in the independent administration of her estate, and consulted the law firm regarding the separate versus community character of the couple's assets. According to Corwin, he and his wife had orally agreed that stock in Automation Industries, Inc., would be his separate property and stock in Gilcrease Oil Co. would be hers. Cox & Smith prepared a memorandum advising Corwin that the Automation and Gilcrease stock was presumed to be community property, and that additional information was necessary before classifying the assets. According to Cox & Smith, Corwin was also advised that he should probably pursue a declaratory judgment to properly classify the stock, which he declined to do. Cox & Smith, relying upon an analysis performed by Corwin's California accountant and without seeking a declaratory judgment, prepared an estate tax return that omitted any Automation stock from a list of Des Cygne's assets. Corwin died twenty-nine years later, leaving the bulk of his estate to charity. Approximately one month after his death, the Denney children, as beneficiaries of Des Cygne's trust, sued Corwin's

estate alleging that Corwin had misclassified the Automation stock as his separate property, and as a result underfunded their mother's trust. O'Donnell, the executor of Corwin's estate, settled the children's claims for approximately $12.9 million, less than half of their estimated value.[1] O'Donnell then brought this suit for legal malpractice against Cox & Smith, alleging that the attorneys failed to properly advise Corwin about the serious consequences of mischaracterizing assets, and that their negligence caused damage to Corwin's estate.

II. Procedural History

At the trial court, Cox & Smith won a summary judgment on all claims. The trial court did not state a basis for its decision. The court of appeals initially affirmed the summary judgment, holding that no cause of action had accrued to Corwin during his lifetime, and thus O'Donnell lacked privity with the lawyers. *O'Donnell v. Smith*, No. 04-04-00108-CV, 2004 WL 2877330, at *3 (Tex. App.—San Antonio Dec. 15, 2004). We vacated and remanded for reconsideration in light of our decision in *Belt*, 192 S.W.3d 780. In *Belt*, we held that there was no accrual problem under similar circumstances. 192 S.W.3d at 785–86. There, the independent executrixes of an estate brought a legal malpractice claim on the estate's behalf alleging that a negligently-drafted will had increased the estate's tax liability. *Id*. at 782. We held that because the injury that formed the basis of the claim occurred when the will was drafted, the claim accrued prior to the decedent's death. 192 S.W.3d at 785–86. We further held that legal malpractice claims for pure economic loss are

[1] According to O'Donnell's attorney, the Des Cygne beneficiaries' claims against Corwin were worth at least $32 million and perhaps as much as $40 million.

survivable and an estate's personal representative may bring survivable claims on behalf of the estate. *Id.* at 785–87.

In this case, the court of appeals held, on remand, that (1) a fact issue existed as to whether a malpractice cause of action accrued during Corwin's lifetime; (2) such a claim would survive in favor of the estate; and (3) no evidence supported O'Donnell's malice claim. 234 S.W.3d at 145–48. Cox & Smith argued to the court of appeals that despite our holding in *Belt*, the summary judgment should have been affirmed because O'Donnell lacks privity with Cox & Smith. Cox & Smith based its argument on *Barcelo*, 923 S.W.2d 575, in which we held that estate-planning attorneys owe no duty to third-party beneficiaries, and are not subject to malpractice lawsuits brought by them. Cox & Smith contends legal malpractice claims cannot be brought by anyone but the client, and *Belt* merely created a narrow exception for executors bringing estate-planning legal malpractice claims. The court of appeals rejected this argument, and we consider it here.

III. Privity Between Attorneys and Executors of the Client's Estate

An executor is a personal representative who "'stands in the shoes'" of the decedent. *Belt*, 192 S.W.3d at 787. As a general rule, an estate's personal representative may bring the decedent's survivable claims on behalf of the estate. *Id.* at 784*; see also* TEX. PROB. CODE § 233A ("Suits for the recovery of personal property, debts, or damages . . . may be instituted by executors or administrators."). In *Belt*, we considered whether the executrixes' legal malpractice claim was survivable. 192 S.W.3d at 784. At common law, actions for damage to real or personal property survive the death of the owner. *Id*. Thus, we held that "legal malpractice claims alleging pure economic loss survive in favor of a deceased client's estate." *Id.* at 785.

Having identified these claims as survivable, we must consider whether there is any reason for an exception preventing executors from bringing them. Cox & Smith again relies on our holding in *Barcelo*, where we identified the longstanding privity rule barring non-clients from suing for legal malpractice. 923 S.W.2d at 577. In that case, the beneficiaries of a will and a trust agreement sued the estate-planning attorney for legal malpractice, alleging that negligent drafting had harmed their interests. *Id*. at 576. We refused to join the majority of states that relax the common-law privity barrier for intended beneficiaries, and held that third parties lack privity with a deceased's attorney and cannot sue for malpractice. *Id.* at 577–79.

We identified two policy considerations that supported our decision in *Barcelo*. First, allowing these suits could disrupt the attorney–client relationship. If third parties could sue for estate-planning legal malpractice, attorneys would be distracted by the threat of future lawsuits from disgruntled heirs, making them less able to serve their clients. *Id.* at 578. Second, third-party estate-planning malpractice suits would allow disappointed beneficiaries to seek a greater share of the estate by claiming the testator's true intent was different from what is expressed in a formally-executed will, and thus create "a host of difficulties." *Id.*

Cox & Smith contends *Barcelo* bars all legal malpractice suits brought by non-clients, with the exception of estate-planning malpractice claims brought by executors, like that in *Belt*. To adopt the rule Cox & Smith suggests would place us alone among the states, and would unnecessarily immunize attorneys who commit malpractice. None of the concerns we voiced about third-party malpractice suits apply to malpractice suits brought by an estate's personal representative. The threat of executor lawsuits will not impede the attorney–client relationship, because the estate's suit is

based on injury to the deceased client, as opposed to any third party. The estate's suit is identical to one the client could have brought during his lifetime. An estate's interests, unlike a third-party beneficiary's, mirror those of the decedent. *Belt*, 192 S.W.3d at 787.[2]

Cox & Smith argues that the estate's interest in this suit is not truly in line with the decedent's because Corwin had always intended to keep the community-property stock out of the trust and treat it as his own property, and he did so without seeking the declaratory judgment Cox & Smith recommended.[3] This argument, though, goes to the weight of the legal malpractice claim and does not change the fact that O'Donnell "stands in the [deceased's] shoes" in assessing the claim's merit and deciding whether or not to assert it on the estate's behalf. *Id*. Of course, if the evidence demonstrates that Corwin would have ignored Cox & Smith's advice no matter how competently provided, the malpractice claim will fail for lack of proximate causation. But at this point in the proceedings, the merits of the malpractice claim are undeveloped. There is at least some evidence that Corwin would have followed his lawyers' advice to pursue a declaratory judgment if they had clearly advised him to do so or warned him adequately of the severe consequences of mischaracterizing community assets.

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[2] In *Belt*, we noted that several considerations should discourage beneficiaries who also act as an estate's personal representative from pursuing estate-planning malpractice claims in order to increase their own shares. First, mismanagement could subject the personal representative to removal. *Belt*, 192 S.W.3d at 787–88 (citing TEX. PROB. CODE § 222(b)(4)). Second, any damages recovered would be paid to the estate, then distributed according to the existing estate plan. *Id.* at 788. These concerns are not present here because O'Donnell is not a beneficiary of Corwin's will or Des Cygne's, and furthermore, the claim is not for estate-planning malpractice.

[3] The dissent asks, "would the client be rooting for the executor and the beneficiaries?" The answer is almost certainly yes. The Des Cygne beneficiaries received fixed amounts under Corwin's will. The only beneficiaries that stand to benefit from the suit against Cox & Smith are the charity to which Corwin intended to leave the bulk of his estate and possibly Corwin's widow.

And although Cox & Smith suggests, and the dissenting justices assume, that O'Donnell colluded with the Denney children in settling their claims, there is nothing in the record that would support such a presumption. If Cox & Smith can in fact demonstrate collusion at trial, it would presumably negate causation and/or mitigate damages on the legal malpractice claim, and could subject O'Donnell to personal liability to Corwin's beneficiaries for violating his fiduciary duties as executor of Corwin's estate. We see no reason to create a rule that would deprive an estate of any remedy for wrongdoing that caused it harm by prohibiting the estate from pursuing survivable claims the decedent could have brought during his lifetime.

Cox & Smith argues that the court of appeals' decision creates an end-run around *Barcelo*, allowing disgruntled beneficiaries to sue to increase their inheritances. However, the Des Cygne beneficiaries' claims were not against Corwin's estate as beneficiaries of his will, but against Corwin as executor of their mother's estate. Had they known during his lifetime that Corwin had misallocated their mother's community property and brought suit while he was alive, as the dissenting justices say they should have, any judgment or settlement they might have obtained for damage to their mother's estate would have been collectable from Corwin, who then could have asserted a claim against Cox & Smith for legal malpractice. In such a case, under Cox & Smith's and the dissenting justices' view, *Barcelo* would extinguish Corwin's malpractice claim upon his death simply because the Des Cygne beneficiaries were also beneficiaries of Corwin's estate. We do not believe *Barcelo* will bear such an expansive reading. To the contrary, when negligent legal advice depletes the decedent's estate in a manner that does not implicate how the decedent intended to apportion his estate, *Barcelo*'s concerns about quarreling beneficiaries and conflicting evidence

do not arise. *See Barcelo*, 923 S.W.2d at 578. Here, the beneficiaries of Des Cygne's trust do not dispute Corwin's intent as expressed in his will. They have already been paid a settlement out of Corwin's estate for damage Corwin allegedly caused to their mother's trust; the outcome of O'Donnell's legal malpractice suit against Cox & Smith will have no impact on their recovery, and they have no interest in that suit.

Adopting the broad rule Cox & Smith proposes would preclude executors from recovering for any claims the estate has to pay potential beneficiaries due to bad legal advice the decedent received during his lifetime. For example, according to Cox & Smith and the dissenting justices, if Corwin had improperly handled co-owned property based on bad legal advice and then died, his estate would be liable to the co-owner and could sue for legal malpractice so long as the co-owner was not related to Corwin and therefore a potential beneficiary of his estate. If a judgment was entered against Corwin because counsel botched his defense in a personal injury action arising out of an automobile accident, and Corwin later died, his estate could not assert a malpractice claim for damages that his estate must pay if the injured party happened to be a beneficiary of his will. We see no reason to extend the *Barcelo* privity bar to survivable malpractice suits brought by an executor, and declined to do so in *Belt.* We do not read *Barcelo* to bar O'Donnell's suit against Cox & Smith.

The dissent contends our decision will somehow allow disgruntled beneficiaries to employ gamesmanship to recover more than they were devised and will open up new avenues for attorney liability. Under *Barcelo*, beneficiaries cannot sue a decedent's attorneys for estate-planning malpractice. *Id*. at 579. But this case does not involve a claim of estate-planning malpractice and

it does not involve a suit by a decedent's beneficiaries against the decedent's attorneys. The Des Cygne beneficiaries did not sue Corwin's attorneys and have no interest in the outcome of the legal malpractice case. They did sue Corwin's estate, but did so in their capacity as the wronged beneficiaries of their mother's allegedly underfunded trust, not as disgruntled beneficiaries of Corwin's will. We see no reason to bar a completely separate lawsuit — that of the executor against Corwin's attorneys — simply because Des Cygne's beneficiaries sued the estate for Corwin's mishandling of their mother's trust.

IV. Malice

O'Donnell has filed a cross-petition challenging the court of appeals' holding that O'Donnell presented no evidence of malice to support an award of exemplary damages. *See* Act of Apr. 11, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 110 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 41.003(a)). Malice has both an objective and a subjective prong; proof of malice involves an objective determination that the defendant's conduct involves an extreme risk of harm, and a subjective determination that the defendant had actual awareness of the extreme risk created by his conduct. *Kinder Morgan N. Tex. Pipeline, L.P. v. Justiss*, 202 S.W.3d 427, 447 (Tex. App.—Texarkana 2006, no pet.).

The objective prong is a function of both the magnitude and the probability of potential injury and is not satisfied if the defendant's conduct merely creates a remote possibility of serious injury. *Universal Servs. Co. v. Ung*, 904 S.W.2d 638, 641 (Tex. 1995). "Extreme risk" is not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001). The

subjective prong requires evidence that the defendant was subjectively aware of the risk but consciously chose to do nothing. *Lee Lewis*, 70 S.W.3d at 786.

In reviewing a no-evidence summary judgment, we review the evidence in the light most favorable to the respondent against whom the summary judgment was rendered. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). If the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact, a no-evidence summary judgment cannot properly be granted. *Reynosa v. Huff*, 21 S.W.3d 510, 512 (Tex. App.—San Antonio 2000, no pet.).

O'Donnell argues that he introduced more than a scintilla of evidence on both the objective and subjective prongs. We agree with the court of appeals that the strict standard for proving malice was not met. The evidence O'Donnell offered to prove that there was an extreme risk of harm amounts to conclusory statements from his expert and Corwin's California counsel. Similarly, the evidence raises no fact issue that Cox & Smith intended to cause Corwin injury or acted with actual awareness of an extreme risk of injury. Cox & Smith recognized that classifying the property was important, and informed Corwin that it was "presumably community," and that more information was needed to classify it properly. Cox & Smith also advised him that he should "probably" seek a declaratory judgment on the classification.

O'Donnell argues that it was inappropriate for the court of appeals to consider this evidence of "some care" exercised by Cox & Smith, because "some care" will not carry the burden on a no-evidence summary judgment. But the court of appeals is charged with considering "*all* the evidence" in reviewing punitive damage issues. *City of Keller,* 168 S.W.3d at 817 (emphasis in original). Moreover, we have held that in reviewing a summary judgment on malice, courts should consider

"all of the surrounding facts, circumstances, and conditions" in deciding whether an action was pursued with conscious indifference to risk. *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981).

The court of appeals did not err in considering evidence that Cox & Smith had in fact made some attempt to point Corwin down the path of correctly classifying the stock. Considering all the evidence, there is nothing to suggest that Cox & Smith had any intent to harm Corwin or consciously chose to not give him more detailed advice, and thus the court of appeals did not err in affirming the no-evidence summary judgment on malice.

V. Conclusion

For the foregoing reasons, the court of appeals' judgment is affirmed.

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Harriet O'Neill
Justice

OPINION DELIVERED: June 26, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0697

PAUL H. SMITH, ET AL., PETITIONERS,

v.

THOMAS O'DONNELL, EXECUTOR OF THE ESTATE OF CORWIN DENNEY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued September 10, 2008

JUSTICE WILLETT, joined by JUSTICE WAINWRIGHT, dissenting.

This legal-malpractice appeal turns on whether *Belt*[1] or *Barcelo*[2] should control. Decided a decade apart, both decisions have their place in our jurisprudence — *Barcelo* states the general rule (non-clients cannot file malpractice suits), *Belt* the exception (executors sometimes can). Unlike the Court, I believe today's case is governed by *Barcelo*'s general privity barrier, as it is rife with *Barcelo*-like concerns of divided loyalties and conflicts of interest. Indeed, this case presents exactly the sort of gamesmanship flagged in *Belt*, "an opportunity for some disappointed beneficiaries to

[1] *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006).

[2] *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996).

recast a malpractice claim for their own 'lost' inheritance, which would be barred by *Barcelo*, as a claim brought on behalf of the estate."[3]

A lawyer's focus should be stubbornly client-focused, concerned with today's representation of satisfied clients, not tomorrow's litigation from dissatisfied critics. The Court's decision, I fear, sends this troubling message: *caveat advocatus*–zealously represent your client at your own risk. It's hard to be zealous while nervous. For the concerns expressed in *Barcelo* (and echoed in *Belt*), I would affirm the trial court's summary judgment for Cox & Smith.

I. *Barcelo* and *Belt* Revisited

Barcelo held that trust beneficiaries lacked privity with the trustor's attorney and therefore had no claim for legal malpractice.[4] The Court reaffirmed the general Texas rule that an attorney's professional duty of care extends only to his client, and declined to recognize an exception to the privity barrier applicable "in the estate planning context."[5] The Court's chief rationale was that relaxing the privity rule might create conflicts of interest that would discourage lawsuit-wary attorneys from acting solely and zealously on behalf of their clients:

> Such a cause of action would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust. This potential tort liability to third parties would create a conflict during the estate planning process, dividing the attorney's loyalty between his or her client and the third-party beneficiaries. . . .
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> . . . .

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[3] *Belt*, 192 S.W.3d at 788.

[4] *Barcelo*, 923 S.W.2d at 578-79.

[5] *Id*. at 577.

> We believe the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent. This will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.[6]

In *Barcelo*, we did not identify an actual conflict of interest between the third-party beneficiaries and the attorney. Our decision to adopt a bright-line rule must therefore be read as based on the mere *possibility* of conflicts of interest between the client trustor or testator and the third-party beneficiary.

Belt, on the other hand, held that independent executors of an estate could sue an estate-planning attorney for injury to the estate as a whole.[7] The alleged injury to the estate in *Belt* was a substantial and avoidable estate-tax liability.[8]

A critical distinction between *Belt* and *Barcelo* is that in *Belt* the interests of the testator, the estate, the executors, and the heirs were aligned. In *Belt*, we respected and reconciled *Barcelo* by emphasizing that the potential conflicts of interest that concerned us in that case were absent in *Belt*:

> [I]n *Barcelo*, we held that an attorney's ability to represent a client zealously would be compromised if the attorney knew that, after the client's death, he could be second-guessed by the client's disappointed heirs. Accordingly, we held that estate-planning attorneys owe no professional duty to beneficiaries named in a trust or will.
>
> While this concern applies when disappointed heirs seek to dispute the size of their bequest or their omission from an estate plan, it does not apply when an estate's personal representative seeks to recover damages incurred by the estate itself. Cases brought by quarreling beneficiaries would require a court to decide how the decedent intended to apportion the estate, a near-impossible task given the limited, and often

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[6] *Id.* at 578-79.

[7] *Belt*, 192 S.W.3d at 782.

[8] *Id*.

> conflicting, evidence available to prove such intent. In cases involving depletion of the decedent's estate due to negligent tax planning, however, the personal representative need not prove how the decedent intended to distribute the estate; rather, the representative need only demonstrate that the decedent intended to minimize tax liability for the estate as a whole.
>
> Additionally, while the interests of the decedent and a potential beneficiary may conflict, a decedent's interests should mirror those of his estate. Thus, the conflicts that concerned us in *Barcelo* are not present in malpractice suits brought on behalf of the estate.[9]

II. The *Barcelo* Privity Barrier Should Govern this Case

Today's case should fall under the *Barcelo* privity barrier because conflicts of interest abound. While this case has a slightly altered procedural posture—suit filed by the executor, not the beneficiaries directly—there is little confusion that the executor is a pass-through, essentially bringing the children's claims in the estate's name. The trust beneficiaries had interests that directly conflicted with the interests of Corwin Denney, the client. The trust was established at the death of Denney's second wife, Des Cygne, pursuant to her will. Every asset that went into Des Cygne's trust was an asset that Denney could not treat as his separate property and spend or otherwise use as he wished. *Barcelo*'s central holding is that this conflict of interest necessarily means that trust beneficiaries do not share privity with the client's attorneys, who should focus solely on the client's best interests and wishes.

The trust beneficiaries, Denney's children, could have sued Denney during his lifetime for failing to adequately fund Des Cygne's trust with her rightful share of the couple's community property. The beneficiaries declined to do so, almost surely aware that Denney would have

[9] *Id.* at 787 (footnote and citations omitted).

vigorously contested any characterization of the Automation Industries stock as community property and that he would have offered evidence of an oral agreement with Des Cygne that all the stock was his separate property. Nor did the beneficiaries sue Denney's attorneys after Denney's death. If they had, they would have lost under *Barcelo*. Instead, they waited thirty-four days after their father died and sued his estate. The executor, O'Donnell, raised no limitations defense but instead settled with the beneficiaries for generous sums.[10] He then sued Cox & Smith for malpractice, essentially taking the position that Denney's attorneys should have persuaded him, against his strong and repeated wishes, to surrender more assets to Des Cygne's trust. So we have a *Barcelo* suit draped in *Belt* garb. I would disallow the legal makeover.

The record is clear that Denney believed that all the Automation Industries stock was his separate property and that he opposed funding the trust with this prized asset. O'Donnell, with nothing to win or lose personally by settling with the trust beneficiaries, has now become a conduit for the trust beneficiaries' claim that Denney should have been more generous to the trust and less generous to himself. Under *Barcelo*, attorneys should not be forced to answer such claims. The privity rule should preempt lawsuits where the executor effectively serves as a pass-through for the beneficiaries' claims.

[10] Affidavits submitted by the executor's experts assert that Denney failed to fund Des Cygne's trust with Automation Industries stock worth approximately $1.8 million at the time of her death, resulting in claims by the trust beneficiaries that O'Donnell settled years later for over $12.86 million. O'Donnell also paid the estate counsel who advised him $2.3 million for eight months of work that included one deposition.

III. A Bypass Suit for Every Bypass Trust?

Because of the conflicts of interest inherent in expecting an attorney to safeguard the interests of clients and beneficiaries alike, claims by disappointed beneficiaries would discourage attorneys from focusing solely on the client's best interests, the essential teaching of *Barcelo*. I see no special significance to the fact that the beneficiaries here were beneficiaries to a trust that was not created by Denney's will. *Barcelo* also concerned a separate trust that allegedly was not properly funded.[11] Regardless, the critical similarity with *Barcelo* is that the interests of the beneficiaries whose claims led to the malpractice suit were not necessarily aligned with the interests of the deceased client, and the mere risk of divided loyalties compelled us to maintain a bright-line privity barrier that precluded legal malpractice suits filed by third parties.

I would not read *Belt* to apply whenever third parties manage to bring suit against the estate instead of the attorneys or the client directly. Again, the trust beneficiaries here could have brought suit against Denney or his attorneys but declined to do so. In *Barcelo*, the disappointed trust beneficiaries apparently could have pursued litigation against the executor of the client's estate, but instead settled with the estate "for what they contend[ed] was a substantially smaller share of the estate than what they would have received pursuant to a valid trust."[12] Bypass trusts and other trusts are extremely common estate planning devices for couples wishing to minimize taxes or serve other

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[11] *Barcelo*, 923 S.W.2d at 576.

[12] *Id*.

estate planning goals.[13] As happened here, the beneficiaries to the trust created by the will of the first spouse to die may have to wait until the surviving spouse dies, since the surviving spouse typically receives income from the trust until death, and the corpus of the trust then goes to the beneficiaries. If *Barcelo* can be circumvented in three simple steps—(1) beneficiaries sue the estate to resolve an objection to how the trust was funded or created; (2) executor settles with the beneficiaries; (3) executor then recoups the settlement by suing the attorneys who long-ago advised one or both spouses—*Barcelo*'s privity bar will prove porous indeed. I would limit *Belt* to cases where the court can safely assume that the interests of the client, the executor, and the disappointed heir or trust beneficiary are plainly and truly aligned, a situation we manifestly do not see here.

Further, if the only prerequisite to suit against a deceased client's attorney is that it must be brought by the executor, an endless variety of claims could be brought on the theory that the attorney's advice resulted in a smaller estate or trust. Every lawyer who advised a client to plead guilty or not, file for bankruptcy or not, settle a dispute or not, incorporate a business or not, and so on, would be fair game. I suspect that many experienced estate-planning attorneys have encountered a client who plans to "breathe his last breath and spend his last dollar," and who wishes not to be bothered with the paperwork, expense, meetings, or loss of control over assets involved in maximizing his estate. Today's decision arguably places a duty on attorneys to dissuade such a client

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[13] *See, e.g.*, *Stoll v. Henderson*, No. 01-07-00733-CV, 2009 WL 468872, at *1 (Tex. App.—Houston [1st Dist.] Feb. 26, 2009, no pet. h.); *In re Townley Bypass Unified Credit Trust*, 252 S.W.3d 715, 718–19 (Tex. App.—Texarkana 2008, no pet.); *Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723, 733 (Tex. App.—San Antonio 2007, pet. denied); *Rosen v. Wells Fargo Bank Texas, N.A.*, 114 S.W.3d 145, 148 (Tex App.—Austin 2003, no pet.); *id.* at 155–56 (Kidd, J., dissenting) (describing bypass trust); *Guest v. Cochran*, 993 S.W.2d 397, 399–400 (Tex. App.—Houston [14th Dist.] 1999, no pet).

from his carefree inclinations, and to steer him instead to altruism, a task, in my view, better left to those with divinity degrees instead of law degrees.

The distinction between this case and *Belt* is best captured with this question: would the client be rooting for the executor and the beneficiaries? In *Belt* we assumed the answer was "yes" so long as the client wanted his estate-tax liability minimized, thus leaving more to the chosen heirs. As the interests of the client-testator, estate, executor, and heirs were perfectly aligned, extending privity from the client to the executor made perfect sense.

In today's case, a "yes" answer is less clear. To put it mildly, the record does not suggest that Denney would be rooting for the trust beneficiaries, his six children, whom he wanted to inherit only nominal sums from himself and Des Cygne, with the bulk of his estate going to charity.[14] The

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[14] The flavor of the relationship between Denney and his children is provided in a letter Denney wrote to daughter Carolyn in 1979, a copy of which was sent to all his children, in which he made clear that he wanted his children only to inherit modest amounts:

> As I look back over my life, I feel extremely fortunate to have been able to have started with absolutely nothing and end up with the potential, in some small way, to contribute to the world . . . .
>
> Now, I would like to discuss with you, each of my children, with your having the knowledge that each will receive a copy of this letter.
>
> . . . DesCygne and I made the trip to pay a visit on more than one occasion with your extending less than a warm welcome to DesCygne. . . . As I recall, not too many months later, you insisted that you be given a wedding almost immediately. Your mother was very much opposed to the wedding, but I sanctioned same, only because of my suspicion of the nature of the urgency, which later became substantiated.
>
> As you know, I soon became suspicious that [son in law] Gerry would never amount to anything. . . . The culmination of these episodes was the asking by you and Gerry that I loan to you $10,000.00 for the purchase of a gasoline filling station. The result, of which, was a complete squandering of the money.
>
> . . . .
>
> . . . DesCygne was very aware of the hatred you, [daughter] Mary, and [daughter] Anne felt for

California suit by the children directly precipitated the Texas legal malpractice suit. *Barcelo* endeavored to bar legal-malpractice suits by beneficiaries with a bright-line rule because conflicts might arise due to "concomitant questions as to the true intentions of the testator."[15] *Belt*

> her . . . . DesCygne's estate was only nominal, and resulted exclusively from what I had given to her . . . . In my will, there is an equally nominal amount to be divided equally between the six children. . . .
>
> . . . I know you abhor the thought of getting a job . . . .
>
> I was violently opposed to Mary marrying Gary; however, I gave them the best of weddings in Tulsa. Mary, was no better than you, in her hatred of DesCygne. . . .
>
> . . . .
>
> . . . Anne is the only one of my children who has ever visited me . . . .
>
> With regard to [sons] Tommy and Pete, both of them were terrible problems for the several years following DesCygne's death. These problems involved rebellion against all moral standards, consumption of drugs, inabilities to hold a job, scrapes with the law, and squandering of money. . . .
>
> . . . .
>
> With regard to [daughter] Deci, as you know, she has achieved an extremely poor academic record every school year. We still do not believe that this record is caused by anything other than a complete lack of application and a selfish desire to do ever what she wants. . . . Her use of drugs and alcohol has contributed to her downfall. . . .
>
> . . . .
>
> At the time Deci made her decision, I explained to her that she was not going to inherit, except in a very nominal way, from her mother or me . . . .
>
> . . . .
>
> Finally, I would like for you and the others to know, that upon my death the vast majority of my assets will go to the Denney Foundation.

Denney's last wife Nanci, in a deposition, summarized the suit that Denney's "horrible, odious, unattractive, disagreeable" children brought against the estate as follows: "They called him a liar and a fraud and a cheat. And I never understood why they really did it. I think they just wanted to get more money than he had left them."

[15] *Barcelo*, 923 S.W.2d at 578.

distinguished cases "when disappointed heirs seek to dispute the size of their bequest,"[16] and where the attorneys are being "second-guessed by the client's disappointed heirs,"[17] the situation here.

Cox & Smith advised Denney regarding Des Cygne's trust and her estate-tax filing. In the course of this advice the Cox & Smith attorneys advised Denney that the Automation Industries stock might, depending on choice-of-law questions, be deemed community property despite Denney's written representation to the attorneys that "DesCygne and I had a firm understanding that she had no interest in my stock in [Automation Industries]." Cox & Smith recommended that Denney seek a declaratory judgment regarding the proper characterization of the stock, but he refused, and instead "made a decision that it . . . was his separate property," according to the testimony of Cox & Smith attorney Jack Guenther. Denney always believed that the Automation Industries stock was his separate property, as he started the company in the 1940s, long before he married Des Cygne. Throughout his lifetime—through Des Cygne's death, three divorces, and a stock sale while married to his fifth wife—Denney insisted the stock was his alone. O'Donnell's testimony confirms Denney's consistent position for thirty years was "that he, not any of his wives, owned all the Automation Industries stock."

At bottom, the legal-malpractice claim is that Cox & Smith should have persuaded Denney to do something he believed was wrong and did not want to do. Denney's lawyers should not be subject to suit, decades after their representation, for implementing their client's express wishes to live out his life as a wealthier man, based on a then-defensible position that the stock was indeed his

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[16] *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 787 (Tex. 2006).

[17] *Id.*

separate property and did not belong in Des Cygne's trust. The privity rule serves to tell lawyers in this situation to fight for Denney, not against him, and try to assure that he gets to keep his stock.

This case presents a conflict between client and trust beneficiary (Denney and his children) and also requires a presumption, against all record evidence, that Denney would cheer his estate's decision to settle with the children (who wanted the millions that Denney instead gave to charity) and then sue Cox & Smith for having carried out his wishes. Unlike the facts in *Belt*, what most benefits the living client who received the legal advice (treating the stock as separate property) and what the executor thought was in the estate's best interest (paying millions to settle claims that the stock was community property) are contradictory. These conflicting, misaligned interests were not present in *Belt*.

IV. Conclusion

On these facts, we cannot indulge *Belt*-like presumptions that Denney's interests while living "mirror those of his estate,"[18] that the estate's interests "are compatible with the client's interests,"[19] or that Denney would want to see his executor "standing in his shoes"[20] by suing the attorneys whose

[18] *Id.*

[19] *Id*. at 789.

[20] *See id*. at 787 ("the estate 'stands in the shoes' of a decedent"); *id.* at 788–89 (noting that estate "merely 'stands in the shoes' of the client after death").

work Denney praised. O'Donnell is trying to squeeze into Denney's shoes, but the fit is quite uncomfortable, and the Court should not allow it.

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Don R. Willett
Justice

OPINION DELIVERED: June 26, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0737

IN RE LESTER COLLINS, M.D., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued November 12, 2008

JUSTICE O'NEILL delivered the opinion of the Court.

In this mandamus proceeding, we must decide whether the trial court abused its discretion by granting a protective order barring the defendants, their attorneys, and any associated persons from having any ex parte contacts with any of the plaintiff's non-party medical providers. Because the plaintiff failed to establish that any of the providers she authorized to release medical information possessed irrelevant, privileged information, we hold that the trial court abused its discretion.

I. Background

Real party in interest Kelly Regian began seeing the relator, Dr. Lester Collins, for headaches in 2002. Over time, her symptoms worsened. More than two years later, her primary care physician ordered an MRI, which revealed nasopharyngeal carcinoma. Regian was referred to the MD Anderson Cancer Center in Houston, where she was diagnosed with stage IV nasopharyngeal carcinoma. She and her husband later sued Collins and the ETMC Neurological Institute, a

professional association with which Collins was affiliated, alleging that Collins's negligence in failing to diagnose the condition allowed the cancer to progress from a curable to an incurable stage.

Several months before filing the suit, in compliance with section 74.051(a) of the Civil Practice and Remedies Code, the Regians sent Collins written notice of a health care liability claim arising from his alleged failure "to timely diagnose and refer Kelly Regian for treatment of nasopharyngeal carcinoma." Attached to the notice was the section 74.052 authorization form for release of protected health information that the Code requires a claimant to provide in order for a health care liability claim to proceed. TEX. CIV. PRAC. & REM. CODE § 74.052(a). The Legislature prescribed the form's precise language as part of the civil liability reforms instituted by its passage of House Bill 4 in 2003. *Id.* § 74.052(c).

In the form, Regian authorized Collins to obtain and disclose, within specified parameters, health information for the "specific purposes" of "facilitat[ing] the investigation and evaluation of the health care claim described in the accompanying Notice of Health Care Claim," and "[d]efen[ding] . . . any litigation arising out of the claim." The authorization extended to "verbal as well as . . . written" information. *See id.* It provided that the authorization would expire upon resolution of the claim asserted or at the conclusion of any litigation, and that "without exception, [Regian would] have the right to revoke th[e] authorization in writing," subject to the consequences imposed by section 74.052 of the Code.[1] *Id.* In exhibit "A" attached to the form, Regian authorized

[1] Under section 74.052(b), a defendant health care provider has the option of abating a health care liability claim for sixty days following the receipt of a replacement authorization form if the claimant elects to modify or revoke the authorization.

the disclosure of information in the custody of a list of health care providers who had examined or treated Regian in connection with the injuries alleged to have been sustained as the result of Collins's alleged negligence; all of the health care providers listed in this section were associated with the MD Anderson Cancer Center. In exhibit "B," Regian authorized the release of information in the custody of health care providers who had treated her in the five years preceding the events leading to her claim against Collins. Finally, in exhibit "C," the form designated "Excluded Health Information" — that is, information in the possession of health care providers "to which this authorization does not apply because [Regian] contend[s] that such health information is not relevant to the damages being claimed or to [Regian's] physical, mental, or emotional condition." In this section, Regian listed seven health professionals, none of whom were listed in the previous sections. Although section 74.052(c) instructs claimants to designate "the inclusive dates of examination, evaluation, or treatment to be withheld from disclosure," Regian listed only the health care providers' names.

Several months after sending the notice and authorization form, the Regians filed the lawsuit underlying this mandamus proceeding. Within days of the defendants' answers, the Regians sought a protective order prohibiting the defendants from engaging in ex parte communications with Kelly's treating physicians. In their motion, the Regians complained that it was "common practice for a medical malpractice defendant's lawyer to have *ex parte* communications with an injured claimant's prior and subsequent treating physicians in order to obtain information that goes beyond what is contained in the plaintiff-patient's medical records." They contended that a defendant's attorney

might elicit opinion testimony not reflected in the health care provider's written records that could be used to ambush the plaintiff at trial:

> Typically, with a wink and a smile, the defense lawyer will start with a perfunctory "You're under no obligation to talk to me, and I only want to discuss those things that are relevant to the issues in the lawsuit." The treating physician may then be presented with a copy of the original petition and the defendant's answer and affirmative defenses, with a comment along the lines of "[t]his is what the plaintiff alleges and this is what we are saying." From there the discussion becomes a full-fledged fishing expedition for a non-retained expert, and a headlong foray into everything but the care and treatment provided to the plaintiff.

(Emphasis in original). The Regians further maintained that by filing suit, a health care liability claimant waives the physician-patient privilege only as to information relevant to a mental or physical condition of the patient that a party relies on as part of a claim or defense, and that only by prohibiting ex parte contacts can a court assure that irrelevant information is not disclosed. The motion did not identify any health care providers who possessed both relevant and irrelevant information. Collins opposed the motion. After a nonevidentiary hearing, the trial court granted the motion,[2] prohibiting the defendants, their lawyers, and all persons associated with them from having any ex parte contacts with any of Regian's non-party treating physicians.

Collins then sought a writ of mandamus from the court of appeals. The court of appeals recognized that section 74.052(c) contemplates the verbal disclosure of protected health information, but concluded that the statute does not explicitly address whether verbal information may be

[2] The trial court denied the motion to the extent it requested the court to order the defendants to disclose any ex parte contacts that had occurred and any notes that discussed the information elicited in those contacts. That portion of the trial court's order is not challenged here.

obtained ex parte. 224 S.W.3d 798, 802. The court also concluded that "ex parte communications, in some instances, may be more practical, less time consuming, and less costly than formal discovery." *Id.* at 803. Thus, the court reasoned, allowing ex parte communications would be consistent with the Legislature's objectives in enacting the statute. *Id.* The court noted that the statute provides a mechanism to allow a claimant to protect irrelevant information by identifying health care providers who possess information the claimant contends is irrelevant. *Id.* It further noted, however, that "exclusion of information by date does not protect irrelevant, privileged information that is acquired in the same date as relevant information." *Id.* at 803 n.3. The court observed that various arguments against allowing ex parte communications have been made, including "the lack of safeguards against the revelation of privileged information, the chilling effect potential breaches of confidentiality may have on a patient's communication with a physician, and the possibility of questionable conduct by defense counsel." *Id.* at 804. But it downplayed those risks, noting that defense counsel could be subject to sanctions for unethical conduct and that it was unlikely patients would withhold information and potentially jeopardize their health based on the mere possibility that the information might be discovered through ex parte communications in a subsequent lawsuit. *Id.* The court concluded that section 74.052 did "not change existing law and therefore does not prohibit a defendant from communicating ex parte with a claimant's . . . health care providers." *Id.* at 805. Nevertheless, the court held that the trial court did not abuse its discretion in issuing the protective order because the statute does not expressly prohibit the issuance of protective orders prohibiting ex parte contacts. *Id.* at 806. We granted oral argument in this case to determine whether the order issued by the trial court amounts to an abuse of discretion.

II. Analysis

A. Parties' Arguments

Collins maintains that the trial court abused its discretion in granting the protective order because section 74.052(c) expressly contemplates ex parte communications in allowing a defendant health care provider and the providers' attorneys to obtain "verbal" information. Collins contends the trial court's order undermines the statute's underlying purpose of speeding up and simplifying the process for resolving health care liability claims. Moreover, he argues that case law preceding the Legislature's enactment of section 74.052 recognized that ex parte contacts were permissible and there is no indication that the Legislature intended to change the status quo. Collins agrees with the Regians that the release prescribed in section 74.052(c) only extends to relevant health care information. But he contends the Legislature conferred a gatekeeper function on claimants by allowing them to identify health care providers who possess irrelevant information. Collins contends the Regians failed to take advantage of that power. According to Collins, if any of the non-party treating physicians the Regians identified in exhibit "B" of the form possessed both relevant and irrelevant information, the Regians should have also listed them in exhibit "C," along with the dates of any visits in which irrelevant information was disclosed. Finally, Collins argues this scheme is not preempted by regulations implementing the federal Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936 (1996) (codified as amended at 42 U.S.C. §§ 1320d to 1320d-8 (2006)), because section 74.052 is not contrary to HIPAA and, in fact, imposes more stringent requirements than the federal law requires. Collins contends mandamus

relief is warranted because this case presents an important issue of first impression with significant public policy consequences.[3]

The Regians argue, on the other hand, that this Court and others have recognized trial courts' authority to issue protective orders to prevent the inadvertent disclosure of privileged medical information through ex parte communications, which, they contend, have heretofore been impermissible. Citing statements by two lawmakers in the legislative history of House Bill 4, the Regians maintain that the Legislature intended to preserve existing law when it passed section 74.052. They further contend that if the statute permits ex parte communications, it is preempted by HIPAA.

B. Legal Background

Generally, litigants are not empowered to restrict access to non-party fact witnesses. But interactions between health care providers and their patients may raise unique privacy concerns. This case requires us to examine the interplay between three enactments relating to medical privacy: Texas Rule of Evidence 509, section 74.052(c) of the Civil Practice and Remedies Code, and regulations adopted under HIPAA. We begin with a brief overview of each of these provisions.

1. Rule of Evidence 509

Texas Rule of Evidence 509(c) protects confidential communications between physicians and their patients and prohibits their disclosure. We have recognized that the privilege serves two

[3] We received a brief from amici curiae Texas Children's Hospital, the Greater Houston Society for Healthcare Risk Management, Greater Houston Anesthesiology, PA, and iMed LP, supporting Collins's position.

purposes. First, it encourages the full and open communication that is required for effective treatment. *R.K. v. Ramirez*, 887 S.W.2d 836, 840 (Tex. 1994). It also serves to prevent the unnecessary disclosure of highly personal information. *Id.* In light of the potentially sensitive nature of information that may have been disclosed within the patient/physician relationship, we have stressed that trial courts bear a "heavy responsibility . . . to prevent any disclosure that is broader than necessary." *Id.* at 844. But several exceptions to the rule may limit the privilege. Pertinent here, the privilege does not shield relevant information when the patient sues a physician, when the patient signs a written consent for the release of relevant information, or when otherwise-privileged information is "relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense." TEX. R. EVID. 509(e)(1), (2), (4). Information relevant to the Regians' claim for damages arising from Collins's alleged failure to timely diagnose Kelly's nasopharyngeal cancer clearly is not subject to the privilege in this lawsuit.

2. Section 74.052(c)

In 2003, the Legislature enacted section 74.052 of the Civil Practice and Remedies Code. The measure is a part of the Legislature's effort to decrease the cost of medical care and increase its availability, in part, by decreasing the costs of health care liability claims. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b), 2003 Tex. Gen. Laws 847, 884–85. As the court of appeals noted, by requiring the disclosure of relevant health care information, both verbal and written, the statute furthers "full, efficient, and cost effective discovery." 224 S.W.3d at 803. Moreover, by requiring a potential claimant to authorize the disclosure of otherwise privileged information sixty days before

suit is filed, the statute provides an opportunity for health care providers to investigate claims and possibly settle those with merit at an early stage. If a conflict emerges between section 74.052 and any rule of procedure or evidence, section 74.052 governs. TEX. CIV. PRAC. & REM. CODE § 74.002. The statutory authorization is to be construed in accord with medical privacy regulations adopted under HIPAA. *Id.* § 74.052(c).

3. HIPAA

Congress enacted HIPAA to increase the portability of health insurance and to reduce health care costs by simplifying administrative procedures. *Arons v. Jutkowitz*, 880 N.E.2d 831, 839–40 (N.Y. 2007); Pub. L. No. 104–191, 110 Stat. 1936 (1996) (codified as amended at 42 U.S.C. §§ 1320d to 1320d-8 (2006)). The development of national standards for electronic medical records management was central to the goal of simplification. *Id.* Envisioning increasing privacy concerns associated with the move toward electronic record-keeping, Congress simultaneously authorized the secretary of the United States Department of Health and Human Services to promulgate rules governing the disclosure of confidential medical records. *Arons*, 880 N.E.2d at 840; 42 U.S.C. 1320d-2 (2006). The privacy rules HHS enacted, 45 C.F.R pts. 160 & 164 (2008), "strike[] a balance that permits important uses of information, while protecting the privacy of people who seek care and healing." United States Department of Health and Human Services, Office for Civil Rights, *Summary of the HIPAA Privacy Rule*, at 1, *available at* http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf [last revised May 2003]. The privacy rules prohibit the disclosure of protected health information except in specified circumstances. *See* 45 C.F.R. § 164.502 (2008). A person who discloses protected health

information in violation of the privacy rule is subject to a fine of up to $50,000, and imprisonment of no more than a year, or both. 42 U.S.C. § 1320d-6 (2006). "Health information" means "any information, whether oral or recorded in any form or medium." 45 C.F.R. § 160.103 (2008). With limited exceptions, HIPAA's privacy rules preempt any contrary requirement of state law unless the state law is more stringent than the federal rules. *Id.* § 160.203. A requirement is "contrary" if it would be impossible for a covered entity to comply with both the state law requirement and the HIPAA privacy rules, or if the requirement would undermine HIPAA's purposes. *Id.* § 160.202.

While the rules strongly favor the protection of individual health information, they permit disclosure of health information in a number of circumstances. In a judicial proceeding, protected information may be disclosed in response to a court order. *Id.* § 164.512(e)(1)(i). It may also be disclosed without a court order in response to a subpoena or discovery request if the health care provider receives satisfactory assurances that the requestor has made reasonable efforts to ensure that the subject of the information has been given notice of the request. *Id.* § 164.512(e)(1)(ii)(A). A health care provider receives "satisfactory assurances" when the requestor provides a written statement and documentation demonstrating that the requestor has made a good faith attempt to notify the subject of the request, and the subject has been given an opportunity to object. *Id.* § 164.512(e)(1)(iii). Alternatively, the requestor may provide satisfactory assurances that reasonable efforts have been made to obtain a qualified protective order limiting the use of the information to the legal proceeding and providing for its return or destruction. *Id.* § 164.512(e)(1)(ii)(B), (e)(1)(v). Finally, health care information may be disclosed if the patient has executed a valid written

authorization. *Id.* § 164.508(a)(1), (c)(1)(vi). Any disclosure the health care provider makes in reliance on a written authorization must be consistent with its terms. *Id.* § 164.508(a)(1).

C. Effect of Section 74.052(c)

The Regians contend that a release executed under section 74.052(c) does not extend to authorize verbal interviews with health care providers. According to the Regians, the statute's reference to "verbal" information was instead intended to cover information that the patient orally conveyed to the physician. We agree with the court of appeals that such a reading of the statute is erroneous. 224 S.W.3d at 803. The term is used in describing the "health information to be obtained, used, or disclosed," and is presented as a category of information in addition to written information. TEX. CIV. PRAC. & REM. CODE § 74.052(c). If, as the Regians argue, the provision refers to the means by which the information was conveyed to the physician, rather than the information that is to be disclosed, then the form also does not authorize the release of written medical records. Such a reading not only would render section 74.052(c) a nullity, it would undermine the Legislature's purpose of reducing the costs of health care liability claims because medical records could be obtained from non-party health care providers only through the use of subpoenas or other formal mandatory processes. Because we are to give meaning to all words in statutes and construe them to effectuate the Legislature's objective in enacting them, we conclude that the release authorizes non-party health care providers to orally convey relevant information to defendants. *See* TEX. GOV'T CODE §§ 311.021(2), 311.023(1), (5).

The Regians further contend that, even if section 74.052(c) authorizes health care providers to orally convey health care information, it does not authorize defendants to contact them ex parte.

In support, the Regians cite an exchange between two legislators in which one of the House Bill 4 sponsors stated, "[n]othing in this section is intended to change the law of privilege [for a patient]." S.J. of Tex., 78th Leg., R.S. 5005 (2003) (statement of Senator Ratliff). According to the Regians, Texas law at that time forbade ex parte contacts between a health care liability defendant and a plaintiff-patient's health care provider. The Regians' argument is flawed in at least two respects. First, we have cautioned that legislative history cannot override a statute's plain words. *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652 n.4 (Tex. 2006). In this instance, the statute places no express restrictions on the conveyance of verbal information, and the fact that it calls for the release to be delivered well before suit is filed strongly implies that the Legislature envisioned a relatively informal process. Moreover, we agree with the court of appeals that prior to section 74.052(c)'s passage, Texas law did not clearly prohibit ex parte communications with non-party health care providers. 224 S.W.3d at 803–04. In *Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex. 1988), the case upon which the Regians principally rely, we held that the trial court abused its discretion by requiring the plaintiffs to sign an authorization permitting the defendant-hospital's attorney to discuss the plaintiff's medical information with treating physicians. We did so, however, not because the authorization allowed ex parte contacts, but because it allowed access to information that was not relevant to the underlying suit and thus remained privileged. *Id.* We need not decide, however, whether section 74.052(c) authorizes ex parte contacts in all situations because, as explained below, the Regians failed to carry their burden in obtaining a protective order.

D. Propriety of the Protective Order

In the context of formal discovery under the Rules of Civil Procedure, we have established standards for the issuance of protective orders. While "a trial judge may exercise some discretion in the granting of protective orders[,] . . . this discretion is not without bounds." *Masinga v. Whittington*, 792 S.W.2d 940, 940 (Tex. 1990). A party seeking a protective order "must show particular, specific and demonstrable injury by facts sufficient to justify a protective order." *Id.* (citing *Garcia v. Peeples*, 734 S.W.2d 343, 345 (Tex. 1987)). Here, the Regians did not seek an order protecting them from discovery authorized by the rules. Instead, they sought the order to place limits on Collins's ability to obtain information available under a release they provided in accordance with section 74.052(c). We believe, however, that health care liability claimants seeking to limit access to information released under the statute should face no less of a burden than parties seeking to limit ordinary discovery, particularly in light of the important objectives the Legislature sought to advance in enacting the law.

In section 74.052(c), the Legislature provided a mechanism for claimants to exclude irrelevant and therefore privileged information from the scope of a release. As we have described, the legislatively prescribed form allows a claimant to identify health care providers whom they contend do not possess relevant information by listing them and providing the dates of treatment in section (C) of the form. TEX. CIV. PRAC. & REM. CODE § 74.052(c). In essence, the Legislature created a scheme that enables patients to act as gatekeepers of their own privileged health information. Although the Regians seek to limit access to the treating physicians they identified in the exhibit they attached under section (B) of the form, they did not list them in the exhibit they attached under section (C) or provide dates on which the physicians might have learned of irrelevant

information. Neither did they provide equivalent information in their motion for a protective order; in fact, the Regians' motion did not even assert that any of Kelly's non-party treating physicians possessed both relevant and irrelevant information.

The Regians complain that requiring health care claimants to identify health care providers who possess both relevant and irrelevant information along with the dates on which irrelevant information was obtained would be "cumbersome and overly burdensome [and] impractical because it essentially would prohibit [Collins] from obtaining any healthcare information whatsoever on the dates specified under subsection C." They also argue that such a procedure would be unworkable because parties often disagree about whether information is relevant or not. We agree with Collins, however, that health care claimants, who are entitled to unrestricted access to their health information and to their non-party health care providers, are in the best position to identify what information they consider privileged. Because the Regians did not make the requisite showing of specific and demonstrable injury,[4] we hold that the trial court abused its discretion in issuing the protective order.

E. Preemption

The Regians argue that, to the extent section 74.052(c) authorizes ex parte communications with non-party treating physicians, it is preempted by HIPAA. As we have said, we do not decide whether section 74.052(c) authorizes ex parte communications in every situation; instead, we hold that in this case, the Regians failed to make the showing necessary to obtain a protective order. In any event, however, HIPAA itself allows the disclosure of protected health information if the patient

[4] The Regians, of course, may rectify this omission by modifying the authorization form as section 74.052(b) permits. The defendants would then have the option of abating the proceedings for sixty days. TEX. CIV. PRAC. & REM. CODE § 74.052(b).

has executed a valid, written authorization conforming to the requirements of 45 C.F.R. § 164.508(c). 45 C.F.R. 164.508(a) (2008). The Regians do not dispute that the authorization Kelly signed conforms to those requirements. Rather, they contend the authorization is not a valid HIPAA release because it was not voluntary, as Kelly was required to sign it as a condition of bringing this suit.

First, while it is true that the Regians could not have proceeded with their suit if Kelly had not executed the authorization, it was their choice to file the suit in the first instance. Moreover, on several occasions, courts have ordered plaintiffs to execute authorizations compliant with section 164.508. *See, e.g.*, *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596, 2004 WL 3520244, at *1 (E.D.N.Y. Aug. 16, 2004); *Doe v. Messier*, No. 20042512c, 2006 WL 619113 at *3 (Mass. Super. Ct. Feb. 2, 2006); *Doe v. O'Neil*, No. 20042513c, 2006 WL 620669, at *3 (Mass. Super. Ct. Feb. 2, 2006).

HIPAA preempts state law only if it would be impossible for a covered entity to comply with both the state and federal requirement, or if it would undermine HIPAA's purposes. While several courts have held that HIPAA preempts state law procedures that would allow ex parte contacts between health care providers and defendants and their representatives, none of them involve situations in which the patient has executed a written release compliant with 45 C.F.R. § 164.508. Because section 74.052(c) authorizes disclosure under the exact same terms as 45 C.F.R. § 164.508, it would not be impossible for a health care provider to comply with both laws. Moreover, while the privacy of medical information is the primary goal of the privacy rules, the rules balance that interest against other important needs. Reducing the costs of medical care is a concern underlying both

HIPAA and section 74.052(c). In this case, the legislatively prescribed form authorizes disclosure only to the extent the information would "facilitate the investigation and evaluation" or defense of the health care claim described in the Regians' notice. TEX. CIV. PRAC. & REM. CODE § 74.052(c). Accordingly, under the circumstances presented, we conclude that HIPAA does not preempt section 74.052(c).

III. Adequate Remedy by Appeal

We finally consider whether mandamus is an appropriate remedy in this case. Collins argues that mandamus is warranted because the trial court's order thwarts important public policies embodied in section 74.052(c). We agree. If the Legislature intended to provide health care liability defendants with an informal, expedited means of evaluating the merits of a health care claimant's claims, then the order here undermines that purpose. Consequently, we hold that Collins has no adequate remedy by appeal. *See In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 469 (Tex. 2008).

IV. Conclusion

For the foregoing reasons, we hold that the trial court abused its discretion in granting the protective order under the circumstances of this case. We further hold that Collins has no adequate remedy by appeal. Accordingly, we conditionally grant the writ of mandamus and order the trial court to vacate its protective order. We are confident the trial court will comply, and our writ will issue only if it does not.

Harriet O'Neill
Justice

OPINION DELIVERED: June 5, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0743

TEXAS DEPARTMENT OF TRANSPORTATION, PETITIONER,

v.

JIMMY DON YORK, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF REBECCA YORK, DECEASED AND JAMES R. BODIFORD, JR., INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF REBECCA YORK, TONYA BODIFORD, AND SHIRLEY FOWLER, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

PER CURIAM

We grant petitioner's motion for rehearing, withdraw our per curiam opinion issued December 5, 2008, and substitute the following in its place.

In this case, we decide whether loose gravel on a road is a "special defect" under Texas Civil Practices and Remedies Code section 101.022(b). We hold that loose gravel is not a special defect as a matter of law, and therefore, reverse the court of appeals' judgment and dismiss the case.

On October 29, 2003, Rebecca York lost control of her vehicle while crossing a patch of loose gravel on Farm-to-Market Road 979 in Robertson County. She crossed the center line and struck an oncoming truck. She died at the scene. The day before the accident, a Texas Department of Transportation (TxDOT) crew applied a spot seal coat on the portion of highway where the

accident occurred. A spot seal application consists of three steps: (1) liquid asphalt is sprayed onto the road surface; (2) a layer of gravel (or aggregate) is spread on top of the asphalt; and (3) the gravel is rolled into the asphalt. The asphalt then hardens and holds the gravel in place to form a new road surface. By the time York reached the serviced portion of the road the next morning, however, the road surface was covered with a layer of loose gravel approximately one-half to three-quarters inches deep. The cause of the presence of the excess loose gravel is disputed.

York's surviving spouse filed a wrongful death suit against TxDOT.[1] TxDOT asserted sovereign immunity against suit and liability, except to the extent waived under the Tort Claims Act. After the presentation of arguments and evidence, the trial court submitted a jury charge with a special defect instruction, rather than a premise defect instruction. The jury returned a verdict in York's favor, awarding damages of $1,033,440. Pursuant to statutory limitations, the verdict was reduced to $250,000. TxDOT moved for judgment notwithstanding the verdict or a new trial, which the trial court denied. TxDOT then appealed the judgment to the court of appeals, arguing that loose gravel is not a special defect, but rather, a premise defect. The court of appeals disagreed, holding that the loose gravel is a special defect and affirming the trial court's judgment. 234 S.W.3d at 218. We reverse.

The State of Texas is protected from suits for damages by sovereign immunity, unless waived by statute. *Gen. Servs. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 594 (Tex. 2001); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). Legislative consent to

[1] In his original petition, York's surviving spouse also included as defendants Robertson County, the driver of the other vehicle, and the driver's employer, but later nonsuited them.

waive sovereign immunity by statute must be by "clear and unambiguous language," TEX. GOV'T CODE § 311.034, and suit can then be brought "only in the manner indicated by that consent." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003) (citing *Hosner v. De Young*, 1 Tex. 764, 769 (1847)). "[W]hen construing a statute that purportedly waives sovereign immunity, we generally resolve ambiguities by retaining immunity." *Wichita Falls State Hosp.*, 106 S.W.3d at 697.

The Texas Legislature has waived sovereign immunity for personal injury claims arising from a premise defect. TEX. CIV. PRAC. & REM. CODE § 101.021. Former section 101.022 of the Texas Civil Practices and Remedies Code[2] applied different duties of care to a suit depending on whether the condition was a premise defect or a special defect:

> (a) If a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises.
>
> (b) The limitation of duty in this section does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets or to the duty to warn of the absence, condition, or malfunction of traffic signs, signals, or warning devices as is required by Section 101.060.

Act of May 17, 1985, 69th Leg., R.S., ch. 959, 1985 Tex. Gen. Laws 3242, 3303 (amended 2005) (current version at TEX. CIV. PRAC. & REM. CODE § 101.022) (hereinafter § 101.022). If a claim involves a premise defect under section (a), a licensee standard applies. TEX. CIV. PRAC. & REM. CODE § 101.022(a); *see also State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235,

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[2] The statute was amended in 2005 to include language dealing specifically with toll roads, which are not at issue in this case. *See* TEX. CIV. PRAC. & REM. CODE § 101.022. The language is the same in all other respects. *See id.* Thus, our holding would be the same under the amended statute.

237 (Tex. 1992). Under a licensee standard, a plaintiff must prove that the governmental unit had actual knowledge of a condition that created an unreasonable risk of harm, and also that the licensee did not have actual knowledge of that same condition. *Payne*, 838 S.W.2d at 237. But if a claim involves a special defect under section (b), a more lenient invitee standard applies. *Id*. Under an invitee standard, a plaintiff need only prove that the governmental unit should have known of a condition that created an unreasonable risk of harm. *Id.*; *see also State Dep't of Highways & Pub. Transp. v. Kitchen*, 867 S.W.2d 784, 786 (Tex. 1993) (per curiam) ("Absent a finding that the State knew of the dangerous condition prior to the accident, it is not liable to plaintiffs unless the condition was a special defect."). Whether a condition is a premise defect or special defect is a question of law, which we review de novo. *Payne*, 838 S.W.2d at 238.

The Civil Practices and Remedies Code does not define "special defect," but does give guidance by likening special defects to "excavations or obstructions." *See* TEX. CIV. PRAC. & REM. CODE § 101.022(b). Thus, "[u]nder the ejusdem generis rule, we are to construe 'special defect' to include those defects of the same kind or class as [excavations or obstructions]." *County of Harris v. Eaton*, 573 S.W.2d 177, 179 (Tex. 1978). While these specific examples "are not exclusive and do not exhaust the class," the central inquiry is whether the condition is of the same kind or falls within the same class as an excavation or obstruction. *Id.*; *City of Grapevine v. Roberts*, 946 S.W.2d 841, 843 (Tex. 1997) (per curiam). A special defect, then, cannot be a condition that falls outside of this class. *See Payne*, 838 S.W.2d at 238–39 n.3 ("[T]o the extent [courts] classify as 'special' a defect that is not like an excavation or obstruction on a roadway, we disapprove of them."); *Eaton*, 573 S.W.2d at 179 ("The statutes provide an understanding of the kinds of dangerous conditions

against which the [L]egislature intended to protect the public. They are expressed as such things 'as excavations or roadway obstructions.'"). We have recognized some characteristics of this class that should be considered. *See Eaton*, 573 S.W.2d at 179 ("the size of the dangerous condition"); *see also City of Dallas v. Reed*, 258 S.W.3d 620, 622 (Tex. 2008) (per curiam) ("some unusual quality outside the ordinary course of events"); *State v. Rodriguez*, 985 S.W.2d 83, 85 (Tex. 1999) (per curiam) (something that "unexpectedly and physically impair[s] a car's ability to travel on the road"); *Payne*, 838 S.W.2d at 238 ("an unexpected and unusual danger to ordinary users of roadways").[3]

A layer of loose gravel on a road does not share the characteristics we have articulated in any of the above cases, and, thus, does not fit within the same class as an obstruction or excavation. Loose gravel does not form a hole in the road or physically block the road like an obstruction or excavation. *See Eaton*, 573 S.W.2d at 178–80 (holding that a large hole six to ten inches deep and four to nine feet wide covering ninety percent of the road's width was a special defect, and suggesting an avalanche clogging a mountain road would likewise be a special defect); *see also State v. Williams*, 940 S.W.2d 583, 585 (Tex. 1996) (deferring to the court of appeals' finding that a street sign lying in middle of a highway was a special defect). Likewise, less than an inch of loose gravel does not "physically impair a car's ability to travel on the road" in the manner that an excavated road or obstruction blocking the road does, *Rodriguez*, 985 S.W.2d at 85, nor does it present the same type of "unexpected and unusual danger to ordinary users of roadways" as does this class. *Payne*, 838 S.W.2d at 238. And while loose gravel could fall within this class if, for example, a sizeable

[3] We have recently emphasized that "unexpected and unusual danger" and other characteristics noted in our special-defect cases are used "to describe the class, not to redefine it." *Denton County v. Benyon*, ___ S.W.3d ___, ___ n.11 (Tex. 2009).

mound of gravel were left on the roadway, a layer of loose gravel falls in the same class as ordinary premise defects—those conditions that do not reach the level of an obstruction or excavation. *See, e.g.*, *Reed*, 258 S.W.3d at 622 (holding that a two-inch difference in elevation between traffic lanes on a roadway was not a special defect); *Rodriguez*, 985 S.W.2d at 86 (holding that a ninety-degree turn in a detour from a road construction project was not a special defect); *Kitchen*, 867 S.W.2d at 786 (holding that an icy bridge was not a special defect); *Payne*, 838 S.W.2d at 239 (holding that a culvert beneath a roadway was not a special defect).

York also cannot recover under an ordinary premises defect claim. York prepared, and the trial court submitted, a jury charge with an invitee standard of care—one associated with a special defect. TxDOT objected to this charge and requested that an ordinary premises defect charge be given instead. *See* TEX. R. CIV. P. 274. As a result, York failed to obtain jury findings on two necessary elements of an ordinary premises defect claim: that TxDOT had actual knowledge of the loose gravel and that York lacked actual knowledge of the loose gravel. *Payne*, 838 S.W.2d at 241. Because TxDOT objected to the lack of these elements in the jury charge, and because York failed to obtain a finding on these issues, York cannot recover under an ordinary premises defect claim. *Id*. (citing TEX. R. CIV. P. 279) (holding that knowledge element could not be deemed in favor of plaintiff where defendant objected to the omission of that element from the jury charge). Therefore, the verdict does not support a judgment in York's favor. *Id.* We reverse the court of appeals' judgment and dismiss the case.

OPINION DELIVERED: May 22, 2009

IN THE SUPREME COURT OF TEXAS

No. 07-0760

GREG TANNER AND MARIBEL TANNER, INDIVIDUALLY AND AS NEXT FRIENDS OF K.T. AND R.T., MINOR CHILDREN, PETITIONERS,

v.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS

Argued October 14, 2008

JUSTICE WILLETT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE JOHNSON joined.

JUSTICE BRISTER filed a dissenting opinion.

A high-speed police chase resulting in a traffic accident sparked a personal-injury lawsuit against the fleeing driver by the family injured in the crash. This related insurance-coverage dispute asks whether the driver's attempts to elude police forfeit coverage under an intentional-injury exclusion in his automobile liability insurance policy. We hold that the insurer did not establish as a matter of law that its insured intentionally caused the family's injuries. The exclusion requires intentional damage, not just intentional conduct. We therefore render judgment on the jury's verdict in favor of the injured family.

I. Background

Richard Gibbons was driving his pickup truck on Interstate 35 south of San Marcos when he was pulled over by a Texas state trooper. Gibbons initially stopped but then fled, with the trooper in hot pursuit chasing him into San Marcos. There, three local police officers responded and continued the pursuit. Gibbons exited the interstate and raced through the city, winding his way through urban and residential areas of San Marcos at speeds in excess of eighty miles per hour.

Gibbons left San Marcos on Highway 80 and entered a rural area, topping 100 miles per hour and swerving into oncoming traffic to pass slower vehicles. He drove off the road and through a freshly plowed cornfield, then turned around and headed back towards San Marcos on a road running parallel to Highway 80. One San Marcos police officer tried to block the road with her cruiser, but Gibbons veered off the road and went around her.

Gibbons continued and approached the intersection with Old Bastrop Road in a rural area that, according to trial testimony, "does not have businesses or houses or anything," but rather consists of "open fields, corn fields." Gibbons reached the intersection at the same time as a car carrying the Tanner family, who had the right-of-way. Gibbons slammed on his brakes but could not avoid the collision. All four Tanners suffered injuries, but seven-year-old Roney's were the most serious, as he was sitting where Gibbons' truck struck the car.[1] Gibbons fled the accident scene, doubling back and eventually driving into yet another field. Determined to end the chase, an officer

[1] Roney spent over a month in the hospital (a week of that comatose) and five years in physical therapy.

shot out two of the truck's tires. Officers forcibly removed Gibbons from his truck and placed him under arrest.

The Tanners sued Gibbons and obtained a default judgment.[2] Gibbons' insurer, Nationwide Mutual Fire Insurance Company, refused to pay damages and filed this declaratory-judgment action, arguing the intentional-injury exclusion barred coverage for the Tanners' claims. The jury disagreed, finding that Gibbons did not intentionally cause the Tanners' injuries. The trial court granted Nationwide's motion for judgment notwithstanding the verdict, and the court of appeals affirmed, "because, as a matter of law, the intentional-acts exclusion in Gibbons' liability policy excluded any coverage for the Tanners' claims."[3]

II. Discussion

A. Standard of Review

We review a JNOV under a no-evidence standard,[4] meaning we "credit evidence favoring the jury verdict if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not."[5] We will uphold the jury's finding if more than a scintilla of competent evidence supports it.[6] "The final test for legal sufficiency must always be whether the evidence at trial would

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[2] Gibbons was jailed and charged with eight felonies: four counts of aggravated assault and four counts of failure to stop and render aid. He posted $10,000 bail and vanished, failing to appear at his 2001 trial. He was last seen in his hometown of Akron, Ohio.

[3] 232 S.W.3d 330, 335.

[4] *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005).

[5] *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007).

[6] *Wal-Mart Stores, Inc. v. Miller*, 102 S.W.3d 706, 709 (Tex. 2003) (per curiam).

enable reasonable and fair-minded people to reach the verdict under review."[7] Thus, to merit the trial court's JNOV, Nationwide was required to show that the evidence conclusively proved that Gibbons intentionally injured the Tanners and that no reasonable jury was free to think otherwise.

B. The Policy's Express Terms Decide This Case

Since insurance policies are contracts, we construe them using ordinary rules of contract interpretation.[8] Our cardinal concern is determining the parties' intent as reflected in the terms of the policy itself.[9] Accordingly, we give policy language its plain, ordinary meaning unless something else in the policy shows the parties intended a different, technical meaning.[10]

Nationwide contends that when Gibbons fled police, he voided coverage under the policy's intentional-injury exclusion, which withholds coverage for:

> Property damage or bodily injury caused intentionally by or at the direction of an insured, including willful acts the result of which the insured knows or ought to know will follow from the insured's conduct.

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[7] *City of Keller*, 168 S.W.3d at 827.

[8] *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 202 (Tex. 2004).

[9] *Id.*

[10] *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603, 606 (Tex. 2008); *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 736 (Tex. 1990).

1. "*Property damage or bodily injury caused intentionally . . .*"

We have not construed this precise policy language before.[11] At the outset, however, we emphasize this critical point: "intentionally" as used in the exclusion speaks to the resulting damage or injury, not to the actions that led to it. That is, the language is effect-focused and not cause-focused, voiding coverage when the resulting *injury* was intentional, not merely when the insured's *conduct* was intentional.

A contrary reading of the exclusion—that reckless acts absent deliberate injury are sufficient to forfeit coverage—"would render insurance coverage illusory for many of the things for which insureds commonly purchase insurance."[12] For example, Texas mandates liability coverage for drivers,[13] but if ordinary Texans are unprotected from those who intentionally speed or run red lights, but intend no harm to others by doing so, then Texas is replete with noncoverage notwithstanding its mandatory-coverage requirement. As one leading commentator puts it, coverage can still exist "when the injury was unintended, even if the act which gave rise to the injury was intentional."[14]

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[11] Although the policy in this case is from Ohio, the standard Texas Personal Automobile Policy promulgated by the Texas Department of Insurance (but subject to approved variations) has a similar liability exclusion for an insured "[w]ho intentionally causes bodily injury or property damage." While this language is congruous to the first half of the exclusion in this case, the Texas exclusion does not have the "including willful acts the result of which the insured knows or ought to know will follow from the insured's conduct" addition. Notably, the standard Texas policy has an exclusion under the Personal Injury Protection Coverage for "bodily injury sustained . . . [b]y that person while attempting to elude arrest by a law enforcement official" but does not have that same exclusion under the Liability Coverage.

[12] *Trinity Universal Life Ins. Co. v. Cowan*, 945 S.W.2d 819, 828 (Tex. 1997) (holding that insured's intentional conduct can nevertheless be an "accident" under homeowner's policy if the injury was not intended); *see State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 377 (Tex. 1993) (noting that the same reasoning applicable to construing the policy term "accidents" is applicable to construing an intentional-injury exclusion).

[13] TEX. TRANSP. CODE § 601.051.

[14] COUCH ON INSURANCE 3D 119:8 (2005).

We construed similar language in *State Farm Fire & Casualty Co. v. S.S.*[15] In that case, a summary-judgment appeal, the plaintiff in an underlying suit claimed she contracted a sexually transmitted disease from the insured.[16] The insured's homeowner's policy contained an intentional-injury exclusion applicable "to bodily injury or property damage caused intentionally by or at the direction of the Insured."[17] The insurer contested coverage based on this exclusion.[18] In deciding what "intentionally" meant in the exclusion, we drew guidance from the Restatement (Second) of Torts and a leading treatise.[19] Reading the exclusion under these authorities, we reasoned that an insured intends to cause harm if he intends or desires the consequences of his act or believes the consequences are substantially certain to occur.[20] Accordingly, we held that although the insured

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[15] 858 S.W.2d 374 (Tex. 1993).

[16] *Id*. at 375.

[17] *Id*. at 377 (alterations omitted).

[18] *Id*. at 375.

[19] *Id*. at 378.

[20] *Id*. (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965) and W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 8, at 35-36 (5th ed. 1984)). We quoted this passage:

> [I]ntent is broader than a desire or purpose to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does . . . . On the other hand, the mere knowledge and appreciation of a risk-something short of substantial certainly-is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong. In such cases the distinction between intent and negligence obviously is a matter of degree. The line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the actor a substantial certainty.

Id. (quoting KEETON ET AL., *supra*, at 35-36).

intentionally had sexual relations with the plaintiff without informing her of his condition, this conduct did not establish as a matter of law that he intended to give her an STD or knew that transmission was substantially certain to follow.[21]

A similar analysis applies to the Nationwide policy, which, like the policy in *S.S.*, excludes coverage where the injury is "caused intentionally" by the insured. The evidence at trial does not indicate, as the jury charge puts it, that "the property damage or bodily injury to the Tanners was caused intentionally," much less indicate such intent as a matter of law. On the contrary, Gibbons slammed on his brakes hard enough to skid before impact, showing he actively tried to avoid the collision. The insured in *S.S.* only *hoped* to avoid causing harm while Gibbons actually, if belatedly, *tried* to avoid causing harm.

Nor does the evidence establish as a matter of law that Gibbons believed his conduct was substantially certain to injure the Tanners. While leading police on a protracted high-speed chase is not merely reckless but reprehensible, we cannot say on this record that no reasonable juror could resist finding that injury to others was unavoidable. In fact, the chase could have ended in any number of ways: with Gibbons rolling his vehicle, with Gibbons hitting a fixed object, with officers using preventive techniques to stop Gibbons' vehicle, or even with officers discontinuing the pursuit, rather than with Gibbons crashing into the Tanners. Nationwide therefore did not establish as a matter of law that the Tanners' injuries were "caused intentionally" under the exclusion.

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[21] *S.S.*, 858 S.W.2d at 378.

2. "*. . . willful acts the result of which the insured knows or ought to know will follow . . . .*"

Nationwide's policy exclusion has additional language excluding coverage for "willful acts the result of which the insured knows or ought to know will follow." Insofar as this passage also focuses on whether the insured intended the injurious *result*, the language reinforces the view that the dispositive inquiry is whether the insured intended to inflict damage or injury. To forfeit coverage, the insured must intend to harm, not merely intend to act.

This part of Nationwide's exclusion also denies coverage if the insured "ought to know" that injury will result. This language might be read as stating an alternative objective test,[22] excluding coverage not only where the insured subjectively knew that injury would follow, but also where a reasonable person would know that injury would follow.

However, this objective ground for denying coverage does not alter the unequivocal "will follow" language that completes the sentence. The clause requires that the insured "ought to *know*" that the resulting injury "*will* follow," not "might follow" or "will likely follow" or anything else. "Will" is "used to express inevitability."[23] Tracking precisely the language of the exclusion, the jury charge—to which Nationwide did not object—asked whether "the property damage or bodily injury to the Tanners was caused intentionally by or at the direction of [Gibbons], including willful acts the result of which [Gibbons] knows or ought to know would follow from his conduct."

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[22] *See Nationwide Mut. Ins. Co. v. Jones*, No. Civ. JFM-05-2792, 2006 WL 361336, at *3 n.3 (D. Md. Feb. 15, 2006) (noting that "ought to know" language in identical Nationwide policy exclusion suggests an objective rather than a subjective analysis).

[23] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2617 (2002).

Under the evidence presented at trial, a reasonable and fair-minded jury would not be compelled to find, under an objective standard, that a reasonable person would know that injury to third parties would result from Gibbons' conduct. Such a jury finding was no more required by the evidence than a finding, under a subjective standard, that Gibbons personally knew that such injury would result. Hence, we part company with the dissent on the effect of the "ought to know" language of the exclusion, and cannot say a reasonable jury in this case would necessarily find that Gibbons ought to have known that injury would result from his conduct, as indisputably reckless as it was. Put simply, the injury was not so inevitable that we can say as a matter of law it was intended.

Nationwide relies on *Nationwide Mutual Insurance Co. v. Finkley*,[24] an Ohio intermediate appeals court decision that construed the same policy exclusion and concluded "no coverage." We find *Finkley* unpersuasive as it misapplies the policy exclusion. Although *Finkley* describes a Texas-like standard that would bar coverage where the insured's conduct is "substantially certain to result in injury,"[25] *Finkley* actually applies a different standard, opining that "[a]ny reasonable person would know, or should know, that such actions [of the driver] would probably lead to serious injury."[26] In our view, this reading departs from the controlling policy language. The exclusion does not apply whenever a reasonable person would or should know that his actions "would probably

[24] 679 N.E.2d 1189 (Ohio Ct. App. 1996).

[25] *Id.* at 1190-91.

[26] *Id*. at 1190. Given the facts of *Finkley*, the Ohio court's no-coverage conclusion is understandable under a looser "would probably lead" test. *Finkley* involved an unlicensed teenager who crashed in an urban area, not, as in our case, a licensed adult who crashed in a rural area. Moreover, unlike our case, *Finkley* includes no evidence regarding the driver's subjective intent to avoid causing injury.

lead" to injury; the policy imposes a stricter test, that the driver ought to know that injury "will follow" from his conduct.

We understand the appeal of a broader exclusion that would withhold coverage for, as Nationwide's predecessor policy put it, "willful acts which can be reasonably expected to result in damage or injury." But Nationwide replaced that test with the more restrictive version that controls today's case. We must construe the policy as written, not as we might have written it nor as Nationwide once wrote it. Given the clarity of the exclusion and the jury charge, which mirrors the exclusion virtually verbatim, we cannot conclude jurors disregarded the policy and the evidence in reaching their verdict, much less conclude they were obliged to reach the opposite result.

III. Conclusion

Because Nationwide did not establish as a matter of law that Gibbons intentionally caused the Tanners' injuries, the jury's verdict must stand. Accordingly, we reverse the court of appeals' judgment and render judgment on the jury verdict.

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Don R. Willett
Justice

OPINION DELIVERED: April 17, 2009.

IN THE SUPREME COURT OF TEXAS

No. 07-0760

GREG TANNER AND MARIBEL TANNER, INDIVIDUALLY AND AS NEXT FRIENDS OF K.T. AND R.T., MINOR CHILDREN, PETITIONERS,

v.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS

Argued October 14, 2008

JUSTICE BRISTER filed a dissenting opinion.

Anyone who drives a huge 4-ton pickup at 100 miles an hour through city streets during rush hour "ought to know" that someone is going to get hurt. This insurance policy excluded such conduct, so the judges of the trial court and court of appeals correctly denied coverage. Because the Court holds otherwise, I respectfully dissent.

There will never be a more extreme case than this. After being pulled over by a state trooper around 5 p.m. on Interstate 35 in San Marcos, Richard Gibbons took off in his Ford F-350 heavy-duty truck, with the trooper and then several local police cars in hot pursuit. Gibbons cut through residential neighborhoods at more than 80 miles an hour, careening around corners and running

through yield and stop signs. Turning onto Highway 80, he hit speeds above 100 miles an hour, swerving head-on into oncoming traffic to pass, cutting across open fields, and driving around a police roadblock. Ultimately he smashed into the Tanners' car at an intersection, which slowed him down only for a moment. He was finally stopped when police shot out half of the truck's six tires. Charged with eight felony counts, Gibbons was released on $10,000 bail; true to form, he fled and has never been prosecuted.

The $300,000 auto liability policy issued to Gibbons excluded "[p]roperty damage or bodily injury caused intentionally by or at the direction of an insured, including willful acts the result of which the insured knows or ought to know will follow from the insured's conduct." "Ordinarily," we have said, "whether an insured intended harm or injury to result from an intentional act is a question of fact."[1] But "ordinarily" means that in some extreme cases it is *not* a question of fact, but a question of law. "Ought to know" is an objective standard, so there must be some outer boundaries beyond which an insured's conduct is either so harmless or so reckless that no fact question is presented.

Texas courts have apparently not addressed whether a high-speed police chase falls within the intentional-acts exclusion. But this Ohio insurance policy was issued to Gibbons in Ohio, and Ohio courts have. "[W]here an insured willfully and purposefully attempts to elude police in an automobile chase through an urban area in reckless disregard of traffic control devices, his actions

[1] *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 378 (Tex. 1993).

are substantially certain to result in injury."[2] This is both sensible and consistent with Texas law, which applies an intentional-injury exclusion if an insured "intends the consequences of his act, or believes that they are substantially certain to follow."[3]

The Court's main mistake is in viewing this accident far more narrowly than the policy does. The Court says the exclusion requires "intentional damage, not just intentional conduct," but the exclusion applies even if he did *not* intend damage but "ought to know [it] will follow from [his] conduct." The Court requires proof that the insured "intentionally injured *the Tanners*," but the exclusion does not require that an insured know precisely who or what he would hit. The Court says reasonable jurors could conclude the chase could have ended with Gibbons "rolling his vehicle" or "hitting a fixed object," but either would still be the kind of property damage he ought to have known would follow. The Court says Gibbons ought to have known the police might "discontinu[e] the pursuit," though it is a mystery why an objective, reasonable-person standard would include such an unreasonable hope. The Court focuses narrowly on the rural area of "open fields, corn fields" where an accident finally occurred, forgetting all of Gibbons' willful acts on I-35, Highway 80, and the residential areas through which this high-speed police chase passed. And the Court emphasizes that Gibbons applied his brakes before the collision, even though someone driving a truck this big this fast in these circumstances ought to know an accident would follow *even if* he tried to avoid it

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[2] *Nationwide Mut. Ins. Co. v. Finkley*, 679 N.E.2d 1189, 1191 (Oh. Ct. App. 1996).

[3] *S.S.*, 858 S.W.2d at 378 (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965)).

at the last second. In sum, the Court avoids this policy exclusion by focusing narrowly on what Gibbons knew a split second before this precise crash.[4]

The rest of the Court's opinion consists largely of red herrings and straw men:

- the insurer did not object to the jury charge, but there was no reason to do so as the charge merely quoted the policy;
- the current policy exclusion is more restrictive than a former one, but the circumstances here meet either; and
- Texans need coverage from drivers who "intentionally speed or run red lights," but Gibbons did a lot more than run a red light.

It should not be debatable whether an insured "ought to know" that harm would follow from this kind of outrageous driving. The police certainly thought so, breaking off the chase in a residential area because it was too dangerous, and shooting at the truck (an act requiring supervisory approval) because the officers "felt like we needed to end it before anyone else was injured." The Tanners' attorney also thought so, conceding in his opening statement that accidents like this one "happen[] all the time when people run from police." Indeed, the most surprising thing on this record is not that there was an accident, but that someone wasn't killed. If the Court "cannot say on this record" that Gibbons ought to have known damage would follow his conduct, then courts can never say it. As a result, this explicit exclusion does not mean what it says, but whatever jurors decide they want it to say.

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[4] *See City of Keller v. Wilson*, 168 S.W.3d 802, 812 (Tex. 2005) ("[I]f evidence may be legally sufficient in one context but insufficient in another, the context cannot be disregarded even if that means rendering judgment contrary to the jury's verdict.").

Not surprisingly, that is precisely what the Tanners' counsel urged jurors to do. In his opening, he summarized the issue for trial as follows: "Does Nationwide have a technicality in this document buried in one sentence of one page that somehow lets them off the hook or not?" Exclusions, of course, are not technicalities — they are part of the contract. Jurors may naturally tend to favor a victimized family rather than a big insurance company, but judges exist to make sure contracts mean what they say, no matter whom the judges or jurors want to win.

If insurers must pay for intentional, criminal acts by policyholders like Gibbons, they will have to charge everyone higher premiums. As a result, some drivers will simply do without insurance. Ignoring the policy terms in this case may seem compassionate, but in the long run it may prove otherwise.

By any measure, an insured like Gibbons "ought to know" that driving like he did would hurt someone or something sooner or later. As his insurer did not agree to pay for that kind of intentional conduct, I would affirm the courts below.

_____

Scott Brister
Justice

OPINION DELIVERED: April 17, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0773

AUTOZONE, INC., PETITIONER,

v.

SALVADOR REYES, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

PER CURIAM

After he was discharged from his job at AutoZone, Inc., sixty-two-year-old Salvador Reyes sued AutoZone for age discrimination. AutoZone contended Reyes was discharged because he sexually harassed a female co-worker. The jury found for Reyes, and the trial court entered judgment on the verdict. The court of appeals determined that statements made by an AutoZone employee not involved in or connected with Reyes's discharge and evidence of discipline meted out to other employees for sexual harassment comprised legally sufficient evidence to support the finding of age discrimination. ___ S.W.3d ___. We disagree. We reverse and render.

During the relevant time involved in this case, AutoZone's employment policy specifically addressed sexual harassment. It stated, in part, that

> AutoZone won't tolerate sexual harassment or harassment of any nature. Such conduct, or encouraging or condoning such conduct, may result in immediate termination.

. . . .

Sexual harassment includes unwelcome verbal, nonverbal or physical sexual advances.

. . . .

Any AutoZoner who receives a complaint or becomes aware of a sexual harassment situation should report the allegation to management *immediately*.

Irma Knowles, an AutoZone employee, told a co-worker about actions by Reyes that arguably violated AutoZone's sexual harassment policy after the co-worker inquired into Reyes's behavior. Reyes was a parts service manager in the same AutoZone store where Knowles worked. Knowles's co-worker reported the situation to an AutoZone manager. The regional manager initiated an investigation and temporarily reassigned Reyes from the store where Knowles worked. As part of its investigation, AutoZone assigned a loss prevention manager, Ken Knecht, to take written statements from Knowles, Reyes, and other involved employees. According to Knowles's written statement, Reyes hugged her, tried to kiss her, held her hand, and asked her for dates on various occasions. She said that when Reyes took those actions she would pull away from him and call him a "dirty old man." In her written statement, Knowles also said that Jim Alvarado, another parts service manager in the store where Knowles worked, leaned against her on numerous occasions, but she did not state that she pulled away from him or verbally responded to him as she did with Reyes. She related that she did not report any of the occurrences with Reyes or Alvarado because she was a "single parent" and was "afraid for my job." In his written statement, Reyes admitted that he engaged in some of the alleged behavior and acknowledged that he should not hug, touch, or kiss another employee. Alvarado denied Knowles's allegations in his written statement. Knecht

forwarded the statements and results of his investigation to AutoZone management in Memphis, Tennessee. There they were reviewed by employee relations specialist Melody Jones. Based on the investigation report, Jones recommended that Reyes be discharged.

After receiving Jones's recommendation, the San Antonio regional manager discharged Reyes for violating AutoZone's sexual harassment policy. The discharge documents reflected that Reyes was not eligible for rehire. Alvarado was not discharged. Jones recommended his transfer to a different store be made permanent so he and Knowles would no longer be working together. Alvarado quit the day after Reyes was fired.

Reyes sued AutoZone for age discrimination. The jury found that Reyes's age was a motivating factor in AutoZone's decision "to discriminate against or discharge" Reyes. AutoZone appealed, arguing among other matters that the evidence was legally insufficient to support the finding.

The court of appeals affirmed. ___ S.W.3d ___. The court of appeals concluded that the following evidence was legally sufficient to support the finding of discrimination: (1) statements made to Alvarado by Jesse Villarreal, manager of the store to which Reyes and Alvarado were assigned after AutoZone initiated its investigation, to the effect that AutoZone intended to get rid of "the old people," and (2) evidence that some younger employees who violated AutoZone's sexual harassment policy either were not fired or were eligible for rehire with "provision" or "reservation" notations on their records. *Id.* at ___.

In this Court, AutoZone continues to challenge, as one of its issues, the legal sufficiency of the evidence to support the finding that age was a motivating factor in Reyes's discharge or that he was discriminated against in any way.

In reviewing for legal sufficiency of the evidence, we consider the evidence in the light most favorable to the verdict, disregarding all contrary evidence that a reasonable jury could have disbelieved. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Even though the evidence is viewed in the light most favorable to the verdict, it cannot be considered in isolated bits and pieces divorced from its surroundings; it must be viewed in its proper context with other evidence. *Id.*

Under the Texas Commission on Human Rights Act (the Act), an employer may not discriminate against or discharge an employee based on "race, color, disability, religion, sex, national origin, or age." TEX. LAB. CODE § 21.051. By adopting the Act, the Legislature "intended to correlate state law with federal law in employment discrimination cases." *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005) (quoting *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 739 (Tex. 2003)). Therefore, we look to federal law to interpret the Act's provisions. *Id.*; *Wal-Mart*, 121 S.W.3d at 739; *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 24 (Tex. 2000). To establish a violation of the Act, a plaintiff must show that he or she was (1) a member of the class protected by the Act, (2) qualified for his or her employment position, (3) terminated by the employer, and (4) treated less favorably than similarly situated members of the opposing class. *Monarrez*, 177 S.W.3d at 917; *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). In this case,

Reyes bore the burden of proving that age was a motivating factor in a decision by AutoZone to discriminate against him. *Wal-Mart*, 121 S.W.3d at 739; *Quantum Chem.*, 47 S.W.3d at 480.

AutoZone first argues that Villarreal's comments to Alvarado that Reyes was terminated because AutoZone was trying to get rid of "the old people" have no evidentiary value. AutoZone urges that the comments were both stray remarks and made by a person who did not take part in and had no input into the ultimate decision to discharge Reyes. Reyes, on the other hand, contends that Villarreal's statements were direct evidence of AutoZone's intent to discharge employees based on considerations of age.

We have held that stray remarks are insufficient to establish discrimination and statements made remotely in time by someone not directly connected with termination decisions do not raise a fact issue about the reason for termination. *See M.D. Anderson*, 28 S.W.3d at 25; *see also Arismendez v. Nightingale Home Health Care, Inc.*, 493 F.3d 602, 607-08 (5th Cir. 2007); *Elgaghil v. Tarrant County Junior Coll.*, 45 S.W.3d 133, 140 (Tex. App.—Fort Worth 2000, pet. denied). Statements and remarks may serve as evidence of discrimination only if they are (1) related to the employee's protected class, (2) close in time to the employment decision, (3) made by an individual with authority over the employment decision, and (4) related to the employment decision at issue. *Arismendez*, 493 F.3d at 608. In determining whether the individual making the remark had authority over the employment decision, consideration is not limited to statements by the person who officially made the decision. *Id.* at 608; *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226-27 (5th Cir. 2000). Discriminatory animus by a person other than the decision-maker may be imputed

to an employer if evidence indicates that the person in question possessed leverage or exerted influence over the decision-maker. *Russell*, 235 F.3d at 226-27.

In this case, the evidence showed that Villarreal neither played any part in AutoZone's investigation or decision to discharge Reyes, nor did he possess any leverage over or exert any influence over the investigation or decision. The undisputed evidence is that Rene Munoz, the San Antonio regional manager, made the decision to terminate Reyes after Jones, an AutoZone employee relations specialist in Tennessee, recommended the action after she reviewed the written statements taken by Knecht. There is no evidence that Knecht or any other person involved in the investigation or decision ever took a statement from or spoke with Villarreal. Further, Villarreal did not work in the store where the sexual harassment allegedly occurred, and he was not part of the management team that investigated and made the decision to discharge Reyes. Although Villarreal was a store manager, he had no authority over Reyes until AutoZone transferred Reyes and Alvarado to his store after the incidents with Knowles had occurred and the investigation was underway. Villarreal, who no longer worked for AutoZone, testified at trial and denied having any connection with or knowledge of the investigation or decision to discharge Reyes.

Reyes argues that Villarreal's statements have evidentiary weight because Villarreal had no personal discriminatory animus but merely conveyed to Alvarado his knowledge of AutoZone's reason for terminating Reyes. But there is no evidence that Villarreal had a basis on which to represent AutoZone's motive or intent as to Reyes's discharge. Regardless of whether Villarreal's statements were an expression of what he *thought* to be AutoZone's purpose, there was no evidence that Villarreal was involved in, had leverage over, or knew or was in a position to know whether

Reyes's age was a motivating reason for the discharge. As to Villarreal's statements about AutoZone getting rid of "the old people," Villarreal testified at trial that he intended to convey only his personal opinion that AutoZone was trying to rid itself of long-time managers who had become too lax and were not adhering to AutoZone's policies. Alvarado, who like Villarreal no longer worked for AutoZone, testified that he understood Villarreal's statements to refer to the length of time employees had been with AutoZone, not the employees' age. When considered in context, as they must be, *see City of Keller*, 168 S.W.3d at 827, Villarreal's statements are not evidence that age was a motivating factor in any of AutoZone's decisions as to Reyes.

We next address AutoZone's assertion that Reyes's ineligibility for rehire was not evidence that it discriminated against Reyes by treating him less favorably than similarly-situated younger employees. To prove discrimination based on disparate discipline, "the disciplined and undisciplined employees' misconduct must be of 'comparable seriousness.'" *Monarrez*, 177 S.W.3d at 917. The situations and conduct of the employees in question must be "nearly identical." *Id.* at 917-18. Employees with different responsibilities, supervisors, capabilities, work rule violations, or disciplinary records are not considered to be "nearly identical." *See id.* at 917; *see also Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 514-15 (5th Cir. 2001). The situations and conduct of employees is not nearly identical "when the difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer." *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 221 (5th Cir. 2001).

Reyes argues that the record reflects three instances in which AutoZone's discipline of younger employees differed from and was less onerous than his. First, Reyes references evidence

that Alvarado, Reyes's younger co-worker, was only permanently transferred to another store while Reyes was discharged. Alvarado's circumstances, however, were not "nearly identical" to Reyes's. Knowles's written statement that AutoZone considered in reaching its decision as to Reyes stated that Reyes held her hands, hugged her, attempted to kiss her, and asked her for dates. Reyes stated that he sometimes held or grabbed Knowles's hand, hugged her, and kissed her; that he knew he should not hug, touch, or kiss another employee; and that although he believed he did not intentionally harass anyone, he was probably "too friendly, not with some but with all my fellow employees, male and female." On the other hand, as to Alvarado, Knowles's written statement only said that he occasionally leaned against her, and Alvarado categorically denied the allegation. During the investigation, the co-worker who reported Reyes's actions to management and who encouraged Knowles to report the incidents stated that Knowles informed him that Reyes kissed her but not that Alvarado touched or leaned against her. Jones, who recommended Reyes's termination, testified at trial that her recommendation was based on his written statement admitting to actions that constituted sexual harassment and admitting he recognized the actions were inappropriate. Jones testified that she did not recommend discharging Alvarado because in his written investigation statement, he denied committing the alleged actions and there was nothing to substantiate them. The evidence as to Reyes's and Alvarado's circumstances does not rise to the level that, viewed in the light most favorable to the judgment, a reasonable jury could find the circumstances were "nearly identical" for the purposes of establishing discrimination based upon disparate discipline.

Next, Reyes argues that AutoZone treated Elroy Harrison, a forty-year-old AutoZone employee, differently than Reyes although their situations were similar. According to Reyes,

AutoZone gave Harrison a warning after his first reported incident, while Reyes was discharged. However, the evidence showed that Harrison's first incident and warning did not involve sexual harassment—it involved a non-sexual negative comment about a co-worker in front of a customer. Harrison was later discharged for an act of sexual harassment, but the incident for which he received the warning was not in the same category of conduct for which Reyes was discharged. *See Perez v. Tex. Dep't of Criminal Justice, Inst. Div.*, 395 F.3d 206, 213 (5th Cir. 2004) (holding that in order for circumstances to be nearly identical, the misconduct itself must be nearly identical). Thus, evidence as to Harrison's circumstances was not probative of discrimination against Reyes based upon disparate discipline.

Finally, Reyes argues that there was evidence younger employees who committed sexual harassment remained eligible for rehire after termination, while he did not. Under AutoZone's termination procedures, a store manager completes a payroll termination report that includes a question as to whether the employee is eligible for rehire. Three such termination reports indicated that employees younger than Reyes who had been terminated for sexual harassment remained eligible to be rehired while Reyes did not. Reyes argues that the reports show a trend of disparate discipline based upon age. We disagree.

Between 1999 and 2001, AutoZone terminated twenty-three employees for sexual harassment; seventeen were under the age of forty. Evidence that the termination reports of three of the seventeen employees indicated they were eligible for rehire was not probative evidence that AutoZone treated younger employees who committed sexual harassment differently than Reyes was treated. First, fourteen of the seventeen were not eligible for rehire. Second, the reports were not

completed by the same official or in the same office as Reyes's termination report. Two were completed by store managers in Ohio and one by a store manager in New Mexico. *See Monarrez*, 177 S.W.3d at 917 (noting that the circumstances must be "comparable in all material respects, including similar standards, supervisors, and conduct"). Third, Munoz explained at trial that the termination reports are prepared for payroll purposes only and are many times completed by managers who have no knowledge of the reason for termination. As to the three employees Reyes claims were eligible for rehire, there was no evidence about the position or level of knowledge of the persons who completed the reports. Finally, AutoZone supervisors testified without contradiction that it is AutoZone's policy not to rehire any employee who has been terminated for sexual harassment, and there was no evidence that AutoZone has ever done so, regardless of whether the termination reports reflected eligibility for rehire. In sum, Reyes presented no evidence under which a reasonable jury could find that AutoZone treated him less favorably than any other employee who had violated its sexual harassment policy.

We conclude that the evidence is legally insufficient to support the jury finding that age was a motivating factor in any action AutoZone took as to Reyes. We sustain AutoZone's first issue. Sustaining AutoZone's issue challenging the legal sufficiency of the evidence requires us to reverse and render judgment for AutoZone, so we do not address AutoZone's remaining issues. Without hearing oral argument, we reverse the court of appeals' judgment and render judgment that Reyes take nothing. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: December 5, 2008

IN THE SUPREME COURT OF TEXAS

NO. 07-0783

IRVING W. MARKS, PETITIONER,

v.

ST. LUKE'S EPISCOPAL HOSPITAL, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued September 11, 2008

JUSTICE MEDINA delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE BRISTER, and JUSTICE GREEN joined.

CHIEF JUSTICE JEFFERSON filed a concurring opinion.

JUSTICE HECHT filed a dissenting opinion.

JUSTICE WAINWRIGHT filed a dissenting opinion.

JUSTICE JOHNSON filed a dissenting opinion, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, and JUSTICE WILLETT joined.

In this case we must decide whether a hospital patient's fall, allegedly caused by a negligently maintained hospital bed, is a health care liability claim under article 4590i of the Revised Civil

Statutes.[1] Article 4590i, also known as the Medical Liability and Insurance Improvement Act, provides that health care liability claims, not accompanied by an expert report, may be dismissed with prejudice 180 days after filing, although a grace period is available under limited circumstances. The trial court concluded that the hospital bed claim here was a health care liability claim, which it then dismissed because of the patient's failure to file a timely expert report. The trial court also denied the patient's request for a grace period. The court of appeals initially disagreed with the trial court, concluding that the patient's claim was not a health care liability claim. *See Marks v. St. Luke's Episcopal Hosp.*, 177 S.W.3d 255, 260 (Tex. App.–Houston [1st Dist.] 2005), *vacated*, 193 S.W.3d 575 (Tex. 2006). Following our remand of the case, however, the court affirmed the trial court's judgment. 229 S.W.3d 396. One justice dissented, arguing that the hospital bed claim was in the nature of a premises liability claim rather than a health care liability claim. *Id*. at 403 (Jennings, J., dissenting in part). We agree with the dissenting justice and accordingly reverse the court of appeals' judgment and remand the case to the trial court.

I

Irving Marks fell and injured himself during his recuperation from back surgery at St. Luke's Hospital. The fall occurred when Marks, while sitting on his hospital bed, attempted to use the bed's footboard to push himself up to a standing position. Unfortunately, the footboard came loose, causing Marks to fall. Marks sued the Hospital, alleging several acts of negligence, including: (1) failing to train and supervise the nursing staff properly, (2) failing to provide him with the assistance

[1] *See* Medical Liability and Insurance Improvement Act of Texas, Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, 2041, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

he required for daily living activities, (3) failing to provide him with a safe environment in which to recover, and (4) providing a hospital bed that had been negligently assembled and maintained by the hospital's employees.

The trial court concluded that Marks's petition asserted health care liability claims as defined under the Medical Liability and Insurance Improvement Act. *See* TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4) (defining health care liability claim).[2] This Act requires that health care liability claims be substantiated by a timely filed expert report. *Id*. § 13.01(d). Because Marks failed to file a timely expert report, the trial court granted the Hospital's motion to dismiss.

The court of appeals initially reversed, concluding that Marks's allegations concerned "an unsafe condition created by an item of furniture" and thus related to "premises liability, not health care liability[.]" *Marks*, 177 S.W.3d at 259. The Hospital appealed, filing its petition for review a few days before we held, in *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005), that a patient's claims against a nursing home for inadequate supervision and nursing services were health care liability claims.

After full briefing, we granted the Hospital's petition. Rather than parse through Marks's claims, however, we vacated the court of appeal's judgment without reference to the merits and remanded for the court of appeals to consider the nature of these claims in light of *Diversicare*. *St. Luke's Episcopal Hosp. v. Marks,* 193 S.W.3d 575 (Tex. 2006) (per curiam). Following our remand, a divided court of appeals affirmed the trial court's dismissal for want of a timely expert report,

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[2] Article 4590i was repealed after the filing of this case. *See* n.1 *supra*. Similar medical liability legislation is now codified in Chapter 74 of the Texas Civil Practice and Remedies Code, affecting actions filed on or after September 1, 2003. *See* TEX. CIV. PRAC. & REM. CODE §§ 74.301-.303.

concluding that Marks had asserted only health care liability claims. 229 S.W.3d at 402. One justice dissented in part, urging that Marks's fourth claim concerning the defective footboard was a premises-liability claim rather than a health care liability claim under the Medical Liability and Insurance Improvement Act. *Id*. at 403 (Jennings, J., dissenting in part).

II

The Medical Liability and Insurance Improvement Act of 1977 was the Legislature's response to a crisis in the cost and availability of medical malpractice insurance in Texas. The Legislature perceived that an inordinate increase in the frequency and severity of health care liability claims had caused the crisis. TEX. REV. CIV. STAT. art. 4590i § 1.02(a)(1)-(5). The Legislature also found that this insurance crisis had adversely affected the cost and delivery of medical and health care in Texas. *Id*. § 1.02(a)(6)-(9). To address the problem, the Legislature sought to reduce the "frequency and severity of health care liability claims through reasonable improvements and modifications in the Texas insurance, tort, and medical practice systems[.]" *Id*. § 1.02(b)(1). The Legislature's modifications included a damages cap, a shortened limitations period, and heightened filing requirements for health care liability claims. *See Diversicare*, 185 S.W.3d at 846-47.

The Act defines a "health care liability claim" as "a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety" proximately resulting in a patient's injury or death. TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4). The Act does not define safety, although it does define other terms, including "health care provider," "physician," "medical care," and "health care." *Id*. § 1.03(a)(2)-(4), (8).

These definitions indicate that physicians provide medical care, and health care providers furnish other health care services. "Medical care" is defined as the practice of medicine, including the diagnosis and treatment by a licensed physician. *Id*. § 1.03(a)(6). "Health care" is defined more broadly to include "any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement." *See id.* § 1.03(a)(3). Hospitals are expressly included in the definition of "health care provider." *Id.* § 1.03(a)(3).

Although *Diversicare* primarily concerned a claimed departure from accepted standards of health care, we mentioned safety and the absence of any statutory definition for the term. *Diversicare*, 185 S.W.3d at 855. We observed that the inclusion of accepted standards of safety expanded the statute's scope beyond what it would have been had the statute only covered medical care and health care. Because the statute offered no definition of safety, we suggested its commonly understood meaning, that is, "'untouched by danger; not exposed to danger; secure from danger, harm or loss.'" *Id.* (quoting BLACK'S LAW DICTIONARY 1336 (6th ed. 1990)). The term's meaning, however, was ultimately unnecessary to our decision, and so we left unresolved its contextual meaning, as well as its relationship to the other defined terms of medical care and health care. *See id.* The meaning of this term is squarely presented here as the parties dispute what the Legislature intended to include as a health care liability claim involving a "departure from accepted standards of . . . safety[.]" TEX. REV. CIV. STAT. art 4590i § 1.03(a)(4).

Marks contends that safety must be read narrowly to include only safety concerns directly related to the patient's care or treatment. The Hospital, on the other hand, argues that the term should

be read broadly to include any patient injury negligently caused by an unsafe condition at a health care facility. Even if the definition is not this broad, the Hospital alternatively argues, it should include equipment used in the patient's care, such as the hospital bed here.

III

To determine the meaning of safety in the context of this Act, we begin with established principles of statutory construction. The first and overarching principle is that we give effect to legislative intent. *See* TEX. GOV'T CODE § 312.005; *see also Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000). When interpreting a statute, we read words and phrases in context and construe them according to the rules of grammar and common usage. TEX. GOV'T CODE § 311.011(a). Words that are not defined are given their ordinary meaning. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). When possible, all words are given effect and none of the statute's language is treated as surplusage. *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 402 (Tex. 2000). Thus, the terms medical care, health care, and safety should add meaning to the statute; none of the terms should be disregarded, discounted, or dismissed. *See Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 89-90 (Tex. 2001).

The Legislature's purpose in article 4590i is clearly stated, to remedy "a medical malpractice insurance crisis" in Texas and its "material adverse effect on the delivery of medical and health care services in Texas[.]" TEX. REV. CIV. STAT. art. 4590i § 1.02(a)(5)-(6). This concern pervades the statute, which is replete with references to medical liability, health care, and malpractice, all of which implicate medical or health care judgments made by professionals. *See*, *e.g.*, *id.* § 13.01(r)(5)-(6) (requiring expert to have knowledge of medical diagnosis, care, and treatment).

By comparison, neither the statute nor the historical background suggests that physicians or health care providers were similarly challenged when obtaining commercial general liability insurance coverage for ordinary, non-medical accidents on their premises. The Legislature was responding only to a medical-malpractice insurance crisis, and medical malpractice insurance generally does not cover premises liability claims. *See*, *e.g.*, *N. Am. Speciality Ins. Co. v. Royal Surplus Lines Ins. Co.,* 541 F.3d 552, 561 (5th Cir. 2008) (recognizing that commercial general liability insurance policies generally exclude professional breaches from coverage).

All patient injuries in a health care setting, regardless of cause, may be said to implicate patient safety in the broader sense, but not all patient injuries involve malpractice. Given the statute's objective and the Legislature's express concern, the Legislature evidently did not intend to define safety as broadly as the Hospital proposes. Moreover, such an expansive interpretation conflicts with the Legislature's express intent that the statute operate to control medical-malpractice insurance costs without unduly restricting a patient's rights. *See* TEX. REV. CIV. STAT. art. 4590i § 1.02(b)(3); *see also O'Reilly v. Wiseman*, 107 S.W.3d 699, 707 n.12 (Tex. App.—Austin 2003, pet. denied). We accordingly reject the Hospital's contention that a health care liability claim includes any patient injury negligently caused by an unsafe condition at a health care facility.

We said as much in *Diversicare*, noting that there could "be circumstances that give rise to premises liability claims in a healthcare setting" and that not every accidental injury to a patient in a health care setting would constitute a health care liability claim under article 4590i. *Diversicare*, 185 S.W.3d at 854 (indicating that a health care claim is determined by the nature of the claim, not the nature of the defendant). As noted, a health care liability claim is defined to include a "claimed

departure from accepted standards of medical care or health care or safety." TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4). Standards of medical care or health care are implicated when the negligent act or omission is an inseparable or integral part of the rendition of medical services. *Diversicare*, 185 S.W.3d at 848-49. Similarly, an accepted standard of safety is implicated under the Act when the unsafe condition or thing is an inseparable or integral part of the patient's care or treatment. *See id.* at 855.

In determining whether the plaintiff's claim is inseparable from the rendition of medical services, and thus a health care liability claim, we are guided by several overlapping factors. They include (1) whether the specialized knowledge of a medical expert may be necessary to prove the claim, (2) whether a specialized standard in the health care community applies to the alleged circumstances, and (3) whether the negligent act involves medical judgment related to the patient's care or treatment. *See Diversicare*, 185 S.W.3d at 847-52. Not surprisingly, these factors confirm the significance that medical or professional judgment plays in classifying the claim as one involving health care liability.

IV

Marks's original petition asserted four negligence claims against the Hospital. The first three—failing to properly train and supervise its agents, employees, servants and nursing staff when caring for him; failing to provide him with the assistance he required for daily living activities; and failing to provide him a safe environment in which to receive treatment and recover—are similar to those in *Diversicare*.

In that case, a nursing home resident's daughter sued on her mother's behalf, alleging the nursing home had been negligent in failing to provide enough staff and supervision to prevent her

mother from falling on two occasions and from being sexually assaulted by another nursing home resident. *Id.* at 845. The trial court concluded that the allegations constituted health care liability claims, dismissing the case because the plaintiff had not filed the requisite expert report. *See* TEX. REV. CIV. STAT. art. 4590i § 13.01(d), (e). The court of appeals reversed, concluding that the sexual-assault claim did not fit the definition of a health care liability claim. *Rubio v. Diversicare Gen. Partner, Inc.*, 82 S.W.3d 778, 783-84 (Tex. App.—Corpus Christi 2002), *rev'd*, 185 S.W.3d 842 (Tex. 2005). We disagreed, however, concluding that all the plaintiff's claims were based on an alleged departure from accepted standards of health care. *Diversicare*, 185 S.W.3d at 849. We noted that nursing homes provide services to their residents that include supervision of daily activities, routine examinations, monitoring of the residents' physical and mental condition, administering medication, "and meeting the fundamental care needs of the residents." *Id.* We further noted that these services are provided by professional staff, and "[t]he level and types of health care services provided vary with the needs and capabilities, both physical and mental, of the patients." *Id.* at 849-50 (citing *Harris v. Harris County Hosp. Dist.*, 557 S.W.2d 353, 355 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ)). We then concluded that those services, including the monitoring and protection of the patient, as well as training and staffing policies, were "integral components of Diversicare's rendition of health care services[.]" *Id.* at 850. Similarly, Marks's first three claims here, involving patient supervision and staff training, are claims implicating professional expertise and the departure from the accepted standard of health care. Such claims are health care liability claims subject to the Act. TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4).

Marks's hospital bed claim is different, however, because it does not assert a departure from the accepted standards of medical care or health care. Instead, Marks alleges that the Hospital was negligent in the bed's assembly or maintenance, or both, and that a defectively attached footboard presented an unsafe condition. At its core, Marks's hospital bed claim involves the failure of a piece of equipment. Whether the failure of that equipment qualifies as a health care liability claim depends on whether that failure constitutes a departure from accepted standards of safety under article 4590i. *Id*. To assist us in answering that question, we consider the various factors indicative of professional judgment, that being the equipment's use and importance in the patient's care or treatment.

No evidence shows that the assembly of Marks's hospital bed involved any medical or professional judgment, or that the bed's footboard or its assembly were related to, or affected by, Marks's care or treatment. To the contrary, Marks presented some evidence that the assembly of the hospital bed was solely the responsibility of the Hospital's maintenance staff. Presumably, tasks performed by the maintenance staff do not require any specialized health care knowledge, and evaluation of whether those tasks were performed negligently would not require expert medical testimony. Other jurisdictions have, for the most part, found claims based on injuries incurred when a hospital fixture or piece of equipment breaks due to negligent assembly, maintenance, or repair to sound in ordinary, rather than medical, negligence.[3]

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[3] *See, e.g., Williamson v. Hosp. Serv. Dist. No. 1 of Jefferson*, 888 So.2d 782, 789-90 (La. 2004) (holding that hospital's negligence in failing to repair and inspect wheelchair prior to returning it to service was ordinary not medical negligence to which state's medical malpractice statute did not apply); *Pluard v. Patients Compensation Fund*, 705 N.E.2d 1035, 1037-38 (Ind. App. 1999) (holding that injuries incurred when surgical lamp inadequately attached to the wall fell on patient not covered by Indiana's Medical Malpractice Act); *Harts v. Caylor-Nickel Hosp., Inc.*, 553 N.E.2d 874, 879 (Ind. App. 1990) (concluding that injury incurred when bed rail collapsed, causing patient to fall, were premises liability claims not covered by Medical Malpractice Act); *but see Prater v. Smyth County Cmty. Hosp.*, No. 93-4050, 1995 WL 1055761, at *2-3 (Va. Cir. Ct. Jan. 30, 1995) (not designated for publication) (holding that a bed rail collapse

A cause of action alleges a departure from accepted standards of safety within the Act's meaning when the unsafe condition is an inseparable or integral part of the patient's care or treatment. An unsafe condition, like a negligent act or omission, is inseparable from the rendition of medical or health care services when the relationship between the two is significant and direct, and thus involves professional judgment. The following cases illustrate this point.

In *Hector v. Christus Health Gulf Coast*, the court of appeals held that a patient's action for injuries in a fall from an operating table during surgery was based on "an alleged departure from accepted standards of safety" under article 4590i. 175 S.W.3d 832, 835-36 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). The patient argued that the operating table was under the hospital's control and that the accident involved an administrative or routine use rather than medical care. *Id.* at 836. The court of appeals agreed in theory with the "distinction between hospital workers that were health care providers, such as nurses and doctors, and hospital workers that were not, such as cooks or electricians." *Id.* But the court concluded the distinction was irrelevant because "any person in the operating room at the time of Hector's accident would necessarily have been considered a health care provider." *Id.* The distinction is relevant in this case, however, because the hospital workers responsible for assembling Marks's bed, identified by the hospital nurses as the maintenance team, would not have been considered health care providers when doing so.

In another case, a patient sued a hospital for a foot injury caused by stepping on a sharp paint chip while showering in preparation for surgery. *Shults v. Baptist St. Anthony's Hosp. Corp.*, 166

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while taking patient's medical history was an integral part of the health care treatment and covered by Virginia's Medical Malpractice Act).

S.W.3d 502, 503 (Tex. App.—Amarillo 2005, pet. denied). The patient alleged negligence based both on the hospital's failure to maintain and keep safe its shower as well as on the hospital's treatment of his foot injury. The court rejected the argument that the negligence claims based on the condition of the hospital shower constituted claims resulting from departures from accepted standards of safety under article 4590i:

> We agree with [hospital's] characterization of [patient's] claims as involving two distinct theories of recovery, one based upon premises liability and the other on medical negligence. Personal injury claims resulting from departures from accepted standards of safety may be included within the scope of article 4590i, but such departures must be inseparable parts of the rendition of medical services and the standards of safety within the health care industry to be covered by the Act. We do not believe that the presence of a sharp paint chip in the shower of [patient's] hospital room could be considered in any way an inseparable part of the medical services rendered to [patient].

Id. at 505.

The shower was, however, taken in preparation for surgery at a physician's instruction. *Id.* at 503. In that sense, it was a functional part of the surgical services provided by the hospital, just as the footboard attached to the hospital bed here was a functional part of the morphine-treatment and recovery services provided to Marks. The source of the negligence in both cases, however, is not directly related to the rendition of any medical or health care services, but instead is incidental, occurring in the course of the Hospital's general maintenance duties which do not involve health care professionals or the exercise of any medical or professional judgment.

There are certainly circumstances in which the assembly or use of a hospital bed might involveprofessional judgment, the evaluation of which would likely require expert testimony. For instance, a health care provider might determine that a patient's condition called for restraints and that

side rails attached to the bed would suffice.[4] Thus, the failure of a part of a hospital bed specifically ordered by a physician or health care provider and integral to the patient's care or treatment might implicate article 4590i. *See, e.g., Espinosa v. Baptist Health System*, No. 04-05-00131-CV, 2006 WL 2871262 (Tex. App.–San Antonio Oct. 11, 2006, pet. denied) (mem. op.) (holding that patient injured while using an overhead bed-frame device or trapeze authorized as part of patient's medical care and installed by a nurse and orthopedic technician was a health care liability claim). But when a piece of hospital equipment is unrelated to any professional judgment and is merely incidental to the patient's care, its alleged unsafe condition does not implicate article 4590i. We conclude that the negligence claim based on the defectively assembled or maintained hospital bed in this case is not a health care liability claim to which article 4590i applies.

JUSTICE JOHNSON's dissent, however, questions that conclusion as permitting Marks to convert a health care liability claim into an ordinary negligence claim by mere pleading. The dissent submits that "no matter how Marks pleads his case, the substantive facts implicate questions about whether St. Luke's met accepted standards of health care and safety [as to its patient]." ___ S.W.3d

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[4] *See, e.g., Bryant v. Oakpointe Villa Nursing Centre, Inc.*, 684 N.W.2d 864, 867 (Mich. 2004) (determining that claims based on nursing home's failure to recognize the risk posed by the configuration of bed rails on a hospital bed sounded in medical malpractice); *Bell v. West Harrison County Dist.*, 523 So.2d 1031, 1033 (Miss. 1988) (determining that a patient's claims arising from a nurse's failure to raise side rails on a hospital bed constituted medical malpractice, rather than ordinary negligence, claims because "[a] nurse's decision as to whether or not bed rails should be utilized entails a degree of knowledge concerning the subject patient's condition, medication, history, etc."); *Lenny v. Loehmann*, 433 N.Y.S.2d 135 (N.Y. App. Div. 1980) (concluding that a physician's alleged negligence in failing to instruct that bed's side rails be raised, or in failing to check condition of the side rails after they had been put up, or in failing to supervise patient's movements to and from bed sounded in medical malpractice rather than ordinary negligence); *cf. Gould v. N.Y. Cty. Health and Hosp. Corp.*, 490 N.Y.S.2d 87, 88-89 (N.Y. Sup. Ct. 1985) (concluding that a plaintiff's claim that hospital bed side railings "were defective and not properly raised" constituted an ordinary negligence claim).

at ___ (Johnson, J. dissenting). We disagree, and our disagreement concerns the essence of a health care liability claim.

JUSTICE JOHNSON's dissent assumes that a patient's claim against a hospital must implicate accepted standards of health care and safety by definition. But it is not the identities of the parties or the place of injury that defines the claim. *See Diversicare,* 185 S.W.3d at 854 (refusing to distinguish patient claims "'simply because the landowner is a health care provider'"). Rather, it is the cause of the injury and its relationship to medical or professional judgment that determines the claim's nature and the application of the Medical Liability and Insurance Improvement Act. *See* TEX. REV. CIV. STAT. art 4590i § 1.03 (a)(2), (4) (defining "health care" and "health care liability claim" as act or omission during patient's medical care, treatment or confinement that departs from accepted standards). Thus, injury caused by a failure to train and supervise the hospital's nursing staff or by a failure to supervise and assist the patient implicates the Act; that is, it involves a departure from accepted standards during a patient's medical care, treatment, or confinement. A claim involving a defective footboard, on the other hand, does not appear to implicate any medical or professional judgment[5] and was not in this case directly related to the patient's care, treatment, or confinement. Hence, we conclude in this case that the injury allegedly caused by the defective footboard was not a health care liability claim under the Act.

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[5] JUSTICE WAINWRIGHT's dissent agrees that *Diversicare* did not define safety and that the proper focus when addressing standards of safety should be on "whether medical judgment was employed in the equipment's use and its importance to the patient's care." ___ S.W.3d at ___ (Wainwright, J. dissenting). His apparent disagreement with the Court concerns the defective footboard's significance in the patient's care and treatment and its relationship to the medical or professional judgments made in the case. JUSTICE HECHT's dissent similarly views the defective footboard as an inseparable part of the professional negligence claim.

JUSTICE JOHNSON's dissent also accuses the Court of "conflating standards of safety with standards of health care," but our intention is just the opposite. ___ S.W.3d at ___ (Johnson, J. dissenting). "Standards of medical care or health care or safety" should each add something to the definition of "health care liability claim." None of these standards should be read so broadly as to subsume the others. Thus, standards of medical care and health care implicate the acts or omissions of physicians and other health care providers, respectively, while standards of safety concern a patient's exposure to unreasonably dangerous or defective conditions or things in the course of treatment. The dissent, however, reads safety so broadly as to subsume all duties—not only standards of medical care and health care, but also the breach of any other duty regardless of its connection to patient care or treatment. *See* ___ S.W.3d at ___ (Johnson, J. dissenting) (noting that "a safety-related cause of action is a health care liability claim" whenever a patient sues a health care provider or physician for a breach of duty involving safety). As we indicated in *Diversicare*, the focus must be on the gravamen of the claim, which is not determined merely by the defendant's status as a health care professional or the place of injury. *See Diversicare*, 185 S.W.3d at 854. We accordingly disagree that article 4590i makes every patient's claim against a health care professional a health care liability claim.

V

Although we have concluded that Marks's other negligence claims involving patient supervision and staff training are health care liability claims, a question remains concerning their dismissal. Marks argues that these claims should not have been dismissed because he was entitled to additional time to provide an expert report. Article 4590i generally requires a claimant to furnish

an expert report within 180 days after the filing of a health care liability claim. TEX. REV. CIV. STAT. art. 4590i, § l3.0l (d). If a claimant fails to comply with this requirement, the court is directed, on motion, to award appropriate costs and fees and to dismiss the health care liability claim with prejudice. *Id.* § 13.01(e). The 180-day period can be extended, however, for good cause and enlarged for accidents and mistakes. *Id*. § 13.01(f), (g). The latter enlargement is referenced in the statute as a grace period. *Id.* § 13.01(g).

Marks contends that he was entitled to this grace period because his failure to file the expert report on time was an accident or mistake within section 13.01(g)'s meaning. That section provides for a thirty-day grace period if, after a hearing, the court finds that the claimant's failure to file a timely expert report was a mistake or accident rather than intentional or the result of conscious indifference.[6] After hearing the Hospital's motion to dismiss and Marks's motion for a grace period, the trial court found that Marks's failure was not an accident or mistake and dismissed the suit. We review that dismissal under an abuse of discretion standard. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001).

In support of Marks's motion for a grace period, Marks's attorney, James E. Doyle, provided his affidavit. Doyle averred that he was Marks's second attorney, becoming lead counsel about seven months after the first attorney filed the case. Doyle further averred that he and Marks's first attorney

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[6] Section 13.01(g) of article 4590i provides:

> Notwithstanding any other provision of this section, if a claimant has failed to comply with a deadline [for filing the expert report] established by Subsection (d) of this section and after hearing the court finds that the failure of the claimant or the claimant's attorney was not intentional or the result of conscious indifference but was the result of an accident or mistake, the court shall grant a grace period of 30 days to permit the claimant to comply with that subsection. A motion by a claimant for relief under this subsection shall be considered timely if it is filed before any hearing on a motion by a defendant under Subsection (e) of this section.

"understood the case to be an ordinary negligence case, not a health care liability claim" at that time. According to Doyle's affidavit, it was only after discovery that he determined that Marks also had a potential health care liability claim, causing him to amend the pleadings and provide an expert report. This report was provided more than 500 days after the filing of Marks's original petition.

The amended petition divided Marks's claims under headings of "Negligence" and "Premises Liability." The original petition had lumped all claims under a single negligence heading. In the amended pleading, Marks included complaints about his bed, his care, and his supervision under the "Negligence" heading. Under the "Premises Liability" heading, Marks complained about the condition of the hospital bed. Doyle avers that he "believed that the case presented claims sounding only in ordinary negligence" until the time he filed the amended pleading.

In our view, no significant difference exists between the original and the amended pleading. The underlying factual complaint in both concern the same set of circumstances: inadequate care and supervision by the Hospital's professional staff and a dangerous hospital bed. "It is well settled that a health care liability claim cannot be recast as another cause of action to avoid the requirements of [article 4590i]." *Diversicare*, 185 S.W.3d at 851. Determining whether a pleading states a health care liability claim thus depends on its underlying substance, not its form. Doyle's affidavit does not clearly indicate what caused him to recognize for the first time that his client had a health care liability claim.

Equally significant, however, is the absence of any evidence explaining the first attorney's failure to furnish an expert report during the first seven months he represented Marks. Doyle's affidavit suggests that the first attorney also mistakenly believed that the original petition did not

implicate article 4590i. According to the affidavit, Doyle's belief is based on his review of the case file he inherited. Affidavits, however, must be based on personal knowledge, not supposition. *See* TEX. R. EVID. 602 ("A witness may not testify to a matter unless . . . the witness has personal knowledge of the matter."). An affidavit not based on personal knowledge is legally insufficient. *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) (per curiam). Because Doyle had no personal knowledge of the first lawyer's intent, and the first lawyer did not provide his own affidavit explaining his failure, there is no evidence of mistake or accident and thus no basis for the requested grace period. Accordingly, the trial court did not abuse its discretion in denying Marks's motion for a grace period under section 13.01(g) and did not err in dismissing Marks's health care liability claims. *See* TEX. REV. CIV. STAT. art. 4590i, § 13.01(e)(3) (stating that dismissal is "with prejudice to the claims refiling").

* * *

To summarize, article 4590i does not apply to Marks's claim concerning the defective hospital bed footboard because that claim concerns ordinary, not medical, negligence and thus is not a health care liability claim. Marks's other claims alleging negligent care and supervision are health care liability claims to which article 4590i does apply. Finally, Marks is not entitled to have the period for filing an expert report enlarged under the grace period provision of article 4590i because he has not established that the failure to comply with the statute was a mistake or accident.

The judgment of the court of appeals is affirmed in part and reversed in part, and the cause is remanded to the trial court for further proceedings consistent with our opinion.

David Medina
Justice

OPINION DELIVERED: August 28, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0783

IRVING W. MARKS, PETITIONER,

v.

ST. LUKE'S EPISCOPAL HOSPITAL, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued September 11, 2008

CHIEF JUSTICE JEFFERSON, concurring.

In *Diversicare*, a case involving a sexual assault of one nursing home patient by another, I argued that the MLIIA's broad "safety" definition encompassed what would otherwise be ordinary premises liability claims against health care providers. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 859-61 (Tex. 2005) (Jefferson, C.J., concurring and dissenting). The Court, however, disagreed, noting that "[t]here may be circumstances that give rise to premises liability claims in a healthcare setting that may not be properly classified as health care liability claims." *Id*. at 854. The Court described the plaintiff's claims in that case as "implicat[ing] more than inadequate security or negligent maintenance," unlike claims involving "an unlocked window that gave an intruder access to the facility or a rickety staircase that gave way under her weight." *Id.*

The loose footboard here is indistinguishable from the rickety staircase referred to in *Diversicare*. Under *Diversicare*, Marks's claim is a "premises liability claim[] in a healthcare setting that may not be properly classified as [a] health care liability claim[]." *Id.* Accordingly, I join the Court's opinion and concur in its judgment.

_____
Wallace B. Jefferson
Chief Justice

Opinion Delivered: August 28, 2009

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Argued September 11, 2008

JUSTICE HECHT, dissenting.

I join JUSTICE JOHNSON's dissent with this bit of explanation.

Marks has never had but one complaint: that he fell in his hospital room. The "Facts" section of his original petition and four amended petitions never changed substantively.[1] All his alleged

[1] The "Facts" section of Marks's original petition stated:

"5. On or about March 24, 2000, Irving Marks, a 66-year-old man, suffered severe injuries after a fall from his hospital bed at St. Luke's.

"6. Mr. Marks was admitted to St. Luke's on March 17, 2000, to undergo treatment for chronic intractable failed back symptomatology and intractable radiculopathy after five lumbar operations failed to cure Mr. Marks' severe back problems.

"7. On March 17, 2000, Mr. Marks underwent surgery to implant an intrathecal morphine pump catheter. Immediately following his surgery, Mr. Marks began his morphine treatment with an initial dose of .25 milligrams, and

damages occurred in that one event. But he contends that he has two claims against the Hospital: one for breaching the standard of professional care in treating him, a health care liability claim, and another for breaching the standard of ordinary care in attaching the footboard to his hospital bed, an ordinary negligence claim. He argues that his original petition pleaded only a claim of ordinary negligence,[2] as made clear in his first amended petition,[3] but that his second, third, and fourth

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Mr. Marks' morphine doses were raised incrementally up to four milligrams on the ninth day.

"8. After his surgery and his morphine treatment, Mr. Marks' condition improved drastically until Mr. Marks fell the night of March 24, 2000.

"9. At the time of his fall, Mr. Marks was getting up from his hospital bed in the middle of the night, and Mr. Marks was in an upright position sitting at or near the foot of his hospital bed. Mr. Marks placed his hand on the hospital bed's footboard to push himself up to a standing position. As he was pushing himself up, the hospital bed's footboard fell off causing Mr. Marks to fall to the floor.

"10. Mr. Marks suffered severe personal injuries as a result of the fall."

Marks's first amended petition renumbered the paragraphs because of insertions earlier in the pleading, changed "drastically" to "markedly" in original paragraph 8, and omitted original paragraph 10. Original paragraph 9 was edited to read: "At the time of his fall, Mr. Marks was getting up from his hospital bed. Mr. Marks was in an upright position sitting at or near the foot of his hospital bed. As Mr. Marks placed his hand on the hospital bed's footboard to push himself up to a standing position, the hospital bed's footboard broke free from the bed causing Mr. Marks to tumble to the floor." Two new paragraphs, 12 and 13, were added, the first alleging that "[i]n addition to a shoulder dislocation, Plaintiff suffered severe injuries to his, knee, neck, and head", and the second that "[a]s a result of his injuries, Mr. Marks had to seek further treatment at Methodist Hospital and the Texas Institute for Rehabilitation and Research."

Marks's second and third amended petitions made no changes in the section. His next amended petition changed "Irving Marks", "Mr. Marks", and "Plaintiff" to "Irving W. Marks" throughout, changed "tumble" to "fall" in the revision of original paragraph 9, changed "dislocation" to "injury" in paragraph 12, and shortened original paragraph 6 to read: "Irving W. Marks was admitted to St. Luke's on March 17, 2000, to undergo treatment for back pain."

[2] Marks's original petition asserted that the Hospital "breached the duty of ordinary care" in four "particulars":

"a. By failing to properly train and supervise any and all agents, employees, servants, and nursing staff when caring for Mr. Marks to prevent and protect him from falls and injuries;

"b. By failing to provide Mr. Marks with the assistance he required for daily living activities;

"c. By failing to provide Mr. Marks with a safe environment in which to receive treatment and recover; and

amended petitions asserted both a health care liability claim and an ordinary negligence claim.[4] Marks filed expert reports that were timely in relation to the second amended petition but late with

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"d. By providing Mr. Marks with a hospital bed that had been negligently attached and assembled by the Defendant's employees, agents, servants or nursing staff."

[3] In response to the Hospital's request that Marks clarify whether he was asserting a health care liability claim, he filed his first amended petition, asserting that the Hospital had "breached the duty of ordinary care" in only these two "particulars":

"a. Failing to install and/or maintain bed rails on the bed occupied by Mr. Marks, and

"b. Failing to repair and/or maintain the footboard to Mr. Marks' bed."

The first amended petition also contained a new section labeled "Premises Liability", asserting that Marks's hospital bed was in a "dangerous condition . . . attributed to its unstable, broken and/or defective footboard and the improper use or absence of its bedrails. This condition posed an unreasonable risk of harm."

[4] In his second amended petition, repeated in his third and fourth amended petitions, Marks asserted that the Hospital had "breached the duty of ordinary care" in these "particulars":

"a. Failing to install and/or maintain bed rails on the bed occupied by Mr. Marks;

"b. Failing to properly assemble and/or maintain Mr. Marks' bed;

"c. Failing to repair and/or maintain the footboard to Mr. Marks' bed;

"d. Failing to properly monitor Mr. Marks;

"e. Failing to inspect Mr. Marks' bed;

"f. Failing to implement adequate policies and procedures to inspect its hospital beds;

"g. Failing to take precautions to prevent Mr. Marks' fall;

"h. Failing to ensure that adequate policies and procedures were in place for the hiring, training and supervision of the nursing staff at the hospital; and

"i. Failing to ensure that the person(s) hired to work at the hospital had a sufficient understanding of safety concerns for the patients and was competent to formulate policies and procedures for patient safety and quality assurance."

The second, third, and fourth amended petitions retained the "Premises Liability" section essentially unchanged, but in their "Negligence" sections added the allegation that the Hospital was negligent in its "nursing monitoring, nursing care and/or treatment" of Marks.

respect to the original petition. The Court concludes that he asserted both claims from the beginning, that his health care liability claim was properly dismissed for failure to timely file an expert report, and that only his ordinary negligence claim remains.

I agree with JUSTICE JOHNSON, for the reasons he thoroughly explains, that Marks had but one claim from the beginning, a health care liability claim. The Court speculated in *Diversicare General Partner, Inc. v. Rubio* that "[t]here may be circumstances that give rise to premises liability claims in a healthcare setting that may not be properly classified as health care liability claims,"[5] but we certainly did not suggest that the same circumstances could give rise to *both* a health care liability claim *and* an ordinary negligence claim. JUSTICE JOHNSON warns of problems attendant to that approach. In terms of concrete examples, a plaintiff may intend to assert only an ordinary negligence claim, as Marks says he did, only to be told after the deadline for an expert report that he also asserted a health care liability claim that must be dismissed. Artful pleading is risky because, as we said in *Diversicare*, it is the "gravamen of [the] complaint", not the label, that is determinative.[6] On the other hand, a plaintiff may attempt to plead only an ordinary negligence claim at first and defer pleading a health care liability claim in order to allow more time for filing an expert report and to conduct full discovery immediately.[7] This subterfuge should not succeed. And if two separate

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[5] 185 S.W.3d 842, 854 (Tex. 2005).

[6] *Id.*

[7] *See* TEX. CIV. PRAC. & REM. CODE § 74.351(s) ("Until a claimant has served the expert report and curriculum vitae as required by Subsection (a), all discovery in a health care liability claim is stayed except for the acquisition by the claimant of information, including medical or hospital records or other documents or tangible things, related to the patient's health care through: (1) written discovery as defined in Rule 192.7, Texas Rules of Civil Procedure; (2) depositions on written questions under Rule 200, Texas Rules of Civil Procedure; and (3) discovery from nonparties under Rule 205, Texas Rules of Civil Procedure.").

claims are tried to verdict and judgment, a jury will be asked to apply two different standards of care to the same conduct and determine damages for each breach separately, and the trial court will be required to apply different limitations to the same findings of damages.[8]

In the abstract, health care may not seem to involve bed assembly. In a hospital room, in the circumstances presented, I agree with JUSTICE JOHNSON that it must.

Nathan L. Hecht
Justice

Opinion delivered: August 28, 2009

[8] *Id*. §§ 74.301-.303.

IN THE SUPREME COURT OF TEXAS

NO. 07-0783

IRVING W. MARKS, PETITIONER,

v.

ST. LUKE'S EPISCOPAL HOSPITAL, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued September 11, 2008

JUSTICE WAINWRIGHT, dissenting.

I join Justice Johnson's dissent for the reasons he cogently explains. I write to explain further my differences with the Court's opinion and to lament the Court's reversal of several precedents that precluded artful pleading of claims to circumvent legislative requirements to pursue medical malpractice cases.

Under article 4590i, section 1.03(a)(4) of the Medical Liability and Insurance Improvement Act (MLIIA),[1] there are three types of health care liability claims: claims arising from failure to satisfy the standards of care for medical care, for health care, or for safety. TEX. REV. CIV. STAT.

[1] In 2003, article 4590i was repealed, amended, and recodified in Chapter 74 of the Civil Practice and Remedies Code, which applies to health care liability claims filed on or after September 1, 2003. *See* Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, 2041, *repealed* by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884 (current version at TEX. CIV. PRAC. & REM. CODE§§ 74.301–.303).

art. 4590i, § 1.03(a)(4) (defining "health care liability claim" as an action against a physician or other health care provider for a "claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient"). In *Diversicare General Partner, Inc. v. Rubio*, we held that an assault at a nursing home by a patient with reduced mental faculties on another mentally challenged patient was a health care claim. 185 S.W.3d 842, 849 (Tex. 2005). Citing statutory health care duties of nursing homes, we explained that nursing home residents were patients at those facilities not merely for shelter, as apartment residents, but also for health care and treatment. *Id.* at 850–51. We also concluded that the inclusion in 4590i of claims based on failure to provide adequate "safety" broadened the scope of the statute beyond medical and health care and, therefore, was another basis for concluding that the assault between patients was a health care liability claim. *Id.* at 855. It was not necessary in *Diversicare* to precisely define the scope of the "safety" component of a health care liability claim, and we did not.

The Court's opinion and the concurrence misconstrue *Diversicare*. The bulk of *Diversicare* construes "health care" under 4590i. Responding to the dissent and concurrence, the opinion in *Diversicare* noted that an injury to a patient resulting from a rickety staircase or an unlocked window does not implicate the "health care" prong of health care liability claims. *Id.* at 854. In this case, the Court and the concurrence erroneously cite those examples as exceptions to the scope of 4590i's "safety" prong in *Diversicare*. *Diversicare*'s only holding concerning the "safety" prong was that its inclusion expanded the reach of the statute and that it was broad enough to include Rubio's claim in that case. *Id.* at 855.

Different from *Diversicare*, this case concerns the circumstances that bring a hospital equipment failure within the scope of article 4590i. Marks underwent surgery at St. Luke's Hospital to implant a lumbar morphine pump catheter into his spinal cord to alleviate back problems. His medical records indicated that St. Luke's Hospital implemented extra safety and fall precautions due to his risk of falling, his limited mobility, his need for an ambulatory assistance device, and his morphine therapy. The hospital's instructions included that his hospital bed was to be "in a low position with the brakes applied," and a fall precaution sticker was placed on the outside door of his room and on his medical chart. The health care providers concluded that Marks required certain prescribed precautions to address his risk of falling as part of his post-surgical care. The Court ignores these and other medical judgments and concludes that the fall was a matter of ordinary negligence disconnected from his hospital treatment.

The Court's conclusion ignores the physician's expert report that Marks himself provided in connection with his claim for medical malpractice. *See* TEX. REV. CIV. STAT. art. 4590i, § 13.01(d) (requiring the substantiation of health care liability claims with a timely served expert report). Marks's expert opined that the "accepted standard of care for nursing and hospital practice is to provide the patient with reasonably safe medical equipment, including a hospital bed for in-patients" and to "implement interventions to eliminate and reduce the patient's risk of falling." The physician concluded that the hospital violated "accepted standards of good nursing care" by failing to provide Marks with a safe hospital bed and, specifically, by failing "to ensure that the footboard was properly secured to the bed." Marks's own expert determined that, "to a reasonable degree of medical probability," breach of these nursing standards of care was the proximate cause of Marks's

fall from the hospital bed. Whether these conclusions are supported by sufficient evidence will be questions for the jury, but they unquestionably establish that Marks pled a health care liability claim and, at least in the amended pleadings, he acknowledged that.

The Court initially asks the right question—whether medical judgment was employed in the equipment's use and its importance to the patient's care. But the Court then inexplicably analyzes whether medical or professional judgment was involved in "the assembly of Marks's hospital bed." __ S.W.3d __. It is difficult to understand how the necessity of medical judgment in the assembly of equipment determines whether that equipment's use meets accepted standards of safety in the definition of a health care liability claim.[2] Under this approach for construing 4590i, a hospital's exoneration from or liability for a defective hospital bed would depend on whether assembly of the bed required the input of a medical professional.[3] Likewise, a claim for injuries caused by the improper operation of a surgical drill due to the failure to tighten the drill bit would give rise to a health care liability claim *if* knowledge of a physician is required to assemble the drill. The Court's reasoning also suggests, for example, that if a defective MRI scanner used to perform a magnetic resonance imaging scan causes injury to a person, the circumstance would not give rise to liability under 4590i unless medical judgment was required to assemble the scanner.

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[2] This assumes the Court is correct that, to be a valid claim for inadequate "safety" under article 4590i, the claim must be an inseparable or integral part of the patient's care or treatment. *See* ___ S.W.3d ___.

[3] Marks based his negligence claim on the improper assembly or maintenance of the hospital bed. However, that does not mean that the determination of whether the claim is a health care claim should turn on whether the assembly of the bed required medical know-how or judgment. By focusing on the assembly rather than the use of the bed, Marks has directed the Court away from the evidence demonstrating the bed's medical purpose and use. The Court has taken the bait, despite our repeated warnings in several cases not to fall for artful pleading. *See* ___ S.W.3d ___.

If the hospital equipment is used in patient care and treatment, its operation at least implicates medical care and health care. But the Court fails to answer these questions and instead discusses whether the *assembly* of the hospital equipment was the responsibility of the hospital's maintenance staff or its medical staff. Concluding that the assembly of the equipment was the responsibility of maintenance staff, the Court, therefore, explains that the hospital bed was "unrelated to any professional judgment and is merely incidental to the patient's care." ___ S.W.3d ___. Would the Court also conclude that tightening a drill bit on a surgical drill was the responsibility of maintenance staff and therefore a patient's injury arising from negligent assembly of the drill or its use during surgery would not be a health care liability claim?

I further wonder if anyone else would agree that the type of bed in which we recuperate from back surgery is merely "incidental" to our care. If that were true, neither a sleeping bag on the floor nor a wooden board elevated on wheels would violate 4590i's treatment standards for a patient who had undergone back surgery. Under the Court's characterization of the hospital bed's role in Marks's care, the instructions in his medical records for specific settings for his bed to recuperate after the surgery are superfluous. And the Court has apparently decided, contrary to the trial court and with no controverting evidence, that the opinions of Marks's physician expert are wrong.

I am also concerned that the Court reverses several precedents. The Court holds that three of the four negligence claims against St. Luke's Hospital are health care liability claims. Those three claims are for 1) failure to train and supervise the nursing staff properly, 2) failure to provide Marks with the assistance he required for daily living activities, and 3) failing to provide him with a safe environment in which to recover. The Court decides that the fourth claim as pled by

Marks—providing a hospital bed that had been negligently assembled and maintained by the hospital's employees—was not a health care liability claim. Yet, all four claims arose from the same facts involving the hospital bed provided to Marks as part of recuperation from back surgery. The Court cites *Diversicare* for its conclusion that the first three claims are health care liability claims, but then fails to follow *Diversicare* and other precedents prohibiting claim-splitting to avoid the statutory limitations on medical malpractice suits.

This Court has repeatedly held that parties may not employ artful pleading to circumvent the requirements for filing a health care liability claim—e.g., shorter statute of limitations than other negligence claims, heightened filing requirements (providing expert reports within 120 days of filing the lawsuit), and caps on damages. *Diversicare*, 185 S.W.3d at 846–49. Negligence claims that are not health care liability claims are not subject to these requirements. To preclude creative recasting of health care liability claims as ordinary negligence claims to circumvent the statutory requirements, we have held that the underlying nature of the claim governs its categorization and not how the petition is worded. *E.g.*, *Sorokolit v. Rhodes*, 889 S.W.2d 239, 242 (Tex. 1994). In *Diversicare*, we reaffirmed the well established rule that "artful pleading and recasting of claims is not permitted" and warned that allowing claim-splitting in the pleadings to recast health care liability claims as something else "would open the door to splicing health care liability claims into a multitude of other causes of action with standards of care, damages, and procedures contrary to the Legislature's explicit requirements." *Id.* at 854. In *Murphy v. Russell*, we reaffirmed that a "claimant cannot escape the Legislature's statutory scheme by artful pleading." 167 S.W.3d 835, 838 (Tex. 2005). In *MacGregor Medical Ass'n v. Campbell*, we prohibited a claimant from bringing a health care

liability claim veiled as a violation of the Deceptive Trade Practices Act, repeating that claimants may not thwart the express legislative intent of the MLIIA by recasting health care claims as DTPA claims to avoid the standards set forth in the MLIIA. 985 S.W.2d 38, 39–40 (Tex. 1998). And fifteen years ago we established in *Sorokolit v. Rhodes* that "[c]laims that a physician or health care provider was negligent may not be recast . . . to avoid the standards set forth in the Medical Liability and Insurance Improvement Act." 889 S.W.2d at 242.

The Court reverses these precedents and takes the position that three of Marks's claims assert health care liability claims and one does not, even though all the claims are of the same underlying nature. The Court allows a claimant to pursue both health care liability claims and non-health care liability claims based on the same facts involving a health care provider. Marks's claim for ordinary negligence in the alleged defective assembly of the hospital bed mirrors the health care liability claim. I would adhere to our precedents and again preclude artful pleading to circumvent the Legislature's objectives under article 4590i. Because the Court does not, I respectfully dissent.

_____

Dale Wainwright
Justice

OPINION DELIVERED: August 28, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0783

IRVING W. MARKS, PETITIONER,

v.

ST. LUKE'S EPISCOPAL HOSPITAL, RESPONDENT

ON PETITION FOR REVIEW FROM THE
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Argued September 11, 2008

JUSTICE JOHNSON, joined by JUSTICE HECHT, JUSTICE WAINWRIGHT, and JUSTICE WILLETT, dissenting.

The Court today allows a health care liability claim to go forward despite Marks's failure to comply with the Medical Liability Insurance Improvement Act (MLIIA or Act). It does so by (1) condoning the recasting of a claim by a patient based on an injury caused by specialized hospital equipment into a non-health care claim by artful pleadings; and (2) misconstruing plain, unambiguous statutory language. I dissent.

Marks underwent surgery at St. Luke's Hospital to implant a morphine pump into his spinal cord after multiple previous surgeries failed to alleviate his back problems. After surgery, the nursing staff made a notation in his medical records that he was at risk of falling because of his

limited mobility, his need for an ambulatory assistance device, and the fact he was on morphine, and "Safety/Fall Precautions" were being implemented. The hospital's Safety/Fall Precautions included provisions that there should be "no environmental hazards" in Marks's room, his hospital bed was to be "in a low position with the brakes applied," and the "side rails and safety devices" should be used as indicated. Marks alleges that seven days after his surgery and while still an inpatient, he and the footboard on his hospital bed fell when he placed his hand on the footboard and attempted to push himself from the bed to a standing position.

Marks sued St. Luke's. He alleged the hospital was negligent in the following respects: (1) failing to properly train and supervise hospital employees in how to prevent falls and injuries; (2) failing to provide Marks with the assistance he required for daily living activities; (3) failing to provide him with a safe environment in which to receive treatment and recover; and (4) providing him with a hospital bed that had been negligently assembled and maintained by the hospital's employees or nursing staff. The Court holds, and I agree, that the first three claims are health care liability claims that fall under the MLIIA. But, unlike the Court, I would hold that the entire suit is a health care liability claim subject to the procedures and limitations set out in the Act.

In order to preclude Marks's suit from being subject to the MLIIA, the Court must, and does, reach three conclusions with which I disagree. The first is that one injury based on a single set of facts can, by the manner in which pleadings are formulated, be both a health care liability claim and a non-health care liability claim. The second is that a hospital bed furnished to a post-surgery hospital inpatient is not an inseparable part of health care provided by the hospital. The third is that

accepted standards of hospital safety do not include providing safe hospital beds to patients confined in the hospital.

First, the Court's holding allows a cause of action by a patient against a health care provider to be both a health care claim and a non-health care claim, even though the action arises from a single injury based on a single set of facts. The Court concludes that because of the manner in which Marks pleads his suit, three of his liability theories are health care liability claims while the other is a premises liability claim that is not subject to the MLIIA. In *Diversicare*, the concurring and dissenting justices similarly concluded that the victim of sexual assault at a nursing home asserted a premises liability claim against the nursing home independent of her health care liability claim. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 857-58 (Tex. 2005) (Jefferson, C.J., concurring in part, and dissenting in part); *id.* at 861-66 (O'Neill, J., dissenting). The Court rejected that view because it "would open the door to splicing health care liability claims into a multitude of other causes of action with standards of care, damages, and procedures contrary to the Legislature's explicit requirements. It is well settled that such artful pleading and recasting of claims is not permitted." *Id.* at 854; *see also Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005) ("[A] claimant cannot escape the Legislature's statutory scheme by artful pleading."); *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004) ("Plaintiffs cannot use artful pleading to avoid the MLIIA's requirements when the essence of the suit is a health care liability claim."). The Court today circumvents explicit language the Court used in *Diversicare* and other cases rejecting this type of claim-splitting by pleadings. The holding will inevitably open the door to manipulated, inventive, and artful pleading designed to avoid the MLIIA requirements and limitations by recasting of claims.

Allowing this type of claim-splitting almost assuredly will lead to more extended and expensive trial court proceedings to determine whether a patient's pleadings assert health care liability claims subject to the MLIIA, non-health care liability claims, or both; and if both, which is which. As this appeal shows, there will be more extended and expensive appellate proceedings for the same purpose. Extended judicial proceedings and associated increased costs, including "economic" settlements to avoid litigation expense, are a significant part of what the Legislature intended to avoid through enactment of the MLIIA. *See* former TEX. REV. CIV. STAT. art. 4590i, § 1.02(b)(2);[1] *see also id.* § 1.02(b)(1).

The most appropriate course in circumstances such as these is the course the Court has taken before today: when the substance of a patient's claim for injury comes within the statutory definition of a health care liability claim, then the MLIIA applies to all the plaintiff's claims against the health care provider based on that injury. Here, no matter how Marks pleads his case, the substantive facts implicate questions about whether St. Luke's met accepted standards of health care and safety. His injury arose during his hospital confinement and from his use of a hospital bed—a bed the nurses' notes show was a specialty bed being used for patient care—that was allegedly improperly assembled and maintained by hospital employees. For this reason, I would hold that Marks's injury and damages arise from a health care liability claim and that he cannot avoid application of the MLIIA by pleading otherwise.

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[1] Medical Liability and Insurance Improvement Act of Texas, 65th Leg., R.S., ch. 817, § 1.02, 1977 Tex. Gen. Laws 2039, 2040, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884. While this case was pending, the Legislature repealed the MLIIA, amended parts of the previous article 4590i, and recodified it in 2003 as chapter 74 of the Texas Civil Practice and Remedies Code. Because article 4590i continues to govern this case, citations are to the former article rather than the Civil Practice and Remedies Code.

Next, I would hold that the hospital bed furnished to Marks was an integral and inseparable part of the health care he received from St. Luke's, so his allegations that the bed was negligently assembled and maintained fall within the provisions of the MLIIA. Thus, even if a plaintiff could recast a health care claim into another type of claim by artful pleadings, Marks has not done so.

In determining whether the MLIIA encompasses Marks's claims, the statutory construction rules are well established. When interpreting statutes, courts should ascertain and give effect to the Legislature's intent as expressed by the language of the statute. *E.g.*, *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009); *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) ("[W]hen possible, we discern [legislative intent] from the plain meaning of the words chosen."). The prime principle to follow when construing a statute is "the words [the Legislature] chooses should be the surest guide to legislative intent." *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999). Only when those words are ambiguous do we "resort to rules of construction or extrinsic aids." *In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex. 2007). We use definitions prescribed by the Legislature and any technical or particular meaning the words have acquired, but otherwise we construe the statute's words according to their plain and common meaning unless a contrary intention is apparent from the context or unless such a construction leads to nonsensical or absurd results. *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 633 (Tex. 2008); *see also Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

St. Luke's asserts Marks's suit implicates accepted standards of both health care and safety as referenced by the MLIIA. The Court, however, focuses on St. Luke's safety argument and

summarily concludes Marks's hospital bed claim does not assert a departure from the accepted standards of health care. ___ S.W.3d at ___. I disagree.

The MLIIA defines a health care liability claim as follows:

> a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, whether the patient's claims or cause of action sounds in tort or contract.

TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4).[2] Under the statute, a cause of action is a health care liability claim if it (1) is against a health care provider or physician; (2) for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety; and (3) the alleged departure from accepted standards proximately results in injury to or death of the patient. The Act broadly defines "health care" as

> any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(2); *see Diversicare*, 185 S.W.3d at 847 (describing health care as "broadly defined" under the MLIIA).

As relevant here, health care includes *any act* that was or should have been performed by a health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement. Applying this broad definition, we have previously concluded that a cause of action alleges a departure from accepted standards of health care if the act or omission complained of is an

[2] Medical Liability and Insurance Improvement Act of Texas, 65th Leg., R.S., ch. 817, § 1.03, 1977 Tex. Gen. Laws 2039, 2041, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

inseparable part of the rendition of health care services. *Diversicare*, 185 S.W.3d at 848; *see Walden v. Jeffery*, 907 S.W.2d 446, 448 (Tex. 1995).

In this case, no one suggests Marks's hospital confinement while recovering from the latest of several back surgeries was not medically necessary. It logically follows that if his condition made hospitalization medically necessary, then the hospital had to provide him with a reasonably safe hospital bed. Indeed, the expert reports Marks eventually filed explicated that as an accepted standard of care. *See* TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(2). And, if a reasonably safe hospital bed was necessary for Marks's care and recuperation, it follows that the bed was an integral and inseparable part of his care and treatment, especially in this case in which it was an integral part of the hospital's Safety/Fall Precautions protocol. *See Diversicare*, 185 S.W.3d at 849-54.

Nevertheless, the Court focuses on the assembling of the bed as opposed to its use in patient care and determines that Marks's claim for negligent assembly and maintenance of the bed is not a health care liability claim because it is based on the breach of an ordinary standard of care and not on a discrete standard of care applicable to the health care industry. Under this holding, St. Luke's owed Marks the general duty of care owed by businesses to their invitees.[3] But although health care providers and patients may well be premises owners or occupiers and invitees, the Legislature has imposed requirements on how suits by patients against health care providers may be brought. Those requirements differ from general requirements for suits by invitees against premises owners or

[3] As the Court did in *Diversicare*, I "note the irony" of this position. *Diversicare*, 185 S.W.3d at 853. In his brief, Marks asserts that the MLIIA should not apply to his claim because it is a premises liability claim based on ordinary negligence. But "[i]f we were to agree with [him], our decision would have the effect of lowering the standard from professional to ordinary care for [patients] in health care facilities under similar circumstances." *Id.* at 853-54.

occupiers. *See* TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(3); *Diversicare*, 185 S.W.3d at 850 ("The obligation of a health care facility to its patients is not the same as the general duty a premises owner owes to invitees."). If Marks had been a guest in a hotel when his bed fell, his fall could well have given rise to a premises liability claim. But he was not a hotel guest; he was a patient receiving health care in a hospital. There is a difference because of the MLIIA. *Diversicare*, 185 S.W.3d at 850 ("There is an important distinction in the relationship between premises owners and invitees on one hand and health care facilities and their patients on the other. The latter involves health care."). Further, the bed furnished to Marks was much more than a hotel bed. As indicated by the nurses' notes, the bed was intended to be and was being used as a specialized patient care bed. The nurses' notes referenced Safety/Fall Precautions that included keeping the bed in a low position with the brakes applied and using the bed's side rails and safety devices as indicated.

While Marks was a patient, the hospital provided him with a hospital bed as part and parcel—an integral and inseparable part—of actions "furnished, or which should have been performed or furnished, by [St. Luke's] for, to, or on behalf of [Marks] during [Marks's] medical care, treatment, or confinement." *See* TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(2). And even if it were debatable whether a safe, specialized hospital bed was integral to and inseparable from health care St. Luke's provided to Marks, the Court need look no further than Marks's own expert reports for the answer. Marks eventually served expert reports from Dr. Jeffrey D. Reuben, an orthopedic surgeon, and Jan Zdanuk, a nurse practitioner. Although the reports were served too late to save his

health care claims from dismissal, they demonstrate what Marks contends is the proper standard of care.[4] Dr. Reuben opined:

> The accepted standard of care for nursing and hospital practice is *to provide the patient with reasonably safe medical equipment, including a hospital bed for in-patients, to receive and recover from medical treatment*. The accepted standard of good care for nursing and hospital practice is to evaluate each patient to determine if he/she is a risk to fall. . . . If a . . . patient may be a risk to fall, the accepted standard of good care for nursing and hospital practice is to implement interventions to eliminate and reduce the patient's risk of falling. . . .
>
> . . . [St. Luke's] knows that patients would use the footboard on a hospital bed as support to get out of bed. It is for this reason that the hospital footboard should be firmly secured to the hospital bed. *[St. Luke's] staff violated the accepted standard of care by failing to provide [Marks] with a [footboard] that was properly secured to the hospital bed*. . . . Given [St. Luke's] staff's knowledge that [Marks] was a risk to fall, that he was on morphine, and that its patients use the footboard as support to get out of the hospital bed, [St. Luke's] nursing staff should have provided [Marks] with a footboard that was properly secured to the hospital bed, and as part of its ongoing duty to assess and identify potential fall hazards, should have identified and properly secured the footboard to the hospital bed.

(emphasis added).

Nurse Zdanuk's opinion was similar:

> Hospitals have a duty to provide a safe environment of care for all patients. *This includes equipment such as hospital beds that must be maintained in safe operating condition at all times.* It is a breach in the standard of care for a footboard to fall off a bed when a patient leans on it while attempting to get up resulting in a fall with serious injuries.

(emphasis added).

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[4] Marks asserts the Court should not consider the expert reports because the "experts were retained to opine as to the standards involved in the health care liability claims that were added in [Marks's] Second Amended Petition. They do not address the ordinary standards of care involved in Marks's other claims." But as the Court acknowledges, "there is no significant difference" between Marks's original and amended petitions. ___ S.W.3d at ___. Both petitions included claims based on the hospital bed, and both experts concluded St. Luke's violated the accepted standard of care for health care providers by providing Marks with an improperly assembled hospital bed.

This is not, as Marks asserts, a claim merely for "broken furniture;" it is a claim by a patient based on a bed that was more than a mere piece of furniture. A waiting room chair is a mere piece of furniture. Even a chair in Marks's hospital room for his guests to sit on, or a cot for them to rest on, might be classified as a mere piece of furniture. A specialized hospital bed that proof shows (1) has wheels and brakes so it can be used to transport patients as well as to allow patients to rest and recuperate, (2) is built so it can be raised and lowered to accommodate patients' needs, and (3) has side rails and other safety devices, cannot be so classified. The Legislature has prescribed and the expert reports filed in this case recognize that disputes such as the one before us involve standards of care owed by hospitals to patients.

The Court, however, says that Marks's hospital bed allegations can be distinguished from a health care liability claim because the maintenance staff "responsible for assembling Marks's bed . . . would not have been considered health care providers when doing so." ___ S.W.3d at ___. The Court misses the mark in two ways. First, Marks's Original Petition states that the hospital bed was negligently assembled by St. Luke's "employees, agents, servants or nursing staff." Nurses are specially-trained health care providers that exercise professional judgment. But second, and more importantly, the MLIIA does not limit "health care" to those actions taken by nurses or doctors. Rather, the legislative definition of health care includes "any act" which was or should have been performed or furnished "by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement." TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(2). And, importantly, the Act defines "health care provider" as

> any person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home, *or an officer, employee, or agent thereof* acting in the course and scope of his employment.

TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(3)(emphasis added).

The definition plainly includes, without qualification, employees of health care providers so long as they are acting in the course and scope of their employment. The definition's course and scope language does not purport to address the *liability* of health care employers such as hospitals for the actions of their officers, employees, and agents, and it is not necessary to do so; employers are liable under general principles of agency law for the actions of their officers, agents, and employees acting in the course and scope of their employment. So, unless the phrase "course and scope of his employment" is construed to be what it must be—a description of which officers, employees, and agents are health care providers—the phrase is surplusage. But we presume the Legislature intended an entire statute to be effective, so we "try to give effect to all the words of a statute, treating none of its language as surplusage when reasonably possible." *Phillips v. Bramlett*, ___ S.W.3d ___, ___ (Tex. 2009); *see* TEX. GOV'T CODE § 311.021(2). Properly construing the "course and scope of employment" language to define the types of employees who are health care providers avoids the type of strained analysis the Court undertakes today by dissecting and inquiring into nuances of language used to plead a cause of action; distinguishing between categories of health care provider employees based on duties, types of actions performed, and the type of judgment exercised; and speculating as to insurance coverages when there are no policies in the record. The Court distinguishes acts or omissions of hospital workers with specialized health care training from

hospital workers that do not have specialized health care training but are nevertheless necessary for a hospital to properly care for patients. The statute does not do so; it does the very opposite. The Court's interpretation contradicts the literal and plain statutory language despite the fact that the context of the language does not call for the Court's interpretation. Moreover, giving the language its literal meaning does not yield absurd or nonsensical results. The Court's "interpretation" violates long-established tenets of statutory construction. *See, e.g.*, *In re Jorden*, 249 S.W.3d 416, 423 n.32 (Tex. 2008) ("There are instances where the literal meaning of a statute may be disregarded. But it is only where it is perfectly plain that the literal sense works an absurdity or manifest injustice.") (quoting *Gilmore v. Waples*, 188 S.W. 1037, 1039 (Tex. 1916)).

The Court additionally states that Marks's claim for negligent assembly and maintenance of the bed is not a health care liability claim because expert medical testimony would not be necessary to prove the claim.[5] Yet, this Court has previously stated that such a circumstance does not preclude a claim from being subject to the MLIIA:

> The fact that in the final analysis, expert testimony may not be necessary to support a verdict does not mean the claim is not a health care liability claim. A claim may be a health care liability claim to which the damage caps and expert report requirements are applicable and yet not require expert testimony to prevail at trial.

Murphy, 167 S.W.3d at 838; *see also Haddock v. Arnspiger*, 793 S.W.2d 948, 951 (Tex. 1990) (noting that expert testimony is not needed to establish breach of a medical duty where the departure

[5] Marks, however, was not so sure. In the trial court he designated Dr. Reuben as an expert witness who "is expected to testify that St. Luke's violated the accepted standard of care of good nursing and hospital practice on March 25, 2000, by failing to provide the plaintiff with a reasonably safe hospital bed in which to receive and recover from medical treatment . . . [or] by providing the plaintiff with a hospital bed with a footboard that was not properly secured or attached to the hospital bed."

is plainly within the common knowledge of laymen). The legislatively-mandated expert report requirement merely establishes a procedural threshold over which a claimant must pass to continue the lawsuit. *Murphy*, 167 S.W.3d at 838.

A patient's medically necessary, specialized hospital bed is different from other property or parts of a premises not designed and intended primarily for use by and in the care of patients, such as a rickety staircase, a defective waiting room chair, or an unlocked window. The hospital's actions in providing Marks with a hospital bed are inseparable from the other medical and health care services it provided to Marks; a staircase, waiting room chair, an open window are not necessarily so. *See Diversicare*, 185 S.W.3d at 855.

I would hold that Marks's claim that the hospital provided a negligently assembled and maintained hospital bed alleges a breach of accepted standards of health care. For this second reason, I would hold that Marks's suit is a health care liability claim subject to the MLIIA.

Finally, I would hold that accepted standards of hospital safety include providing reasonably safe hospital beds to patients, and Marks's claim is for a violation of that standard. For this third reason, I would hold that his claim comes under the MLIIA.

The MLIIA defines a health care liability claim to include "a cause of action against a health care provider or physician for . . . [a] claimed departure from accepted standards of . . . safety which proximately results in injury to or death of the patient." TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4). Thus, a safety-related cause of action is a health care liability claim if it (1) is against a health care provider or physician; (2) is for a departure from accepted standards of safety; and (3) the alleged departure proximately results in injury to or death of the patient. *Id.*

Although the foregoing are the only elements required by the text of the statute, the Court adds a fourth element: a cause of action alleges a departure from accepted safety standards *when the unsafe condition is an inseparable or integral part of the patient's care or treatment.* The Court effectively adds language to the statute to justify its conclusion as to safety. Even so, there is no question the bed was an inseparable and integral part of Marks's care and treatment and meets even the narrowed safety standard erroneously adopted by the Court. Although analysis of the statute's language yields that conclusion, the nurses' notes in Marks's hospital chart referencing the implementation of Safety/Fall Precautions, which incorporated the hospital bed as part of the precautions, do not just yield the conclusion, they compel it.

Although the MLIIA does not define "safety," the statute specifies that legal terms or words of art used but not otherwise defined in the statute "shall have such meaning as is consistent with the common law." TEX. REV. CIV. STAT. art. 4590i, § 1.03(b). Thus, in interpreting the MLIIA, the Court has previously construed "safety" according to its common law definition as the condition of being "untouched by danger; not exposed to danger; secure from danger, harm or loss." *Diversicare*, 185 S.W.3d at 855 (quoting BLACK'S LAW DICTIONARY 1336 (6th ed. 1990)).

Our prior construction is consistent with the plain language of the statute, does not offend the purpose of the statute, is not inconsistent with its contextual meaning, and does not yield an absurd or nonsensical result. Because the Court does not determine otherwise, that should settle the question. Unfortunately, it does not. Instead, the Court justifies effectively adding language to the statute by concluding that a "broad" interpretation is at odds with the legislative purpose. ___ S.W.3d at ___ (citing TEX. REV. CIV. STAT. art. 4590i, § 1.02(b)(1),(3)). The Court reasons that

because a broad interpretation is not warranted, the statute's safety standard is implicated only when the unsafe condition or thing "is an inseparable or integral part of the patient's care or treatment." *Id.* at ___. This is in direct contravention of the MLIIA's explicit mandate that terms not defined by the statute be given their common law meaning, *see* TEX. REV. CIV. STAT. art. 4590i, § 1.03(b), and our previous interpretation of the MLIIA. *See Diversicare*, 185 S.W.3d at 847 (describing health care as "broadly defined" under the MLIIA). The statute quite clearly does not say what the Court interprets it to say, and I agree with Chief Justice Jefferson's choice of words in *Diversicare*:

> Because the statute does not define "safety," we must assign its common meaning . . . [of] protection from danger. . . . The specific source of that danger, be it a structural defect, criminal assault, or careless act, is without limitation. While it may be logical to read into the statute a requirement that a safety related claim also involve health care, there is nothing implicit in safety's plain meaning nor explicit in the MLIIA's language that allows us to impose such a restriction.

See id. at 860-61 (Jefferson, C.J., concurring in part, and dissenting in part) (citations omitted).

Further, en route to its unfortunate conclusion, the Court speculates about coverages of medical malpractice insurance policies and commercial general liability insurance policies that are not before us. It concludes the Legislature intended to exclude claims against health care providers that are covered by general liability insurance policies from the MLIIA. ___ S.W.3d at ___. Aside from the constitutional problem posed if the Legislature effectively delegated authority to insurance companies to determine operative statutory language by their contracts, *see Proctor v. Andrews*, 972 S.W.2d 729, 735 (Tex. 1998), and although the Legislature intended to relieve the malpractice insurance crisis by enacting the MLIIA, I simply do not agree that the MLIIA reflects intent by the Legislature to abdicate its legislative function by allowing claims against health care providers to be

excluded from the Act's provisions based on coverages provided by particular types of insurance policies.

What the MLIIA *does* reflect is legislative intent to broadly, not narrowly, include within the statute's coverage claims made by patients against their health care providers. If policy considerations support excluding subcategories of claims from the MLIIA when the unambiguous statutory language includes the overall category, as it does here, then incorporating those exclusions into the statute is a Legislative prerogative, not a judicial one. *See* TEX. CONST. art. II, § 1; *Lee v. City of Houston*, 807 S.W.2d 290, 294-95 (Tex. 1991) ("A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute."); *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968). It is our duty as judges to ascertain the Legislature's intent from the specific language it used, if possible, and to refrain from looking for extraneous reasons to read into laws unexpressed intentions. *Gov't Pers. Mut. Life Ins. Co. v. Wear*, 251 S.W.2d 525, 529 (Tex. 1952).

Additionally, by conflating standards of safety with standards of health care, the Court negates the Legislature's intent to include within the MLIIA's coverage a separate category of claims based on safety. If a health care provider furnishes unsafe materials or creates an unsafe condition as an integral and inseparable part of a patient's health care or treatment, the health care provider's acts or omissions would already fall within the category of claims based on departures from accepted standards of medical care or health care and there would be no need for the Act to include the word "safety." *See Diversicare*, 185 S.W.3d at 848 ("A cause of action alleges a departure from accepted standards of medical care or health care if the act or omission complained of is an inseparable part

of the rendition of medical services."). Applying the Court's "inseparable or integral part of the patient's care or treatment" standard to "safety" effectively reads safety out of the statute instead of properly giving it meaning as adding a category of claims. *Id.* at 855 ("Certainly, the Legislature's inclusion within the scope of the MLIIA of claims based on breaches of accepted standards of 'safety' expands the scope of the statute beyond what it would be if it only covered medical and health care."). As noted previously, this Court has consistently construed statutes based on the presumption that the Legislature intended an entire statute to be effective, so we "try to give effect to all the words of a statute, treating none of its language as surplusage when reasonably possible." *Phillips*, ___ S.W.3d at ___; *e.g.*, TEX. GOV'T CODE § 311.021(2); *Sultan v. Mathew*, 178 S.W.3d 747, 751 (Tex. 2005) ("We must avoid, when possible, treating statutory language as surplusage."); *City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995) ("We will not read statutory language to be pointless if it is reasonably susceptible of another construction."); *Perkins v. State*, 367 S.W.2d 140, 146 (Tex. 1963) ("[E]ach sentence, clause and word is to be given effect if reasonable and possible."). Accordingly, the Court should construe the Legislature's inclusion of "safety" claims in the MLIIA as expanding the scope of health care liability claims beyond what it would be if the statute only covered medical and health care claims. *Diversicare*, 185 S.W.3d at 855 ("Certainly, the Legislature's inclusion within the scope of the MLIIA of claims based on breaches of accepted standards of 'safety' expands the scope of the statute beyond what it would be if it only covered medical and health care."). Instead, the Court cites case law from other jurisdictions to support the proposition that claims arising from negligent assembly or maintenance of hospital equipment generally sound in ordinary negligence and are not health care liability claims. ___ S.W.3d at ___

& n.3. But the MLIIA is different from most, if not all, statutes in other states that regulate medical malpractice claims: it specifies that it extends to claims involving breaches of accepted standards of safety. *See Diversicare*, 185 S.W.3d at 860 n.3 (Jefferson, C.J., concurring in part, and dissenting in part) ("Though many states have statutes regulating medical malpractice claims, the MLIIA is unique in that it apparently is the only statute of its kind that by definition extends to claims involving safety."). Examination of the statutes underlying the cases cited by the Court reveal their differences from the MLIIA. *See* LA. REV. STAT. ANN. § 40:1299.41 (providing statutory protections for "malpractice" claims based on "health care or professional services rendered"); IND. CODE 34-18-2-18 (providing statutory protections for "malpractice" claims based on "health care or professional services" provided). Because the MLIIA extends to claims for injuries to patients based on breaches of accepted standards of safety, many claims by patients that might be considered claims for ordinary negligence or premises liability in other states are health care liability claims in Texas. Marks's claim is one of them.

In sum, I would affirm the trial court's dismissal of Marks's claims for failure to file an expert report in accordance with requirements of the MLIIA. I would hold that Marks's suit falls within the MLIIA for three separate reasons: (1) the entire claim is based on alleged violations of accepted standards of health care and safety and cannot be recast by artful pleading into both health care and non-health care claims; (2) the claim for negligently assembling, providing, and maintaining a hospital bed is a health care liability claim because it alleges a breach of accepted standards of health care; and (3) the claim for negligently assembling, providing, and maintaining a hospital bed is a health care liability claim because it alleges a breach of accepted standards of safety.

_____

Phil Johnson
Justice

OPINION DELIVERED: August 28, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0784

HARRY HOLMES, II, INDEPENDENT EXECUTOR OF THE ESTATE OF THOMAS J. HOLMES, SR., DECEASED AND AS TRUSTEE OF ANY TRUST NAMED AS A LEGATEE IN THE WILL OF THOMAS J. HOLMES, SR., DECEASED, PETITIONERS,

v.

DOUGLAS G. BEATTY, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHRYN V. HOLMES, DECEASED, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

- consolidated with -

NO. 07-0785

HARRY HOLMES, II, INDEPENDENT EXECUTOR OF THE ESTATE OF THOMAS J. HOLMES, SR., DECEASED AND AS TRUSTEE OF ANY TRUST NAMED AS A LEGATEE IN THE WILL OF THOMAS J. HOLMES, SR., DECEASED, PETITIONERS,

v.

DOUGLAS G. BEATTY, INDEPENDENT EXECUTOR OF THE ESTATE OF KATHRYN V. HOLMES, DECEASED, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued December 5, 2008

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

After decades of debate in the bench, bar, and the Legislature about the ability of spouses to obtain rights of survivorship in community property, Texas citizens changed the constitution to confirm that right. The 1987 amendment provides that "spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse." TEX. CONST. art. XVI, § 15. Two years later, the Legislature enacted Probate Code sections 451 through 462 to address the formalities necessary to the create a survivorship arrangement. *See* TEX. PROB. CODE §§ 451-62. Today we are asked to determine how these sections operate with respect to rights of survivorship in certain brokerage accounts and securities certificates issued from those

accounts. We conclude that the account agreements and certificates at issue here created rights of survivorship. Accordingly, we reverse and render in part and affirm in part the court of appeals' judgment.

I

Factual and Procedural Background

Thomas and Kathryn Holmes married in 1972. During their marriage, Thomas and Kathryn amassed over ten million dollars in brokerage accounts and acquired securities certificates issued from those accounts. Kathryn died in 1999. Her will appointed Douglas Beatty, her son from a previous marriage, as the independent executor of her estate. Thomas died approximately nine months later. His son, Harry Holmes II ("Holmes"), also from a previous marriage, was appointed independent executor of his estate. The accounts and certificates were variously listed as "JT TEN"; "JT TEN *defined as* 'joint tenants with right of survivorship and not as tenants in common'"; "JTWROS"; and "Joint (WROS)." If those acronyms and definitions establish a right of survivorship, then Thomas acquired 100% upon Kathryn's death, and upon his death, the holdings would have passed under his will, which left nothing to Kathryn's children. If those designations were insufficient to create survivorship interests then, as community property, only 50% would have passed to Thomas, with the remaining 50% of the accounts and certificates passing under Kathryn's will, which left nothing to Thomas's children.

Beatty sought a declaration that all of the assets were community property; Holmes countered that the assets passed to Thomas through survivorship, and then to Thomas's beneficiaries following his death. On competing motions for summary judgment, the trial court concluded that some of the

assets were held jointly with survivorship rights and others were community property. In two opinions, the court of appeals affirmed in part, reversed and rendered in part, and remanded for further proceedings. 233 S.W.3d 475, 494; 233 S.W.3d 494, 522-23. Holmes and Beatty petitioned this Court for review, which we granted. 52 Tex. Sup. Ct. J. 149 (Dec. 4, 2008). Because these two appeals involve "substantially similar facts, arguments, and briefing," we have consolidated them into a single opinion and judgment. *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 179 (Tex. 2004).

II

Development of Rights of Survivorship in Community Property in Texas

A

The *Hilley* Era

Texas has not always allowed spouses to create rights of survivorship in community property. In *Hilley v. Hilley*, 342 S.W.2d 565, 568 (Tex. 1961), we held that it was unconstitutional for spouses to hold community property with rights of survivorship. The dispute in *Hilley* concerned whether stock purchased with community funds and "issued in the names of the husband and wife 'as joint tenants with rights of survivorship and not as tenants in common'" actually conferred rights of survivorship. *Id.* at 566. We reasoned that because this property was acquired during marriage with community funds and thus "by definition became community property," it was required to pass either under the decedent's will or under the intestacy statutes, absent a written agreement signed by the spouses partitioning the stock from their community property, thereby making it separate property. *Id.* at 568. We noted that to hold otherwise would directly contravene the constitution's

community property provision. *Id.* (citing TEX. CONST. art. XVI, § 15; Act of May 12, 1949, 51st Leg., R.S., ch. 242, § 1, 1949 Tex. Gen. Laws 450, 450, *repealed by*, Act of June 2, 1969, 61st Leg., R.S., ch. 888, § 6, 1969 Tex. Gen. Laws 2707, 2733 (former TEX. REV. CIV. STAT. art. 4610)).

After *Hilley*, the Legislature amended the Probate Code in an attempt to recognize survivorship rights in community property. Act of April 27, 1961, 57th Leg., R.S., ch. 120, § 1, 1961 Tex. Gen. Laws 233, *amended by* Act of May 22, 1969, 61st Leg., R.S., ch. 641, § 3, 1969 Tex. Gen. Laws 1922, 1922 ("It is specifically provided that any husband and his wife may, by written agreement, create a joint estate out of their community property, with rights of survivorship."). In *Williams v. McKnight*, 402 S.W.2d 505, 508 (Tex. 1966), we considered the amendment's constitutionality. Citing *Hilley*, we held that any statutory attempt to grant survivorship rights in community property would be unconstitutional. *Id.* ("Constitutional limitations are as binding upon the Legislature as they are upon the Judiciary."). We reaffirmed that the only way for a couple to create survivorship rights was to partition their community property into separate property, then execute survivorship agreements for that separate property. *Id.* at 508. This process came to be known among practitioners as the "Texas Two-Step." *See, e.g.*, Robert N. Virden, *Joint Tenancy with Right of Survivorship & Community Property with Right of Survivorship*, 53 TEX. B.J. 1179, 1179 (1990). Subsequent decisions echoed this result. *See, e.g.*, *Allard v. Frech*, 754 S.W.2d 111, 115 (Tex. 1988) ("This holding is based on a firmly rooted principle of community property law which requires the actual partition of community property before a valid joint tenancy with the right of survivorship can be created."); *Maples v. Nimitz*, 615 S.W.2d 690, 695 (Tex. 1981) (same).

B

The 1987 Constitutional Amendment and Subsequent Legislation

In 1987, the Legislature passed, and the Texas voters approved, a constitutional amendment authorizing rights of survivorship in community property. Tex. S.J. Res. 35, 70th Leg., R.S., 1987 Tex. Gen. Laws 4114, 4114-15. The amendment provided that "spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse." TEX. CONST. art. XVI, § 15. Two years later, the Legislature passed Senate Bill 1643, which added Part 3 to Chapter XI of the Probate Code concerning non-testamentary transfers. Act of May 26, 1989, 71st Leg., R.S., Ch. 655, § 2, 1989 Tex. Gen. Laws 2159, 2159-63. This new section governs "[a]greements between spouses regarding rights of survivorship in community property." TEX. PROB. CODE § 46(b).

Probate Code sections 451 and 452 are at issue in this case. Section 451 states: "At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse." *Id.* § 451. Section 452 lays out these requirements:

> An agreement between spouses creating a right of survivorship in community property must be in writing and signed by both spouses. If an agreement in writing is signed by both spouses, the agreement shall be sufficient to create a right of survivorship in the community property described in the agreement if it includes any of the following phrases:
>
> (1) "with right of survivorship";
> (2) "will become the property of the survivor";
> (3) "will vest in and belong to the surviving spouse"; or
> (4) "shall pass to the surviving spouse."

> An agreement that otherwise meets the requirements of this part, however, shall be effective without including any of those phrases.

Id. § 452. The Legislature stated that these agreements do not change the nature of community property: "Property subject to an agreement between spouses creating a right of survivorship in community property remains community property during the marriage of the spouses." *Id.* § 453.

With this constitutional amendment and legislation, the Legislature hoped to finally resolve the battle over survivorship rights in community property. The proponents[1] urged that these sorts of agreements were common in other states and simplified the transfer of certain assets to surviving spouses. *See* GERRY W. BEYER, 10 TEXAS PRACTICE SERIES: TEXAS LAW OF WILLS § 60.1 (3d ed. 2002). As Professor Beyer noted, a community property survivorship agreement "is a simple, convenient and inexpensive method for many married people to achieve an at-death distribution of their community property that is in accord with their intent." *Id.* § 60.9.

As the amendment's drafters noted at the time, "[m]any Texas spouses hold a substantial amount of assets in a form that is ineffective to achieve their desired purpose." Senate Judiciary Comm., Resolution Analysis, Tex. S.J. Res. 35, 70th Leg., R.S. (1987). Supporters argued that the proposed constitutional amendment would "eliminate a trap for the unwary married couple who would execute a signature card provided by a financial institution and believe, mistakenly, that they have created an effective joint tenancy with right of survivorship in relation to their community property." TEXAS LEGISLATIVE COUNCIL, ANALYSES OF PROPOSED CONSTITUTIONAL AMENDMENTS AND REFERENDA, INFO. REPORT, NO. 87-2 at 36 (Sept. 1987).

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[1] The primary sponsor for the amendment and legislation was the Family Law Section of the State Bar of Texas. *See* GERRY W. BEYER, 10 TEXAS PRACTICE SERIES: TEXAS LAW OF WILLS § 60.1 (3d ed. 2002).

The purpose of the amendment and accompanying legislation, then, was to provide "[a] simple means . . . by which both spouses by a written instrument can provide that the survivor of them may be entitled to all or any designated portion of their community property without the necessity of making a will for that purpose." Senate Judiciary Comm., Resolution Analysis, Tex. S.J. Res. 35, 70th Leg., R.S. (1987). As the committee observed, "many banks and savings and loans associations have often failed to provide forms by which their customers can create effective joint tenancies out of community property." *Id.* The amendment addressed these concerns by removing the constitutional hurdles to creating rights of survivorship in community property.

III

Application

The assets at issue in this case fall into two categories: (1) securities accounts and (2) securities certificates issued from those accounts. These two categories of assets are affected by distinct legal analyses, so we address each in turn.

A

The Securities Accounts

Thomas and Kathryn Holmes maintained investment accounts with multiple financial institutions. Each of them was governed by an account agreement that dictated terms, such as who could manage the accounts and whether the accounts were held with rights of survivorship.

1

Accounts Agreements With a "JT TEN" Designation

At the time of Kathryn's death, the Holmeses held two investment accounts whose agreements included the designation "JT TEN": one with Dain Rauscher, Inc. and another with First Southwest Company. Thomas and Kathryn opened the Dain Rauscher account in 1994. The account agreement, titled "JOINT ACCOUNT AGREEMENT" was styled "THOMAS J. HOLMES AND KATHRYN V. HOLMES, JT TEN." The agreement gave the account holders an option to strike through "paragraph (a) or (b) whichever is inapplicable." Paragraph (a) stated "it is the express intention of the undersigned to create an estate or account as joint tenants with rights of survivorship and not as tenants in common." Paragraph (b) gave the account holders the option to designate who would receive the interest in the account upon their death and the percentages each recipient would receive. The Holmeses struck neither provision. They both signed the agreement, and "Jt. Ten" appeared next to Kathryn's name on the signature line.

The Holmeses opened the First Southwest Account in 1997. The account agreement listed their names as "THOMAS J. HOLMES, KATHRYN V. HOLMES JT TEN." The agreement did not define "JT TEN" and did not include any further discussion of survivorship rights. Both Thomas and Kathryn signed the First Southwest account, as well.

The court of appeals held that neither of these agreements "clearly reflect[ed] intent to own the account with a right of survivorship." 233 S.W.3d 475, 481; *see also* 233 S.W.3d 494, 505. As to the Dain Rauscher account, the court noted that because the couple did not strike through paragraph (a) or (b), the agreement "did not affirmatively reflect any intent to effect a non-testamentary transfer—through a right of survivorship or otherwise." 233 S.W.3d 475, 481. The court also rejected Holmes's argument that the "JT TEN" designation on the agreements satisfied

section 452's requirements: the "mere inclusion of 'JT TEN' next to Kathryn's and Thomas's names in the account title did not sufficiently convey intent to create a right of survivorship." *Id.* at 483. The court agreed with Beatty's argument that "parties may own property as joint tenants without being subject to a right of survivorship." *Id.*; 233 S.W.3d 494, 505.

We disagree with the court of appeals on each point. A joint tenancy carries rights of survivorship. *See, e.g.*, *U.S. v. Craft*, 535 U.S. 274, 280 (2002) ("The main difference between a joint tenancy and a tenancy in common is that a joint tenant also has a right of automatic inheritance known as 'survivorship.' Upon the death of one joint tenant, that tenant's share in the property does not pass through will or the rules of intestate succession; rather, the remaining tenant or tenants automatically inherit it."); 2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 183 (3rd ed. 1768) ("[The] remaining grand incident of joint estates [is] the doctrine of survivorship . . . ."); LITTLETON'S TENURES, Book III, ch. III, § 280 (Eugene W. Wambaugh ed., 1903) ("And it is to be understood, that the nature of joint-tenancy is, that he which surviveth shall have only the entire tenancy according to such estate as he hath . . . ."); 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 51.03[3] (Michael Allan Wolf ed., 2000) ("Survivorship is central to a joint tenancy."). Contrary to Beatty's and the court of appeals' assertion then, a joint tenancy cannot be held without rights of survivorship; such a joint agreement would be a tenancy in common. *See Craft*, 535 U.S. at 280; 7 POWELL ON REAL PROPERTY § 51.01[1] ("[A joint tenancy] is distinguished from a tenancy in common principally by the right of survivorship."). The financial industry's use of "joint tenancy" is also consistent with this view. *See, e.g.*, SEC. TRANSFER ASSOC., *Guidelines of the Securities Transfer Association* AV-1 (Oct. 2005) (defining "Joint Tenancy" as a "[f]orm of ownership where

two or more individuals hold shares as joint tenants with right of survivorship. When one tenant dies, the entire tenancy remains to the surviving tenants. JOHN BROWN & MARY BROWN JT TEN.").

Citing *Stauffer v. Henderson*, 801 S.W.2d 858, 865 (Tex. 1990), the court of appeals held that it could not consider information that is not explicitly referenced in the agreement itself. 233 S.W.3d 494, 507. It therefore evaluated the designations "JT TEN" and "Jt. Ten" without reference to guidelines, codes, or custom. *Id.* at 509-13. In *Stauffer*, we held that under Probate Code section 439(a), concerning survivorship rights between non-spouses, parties could only establish survivorship using the statute's language (or language "substantially" similar to it), and a court could not consider other evidence to ascertain the parties' intent. *Stauffer*, 801 S.W.2d at 863-65 (citing TEX. PROB. CODE § 439(a)). Applying this holding to the current case, the court of appeals stated:

> [W]e are addressing a situation in which Texas law dictates parties do not even have a certain type of agreement—a survivorship agreement—unless they have executed a written instrument complying with statutory formalities, including expression of their intent to create a right of survivorship. Therefore, if we must look outside the written instrument to determine that a term used therein means "right of survivorship," the parties have not expressed their intent within the written instrument.

233 S.W.3d 494, 511.

The court of appeals' reliance on *Stauffer*, however, was misplaced. Section 439(a) requires that a survivorship agreement between non-spouses use either the statute's language or a substitute that is "in substantially the [same] form." TEX. PROB. CODE § 439(a). Section 452 is less restrictive, presumably because agreements between spouses are less vulnerable to fraud. The constitutional amendment permitting survivorship agreements in community property was intended to facilitate

the creation of such agreements, *see, e.g.*, Senate Judiciary Comm., Resolution Analysis, Tex. S.J. Res. 35, 70th Leg., R.S. (1987), and the Legislature's use of less confining language comports with that goal. Moreover, *Stauffer* precludes outside evidence, not reference to the common law or trade usage. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 222 cmt. b ("There is no requirement that an agreement be ambiguous before evidence of a usage of trade can be shown . . . .").

Precedent, trade usage, and seminal treatises make clear that joint tenancies carry rights of survivorship, and the Holmeses' agreement included this designation. This does not fully answer, however, the inherent tension in owning community property as "joint tenants." Professor Reed Quilliam noted in an article published shortly after the constitutional amendment and statutes were adopted that "[j]oint tenancy is a form of separate property ownership and is wholly incompatible with community property concepts." *See* W. Reed Quilliam, Jr., *A Requiem for* Hilley*: Is Survivorship Community Property a Solution Worse than the Problem?*, 21 TEX. TECH L. REV. 1153, 1167 (1990). In the same discussion, though, Professor Quilliam predicted that situations like this case were likely to arise:

> It is likely that misconceptions about the new form of property ownership will result in instances of spouses agreeing to hold community property "as joint tenants with right of survivorship" rather than merely "with right of survivorship." What will be the effect of such designation?
>
> Manifestly the property will remain community, although the spouses' agreement to hold with right of survivorship should be given effect to impress *this* characteristic on it. The property *cannot* be joint tenancy property, a form of separate property ownership, unless it has first been rendered separate by partition. The agreement of the spouse violates the constitution insofar as it seeks to establish a joint tenancy in community property. But the agreement to hold such property with right of survivorship is now constitutionally sanctioned.

Id. at 1168-69 (emphasis in original). We agree with Professor Quilliam. A "joint tenancy" or "JT TEN" designation on an account is sufficient to create rights of survivorship in community property under section 452. The Dain Rauscher and First Southwest accounts included this designation, and we "give effect to the written expression of the parties' intent." *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998). Because the "JT TEN" designation was sufficient to indicate the Holmeses' intent to hold those accounts with rights of survivorship, we reverse the court of appeals' judgment on the Dain Rauscher and First Southwest accounts.

2

The Raymond James Account

The Holmeses opened an investment account with Raymond James & Associates in 1995. The "New Account Form" gave Thomas and Kathryn the option to check a box for the "Account Classification." They chose "Joint (WROS)." The form also listed their names as "THOMAS J. HOLMES & KATHRYN V. HOLMES JTWROS." The trial court held that this account did not carry rights of survivorship, but the court of appeals reversed, holding "the Raymond James account agreement sufficiently conveyed Kathryn's and Thomas's intent to create a right of survivorship." 233 S.W.3d 494, 515.

The court of appeals reached this decision primarily based on the Holmeses' affirmative act of checking the "Joint (WROS)" box:

> Kathryn and Thomas affirmatively selected an "Account Classification." They were presented with fourteen options for the account classification and selected "Joint (WROS)" to the exclusion of all other options. Significantly, Kathryn and Thomas rejected "tenancy in common"—the very designation that Beatty attempts to assign to this account. We can conceive of no other meaning Kathryn and Thomas could

> have contemplated for "Joint (WROS)," considering that none of the other options can possibly be construed as meaning joint tenancy with rights of survivorship.

Id. at 515.

We agree with the court of appeals that "Joint (WROS)" means "joint tenancy with rights of survivorship." As such, this indicated the Holmeses' intent to obtain rights of survivorship in this account. This designation, along with Thomas's and Kathryn's signatures on the form, satisfy section 452's requirements. We therefore affirm the court of appeals' judgment on the Raymond James account.

B

The Securities Certificates

Securities issued in certificate form represent the other category of assets in dispute. Kathryn and Thomas opened accounts with several brokerage companies during their marriage, investing in a combination of stocks and bonds. Over time, the respective brokerage companies distributed some of these individual securities, in certificate form, to the Holmeses. The certificates themselves had various designations, such as "JT TEN"; "JT TEN-as joint tenants with right of survivorship and not as tenants in common"; and "JT WROS."

None of the certificates were signed by Kathryn or Thomas. As the court of appeals pointed out, it would have been unusual for them to do so. 233 S.W.3d 475, 484 ("None of the certificates at issue were signed by Kathryn or Thomas because owners do not typically sign stocks or bonds until they are ready to sell or redeem them."). Beatty contends that these individual certificates must satisfy the requirements of section 452 on their own, and because they were unsigned, they fail to

do so. Holmes posits two alternative theories for establishing rights of survivorship in the certificates: (1) the survivorship language on the certificates is valid under section 450 of the Probate Code, and alternatively, (2) the survivorship language in the underlying account agreements govern the securities themselves. The court of appeals disagreed with Holmes on both theories and held that none of the certificates were held with rights of survivorship. 233 S.W.3d 475, 483; 233 S.W.3d 494, 522. We agree that section 450 is inapplicable to these assets, but we disagree with the court of appeals on Holmes's second argument. Because we hold that the agreements' survivorship language conferred survivorship rights in the certificates until the Holmeses disposed of them, the certificates passed to Thomas pursuant to those rights.

1

Texas Probate Code Section 450

Texas Probate Code section 450 falls under Part 2 of the chapter dealing with nontestamentary transfers. TEX. PROB. CODE § 450. Section 450 states, in relevant part:

> (a) Any of the following provisions in [a] . . . bond, [or] . . . securities . . . is deemed to be nontestamentary, and this code does not invalidate the instrument or any provision:
>
> (1) that money or other benefits theretofore due to, controlled, or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently . . . .

Id. Holmes argues that this language controls the securities certificates, and that the various designations found on the certificates (e.g. "JT TEN") establish rights of survivorship in those assets, and that section 452's requirements cannot "invalidate" this agreement. The court of appeals

disagreed, holding that Part 3 of Chapter XI controlled, and Holmes, therefore, could not rely on section 450 to establish rights of survivorship in the certificates. 233 S.W.3d 475, 490. We agree with the court of appeals.

Probate Code section 46(b) states that "[a]greements between spouses regarding rights of survivorship in community property are governed by Part 3 of Chapter XI of this code." TEX. PROB. CODE § 46(b). The court of appeals correctly noted that this provision makes it clear that "section 450 irreconcilably conflicts with Part 3." 233 S.W.3d 475, 489. To hold otherwise would allow parties to circumvent section 452's writing and signature requirements. By enacting section 46(b) at the same time as sections 451 through 462 (Chapter XI, Part 3 of the Probate Code), the Legislature provided that Part 3 is the exclusive means to establish rights of survivorship in community property.

2

Texas Probate Code Section 455

Holmes also argues that the certificates issued from the Holmeses' investment accounts retained the survivorship rights established by their respective account agreements pursuant to section 455. Section 455 falls within the Probate Code's discussion of survivorship rights in community property. TEX. PROB. CODE § 455. Section 455, titled "Revocation," states:

> An agreement between spouses made in accordance with this part of this code may be revoked in accordance with the terms of the agreement. If the agreement does not provide a method for revocation, the agreement may be revoked by a written instrument signed by both spouses or by a written instrument signed by one spouse and delivered to the other spouse. The agreement may be revoked with respect to specific property subject to the agreement by the disposition of such property by one

> or both of the spouses if such disposition is not inconsistent with specific terms of the agreement and applicable law.

Id. Holmes argues that because Thomas and Kathryn never executed a revocation agreement pursuant to this section, and because the certificates were never disposed of, the account agreements govern the certificates. Beatty argues that the act of alienating the certificates from the accounts acted as a "disposition." We disagree.

Once the survivorship agreement was in place, the only means of revoking it was pursuant to the statute, i.e., through a subsequent written agreement or a disposition of the assets covered by the agreement. Section 455 does not define what constitutes a "disposition." Therefore, we give it its "ordinary meaning." TEX. GOV'T CODE § 312.002. Black's Law Dictionary defines "disposition" as "[t]he act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property." BLACK'S LAW DICTIONARY 505 (8th ed. 2004). Webster's defines "disposition" as "a giving over to the care or possession of another, or a relinquishing." WEBSTER'S THIRD NEW INT'L DICTIONARY 654 (2002).

The issuance of securities in certificate form is not a "disposition" under the statute. The certificates were issued in the Holmeses' names, so ownership never changed; there was no "relinquishment" of the assets. As the court of appeals observed, "Kathryn and Thomas may have intended to own the securities in certificate form with a right of survivorship because they received the same property they had purchased through the accounts—just in a different form." 233 S.W.3d 494, 519. We agree that this was likely the Holmeses' expectation, especially because survivorship

designations appeared on each of the certificates themselves, among them "JT WROS," "JT TEN," and "JT TEN - as joint tenancy with right of survivorship and not as tenancy in common."

Because we hold that issuing these certificates did not revoke the accounts' survivorship agreements, the certificates retained survivorship rights. We held above that the Dain Rauscher, First Southwest, and Raymond James accounts were held with rights of survivorship, so the certificates that were issued from those accounts carried the rights of survivorship established by those accounts' agreements. We therefore reverse the court of appeals judgment as to those certificates.

At the time of Kathryn's death, the Holmeses also held securities in certificate form issued from accounts once held with Kemper Securities and Principal/Eppler, Guerin & Turner.[2] We must determine, then, whether the Kemper Securities and Principal account agreements established rights of survivorship. The Kemper account agreement was titled "JOINT ACCOUNT WITH RIGHT OF SURVIVORSHIP" and was signed by both spouses. This meets the test we established above to create rights of survivorship in an investment account. The agreement for the account held with Principal/Eppler, Guerin & Turner listed the Holmeses' names as "Thomas J. Holmes & Kathryn V. Holmes JTWROS" and was signed by both. This agreement, too, established rights of survivorship in the account. Because both of these accounts were held with rights of survivorship, so too were the certificates issued from those accounts. Accordingly, we reverse the court of appeals' judgment as to these securities.

[2] These accounts were no longer active at the time of Kathryn's death, but this does not affect our analysis. The account agreements continued to act as an expression of the Holmeses' intent as it related to the certificates.

IV

Conclusion

The 1987 constitutional amendment and accompanying legislation sought to facilitate the creation of rights of survivorship in community property and eliminate the constitutional hurdles spouses faced when attempting to establish such rights. The Holmeses' account agreements clearly indicated their intent to create rights of survivorship in those accounts. The rights were not lost when the Holmeses later obtained some of their investments in certificate form. Pursuant to these survivorship agreements, each of the accounts and certificates at issue in this case passed to Thomas upon his wife's death, and then by will to Thomas's beneficiaries when he died. If the Holmeses had wished an alternate devise, they could have made appropriate provisions in their respective wills. As they did not, we reverse and render in part and affirm in part the court of appeals' judgment. TEX. R. APP. P. 60.2(a), (c).

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 26, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0806

WALTER E. HARRELL, PETITIONER,

v.

THE STATE OF TEXAS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

Argued November 13, 2008

JUSTICE WILLETT delivered the opinion of the Court.

In this case, we examine whether a court order directing prison officials to withdraw money from an inmate trust account is a civil or criminal matter and, if civil, what process is due an inmate when such an order is issued. We conclude that proceedings under Government Code section 501.014(e) to recover court fees and costs assessed against inmates are civil in nature and not part of the underlying criminal case. Such post-judgment collection efforts are designed to reimburse the State, not to punish the inmate, and due process is satisfied if the inmate receives notice and the opportunity to be heard after funds are withdrawn. Accordingly, we reverse the court of appeals' judgment and render judgment affirming the trial court's order denying the inmate's objections to the withdrawal orders.[1]

I. Background

Walter Harrell pled guilty to drug charges in 1997 and 2003. In 2006 the convicting trial court issued orders directing the Texas Department of Criminal Justice (TDCJ) to withdraw $748 from Harrell's inmate trust account to pay for court costs and appointed-counsel fees related to the earlier proceedings.[2]

The court sent copies of its withdrawal orders to Harrell, who moved to rescind them on grounds he was denied due process,[3] specifically the opportunity to present evidence of his inability to pay the assessed costs. The trial court denied Harrell's motion, and the court of appeals dismissed his appeal for lack of jurisdiction, citing its earlier holding in *Gross v. State*[4] that there is no statutory mechanism for appealing a withdrawal order.

In this appeal, Harrell does not challenge the amount of fees and costs originally assessed in his criminal cases or the authority of the trial court to assess them, nor does he claim that the

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[1] This opinion uses the term "withdrawal order" since that is what the trial court entered in this case. However, the controlling statute describes the trigger as "notification by a court"—something that informs prison officials of an inmate's obligations and directs officials to withdraw funds. *See* TEX. GOV'T CODE § 501.014(e).

[2] Inmate trust accounts are authorized by Government Code section 501.014(a), styled "Inmate Money":

> The department shall take possession of all money that an inmate has on the inmate's person or that is received with the inmate when the inmate arrives at a facility to be admitted to the custody of the department and all money the inmate receives at the department during confinement and shall credit the money to an account created for the inmate. . . .

Amicus curiae TDCJ notes it began receiving withdrawal orders in June 2005, something it attributes to the passage that year of article 103.0033 of the Code of Criminal Procedure ("Collection Improvement Program"), which requires larger cities and municipalities to boost collections of court costs, fees, and fines imposed in criminal cases. *See* Act of May 29, 2005, 79th Leg., R.S., ch. 899, § 10.01, 2005 Tex. Gen. Laws 3098, 3107.

[3] *See* U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 19.

[4] 279 S.W.3d 791, 794 (Tex. App.–Amarillo 2007, no pet.).

withdrawal orders totaling $748 do not match the amounts originally assessed. His position is simply stated: "The State gave Harrell notice and an opportunity to be heard when it came to his liberty. However, when it came to his property, the State just took it."

II. Jurisdiction: Is This a Civil or Criminal Matter?

We cannot address Harrell's due-process claim if we lack jurisdiction. "Courts always have jurisdiction to determine their own jurisdiction."[5]

The Texas Constitution gives us jurisdiction in "all cases except in criminal law matters."[6] We therefore consider whether an inmate trust fund withdrawal order is a civil or criminal matter. If the former, we have jurisdiction to reach the due-process issue; if the latter, jurisdiction rests, if anywhere, with our sister high court, the Court of Criminal Appeals.[7]

Four Texas courts of appeals have divided 2-2 over whether a section 501.014(e) order is civil or criminal. The Waco and Amarillo courts of appeals have declared them criminal in nature as they arise from and are closely related to a criminal matter.[8] The San Antonio and Texarkana courts of appeals have reached the opposite conclusion, reasoning that withdrawal orders are a post-judgment collection process distinct from the underlying criminal case.[9]

This split of authority has led inmates to file appeals both in this Court and in the Court of

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[5] *Houston Mun. Employees Pension Sys. v. Ferrell*, 248 S.W.3d 151, 158 (Tex. 2007).

[6] TEX. CONST. art. V, § 3(a).

[7] *Id*. § 5.

[8] *See Zink v. State*, 244 S.W.3d 508, 509 (Tex. App.–Waco 2007, no pet.); *Gross*, 279 S.W.3d at 794.

[9] *See Reed v. State*, 269 S.W.3d 619, 623-24 (Tex. App.–San Antonio 2008, no pet.); *Abdullah v. State*, 211 S.W.3d 938, 940-41 (Tex. App.–Texarkana 2007, no pet.).

Criminal Appeals, which recently addressed the jurisdictional issue in *In re Johnson*.[10] In that case, the Court of Criminal Appeals examined its own jurisprudence and the risk of "a potential conflict between our bifurcated highest appellate courts" in deciding that withdrawal orders were not criminal-law matters.[11]

We agree that withdrawal orders are more civil in nature than criminal. We start with the proposition that "[d]isputes which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure, and which arise as a result of or incident to a criminal prosecution, are criminal law matters."[12] Further, we observe that in criminal-law matters, "criminal law is the subject of the litigation."[13]

The withdrawal orders here—issued nine years after Harrell's first conviction and three years after his second—may be incidental to criminal prosecutions and a mechanism to enforce criminal judgments, but they do not arise over enforcement of a statute governed by the Code of Criminal Procedure. Nor is criminal law the focus of this action. True, a withdrawal order does seize payment for costs previously taxed in a criminal case, but the criminal case is over. Harrell is not contesting the convicting court's authority to *assess* costs but its authority to *collect* costs. And those costs are collected, as the two orders in this case make clear, "pursuant to Government Code, Sec. 501.014," not any provision in the Code of Criminal Procedure nor any other criminal statute.

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[10] 280 S.W.3d 866 (Tex. Crim. App. 2008) (orig. proceeding).

[11] *Id*. at 869-70, 874.

[12] *Curry v. Wilson*, 853 S.W.2d 40, 43 (Tex. Crim. App. 1993).

[13] *Smith v. Flack*, 728 S.W.2d 784, 788 (Tex. Crim. App. 1987).

Section 501.014 includes costs assessed during criminal matters, but it also authorizes inmate-account withdrawals for costs arising in civil proceedings, including payment of child support, restitution, health care costs, and fines.[14] Even as to court fees and costs, the statute applies not just to criminal cases but to "all orders for court fees and costs."[15] Moreover, the subject matter of this appeal does not concern Harrell's guilt, innocence, or punishment, the chief features of a criminal proceeding.[16] The procedure at issue is substantively akin to a garnishment action or an action to obtain a turnover order. Properly viewed, it is a civil post-judgment collection action that is (1) distinct from the underlying criminal judgments assessing Harrell's conviction, sentence, and court costs, and (2) aimed at seizing funds to satisfy the monetary portion of those judgments. The court is enforcing a money judgment that, while tangentially related to the underlying criminal judgments, is nonetheless removed from them.

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[14] Government Code section 501.014(e) states:

> (e) On notification by a court, the department shall withdraw from an inmate's account any amount the inmate is ordered to pay by order of the court under this subsection. The department shall make a payment under this subsection as ordered by the court to either the court or the party specified in the court order. The department is not liable for withdrawing or failing to withdraw money or making payments or failing to make payments under this subsection. The department shall make withdrawals and payments from an inmate's account under this subsection according to the following schedule of priorities:
>
> (1) as payment in full for all orders for child support;
> (2) as payment in full for all orders for restitution;
> (3) as payment in full for all orders for reimbursement of the Texas Department of Human Services for financial assistance provided for the child's health needs under Chapter 31, Human Resources Code, to a child of the inmate;
> (4) as payment in full for all orders for court fees and costs;
> (5) as payment in full for all orders for fines; and
> (6) as payment in full for any other court order, judgment, or writ.

[15] *Id*. (e)(4).

[16] *See* BLACK'S LAW DICTIONARY 1241 (8th ed. 2004) (defining "criminal proceeding" as "[a] proceeding instituted to determine a person's guilt or innocence or to set a convicted person's punishment . . .").

At bottom, Harrell is alleging the alleged wrongful taking of property. Given that this case presents no construction of a criminal statute, and instead presents the issue of a trial court's ability to seize funds post-judgment pursuant to a civil statute, we hold that withdrawal orders are more substantively civil than criminal. We now turn to the merits of Harrell's due-process claim.

III. What Process is Due?

Harrell argues the two withdrawal orders violated his procedural due-process rights to notice and an opportunity to be heard.[17] In evaluating this argument, we first determine whether Harrell has a property or liberty interest that merits protection.[18] Texas courts have long recognized that prisoners have a property interest in their inmate trust accounts.[19] In light of Harrell's property right, we now consider what process is due to Harrell.[20]

"The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances."[21] To determine what amount of process Harrell is due, we balance the three factors announced by the United States Supreme Court in *Mathews v. Eldridge*:

First, the private interest that will be affected by the official action;

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[17] Insofar as Harrell's briefing suggests that his account funds are immune from seizure due to his indigency, we reject this argument. Harrell presents no authority, nor can we locate any, that due process mandates a minimal funding of an inmate trust account that is immune from execution to cover court costs.

[18] *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

[19] *See Reed v. State*, 269 S.W.3d 619, 625 (Tex. App.–San Antonio 2008, no pet.); *Abdullah v. State*, 211 S.W.3d 938, 943 (Tex. App.–Texarkana 2007, no pet.); *Covarrubias v. Tex. Dep't of Criminal Justice-Inst. Div.*, 52 S.W.3d 318, 324 (Tex. App.–Corpus Christi 2001, no pet.); *Brewer v. Collins*, 857 S.W.2d 819, 823 (Tex. App.–Houston [1st Dist.] 1993, no writ).

[20] *Than*, 901 S.W.2d at 929.

[21] *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

> [S]econd, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
>
> [F]inally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[22]

As to the first factor, the private interest affected can be stated with exactness: Harrell's $748. The second factor—the risk of erroneous deprivation—cannot be measured as precisely, but any risk is modest, as withdrawal notifications under the statute are based on an amount identified in a prior court document.[23] Harrell was party to the underlying action and notified of the costs assessed when the convicting court sentenced him. If he believed they were erroneous, he was free to contest them at the time they were assessed. He did not. We are mindful, however, of other cases where the amount in the withdrawal order varied from the amount in the underlying criminal judgment.[24] Accordingly, there is some risk of the erroneous deprivation of an inmate's property.[25]

Turning to factor three, we assess the government's interest, including the fiscal and administrative burdens of added or alternative procedures. The State's interest is the efficient

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[22] 424 U.S. 319, 335 (1976).

[23] *See* TEX. GOV'T CODE § 501.014(e)(1)-(6).

[24] *See, e.g., In re Martinez*, 238 S.W.3d 601, 602 (Tex. App.–Waco 2007, orig. proceeding) (criminal judgment had costs at $308, but withdrawal order was for $7,317.47); *Crawford v. State*, 226 S.W.3d 688, 691 (Tex. App.–Waco 2007, no pet.) (Gray, C.J., dissenting) (Appendix B) (criminal judgment had costs at $198, but withdrawal order was for $1,142); *Abdullah v. State*, 211 S.W.3d 938, 940 (Tex. App.–Texarkana 2007, no pet.) (line in criminal judgment for costs was blank, but withdrawal order was for $1,517.25).

[25] Such a risk could be minimized if the trial court includes a copy of the original judgment that assessed costs when it sends a withdrawal order to TDCJ.

recoupment of court costs.[26] The State provides legal services to indigent criminal defendants who cannot afford counsel, and if it later turns out the person can contribute to his own defense, the State has an interest in ensuring taxpayers are reimbursed for the expenses they incurred.[27]

Nothing in Texas law requires the grafting of comprehensive garnishment procedures onto Government Code section 501.014.[28] If TDCJ were required to conform strictly with full-blown statutory garnishment requirements as suggested by the Texarkana court of appeals in *Abdullah*,[29] TDCJ would doubtless face expending more money than it would ever collect in many cases, since withdrawal orders typically seek modest sums. Faced with this cost-benefit tradeoff, TDCJ would likely opt not to seek recoupment at all, thus subverting the Legislature's goal of efficient cost-collection.

In balancing the three *Mathews* factors, we note that Harrell has already received some measure of due process. The determination of indigency and the taxing of costs occurred as part of the two criminal cases against him. Thus, as to whether Harrell is indigent and the amount of costs to be levied against him, he has already received all that due process demands.

However, there remains a risk of erroneous deprivation via clerical and other errors. As noted above, some withdrawal orders have authorized the seizure of more money than was taxed in

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[26] *See* CODE CRIM. PROC. art. 103.0033.

[27] *See Curry v. Wilson*, 853 S.W.2d 40, 45-46 (Tex. Crim. App. 1993).

[28] Although Texas Civil Practice and Remedies Code section 63.007 permits writs of garnishment against inmate trust funds, that provision—a waiver of immunity so outside creditors can pursue inmate funds—has no application here, where the judgment creditor (the State of Texas) and the third party holding the funds (TDCJ) are essentially one and the same.

[29] 211 S.W.3d at 940.

the original criminal judgment. An inmate should have a chance to compare the amount assessed to the amount withdrawn and alert the issuing court of any alleged errors.

We hold an inmate is entitled to notice just as happened here (via copy of the order, or other notification, from the trial court) and an opportunity to be heard just as happened here (via motion made by the inmate)—but neither need occur before the funds are withdrawn.[30] Moreover, appellate review should be by appeal, as in analogous civil post-judgment enforcement actions.

In this case, Harrell received notice of the trial court's withdrawal order on the same day TDCJ received copies of the order. The Constitution does not require pre-withdrawal notice or a comprehensive civil garnishment proceeding. Harrell received notice contemporaneously with the withdrawal orders and had his concerns considered by the trial court that issued them. Due process requires nothing more.

IV. Conclusion

We reverse the court of appeals' judgment dismissing Harrell's appeal for want of jurisdiction. Section 501.014(e) proceedings to withdraw funds from inmate trust accounts are civil

[30] Although the convicting court in this case hears both civil and criminal matters, a few district courts in urban counties are designated as "criminal district courts." Still, under the Texas Constitution, those criminal district courts can hear "all actions, proceedings, and remedies." TEX. CONST. art. V, § 8. And while the Legislature has deemed that some district courts shall give preference to criminal law matters, *see, e.g.,* TEX. GOV'T CODE § 24.474, it cannot completely eliminate a district court's civil constitutional jurisdiction. *See Lord v. Clayton*, 352 S.W.2d 718, 721-22 (Tex. 1961). Further, all trial courts have inherent authority to enforce their own judgments. *See Arndt v. Farris*, 633 S.W.2d 497, 499 (Tex. 1982) ("The general rule is that every court having jurisdiction to render a judgment has the inherent power to enforce its judgments."); *see also* TEX. R. CIV. P. 308 ("The court shall cause its judgments and decrees to be carried into execution . . ."). Thus, while we categorize withdrawal orders as civil, a "criminal district court" has jurisdiction to issue such orders and to hear any inmate challenges to them.

in nature, not criminal. However, because Harrell received all that due process requires, post-withdrawal notice and hearing, we render judgment affirming the trial court's order denying his motion to rescind the withdrawal orders.

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Don R. Willett
Justice

OPINION DELIVERED: June 5, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0815

INTERCONTINENTAL GROUP PARTNERSHIP, PETITIONER,

v.

KB HOME LONE STAR L.P., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued March 12, 2009

JUSTICE WILLETT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE GREEN, and JUSTICE JOHNSON joined.

JUSTICE BRISTER filed a dissenting opinion, in which JUSTICE O'NEILL, JUSTICE WAINWRIGHT and JUSTICE MEDINA joined.

This breach-of-contract case poses a straightforward question: What does "prevailing party" mean? We have construed this phrase in a discretionary fee-award statute[1] but not in a mandatory fee-award contract. Specifically, when a contract mandates attorney's fees to a "prevailing party," a term undefined in the contract, has a party "prevailed" if the jury finds the other side violated the contract but awards no money damages? We agree with the United States Supreme Court, which holds that to prevail, a claimant must obtain actual and meaningful relief, something that materially

[1] *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997).

alters the parties' legal relationship.[2] That is, a plaintiff must prove compensable injury and secure an enforceable judgment in the form of damages or equitable relief. The plaintiff here secured neither. We thus reach the same conclusion as in another breach-of-contract case decided today: "a client must gain something before attorney's fees can be awarded."[3] We reverse the court of appeals' judgment and render a take-nothing judgment.

I. Background

KB Home Lone Star L.P. (KB Home), a national homebuilder, contracted with Intercontinental Group Partnership (Intercontinental), a real estate developer, to develop lots in a McAllen subdivision known as Santa Clara and sell them to KB Home. The contract provided:

> Attorney's fees. If either party named herein brings an action to enforce the terms of this Contract or to declare rights hereunder, the prevailing party in any such action, on trial or appeal, shall be entitled to his reasonable attorney's fees to be paid by losing party as fixed by the court.

"Prevailing party" was not defined.

Intercontinental began selling Santa Clara lots to other buyers, and KB Home sued for breach of contract (among other theories) and sought specific performance, damages, injunctive relief, and attorney's fees.[4] KB Home did not seek a declaratory judgment under the contract. At trial, KB Home sought only one type of actual damages: lost profits due to Intercontinental's alleged breach.

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[2] *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992).

[3] *MBM Fin. Corp. v. Woodlands Operating Co.*, ___ S.W.3d ___, ___ (Tex. 2009) (construing the attorney's-fees provision in section 38.001 of the Texas Civil Practice & Remedies Code, which specifies that attorney's fees must be "in addition to the amount of a valid claim and costs").

[4] Intercontinental had sold a majority of the Santa Clara lots to other developers, so KB Home dropped its specific performance and injunctive relief claims before trial and sought only lost profits.

Intercontinental counterclaimed, asserting that KB Home failed to honor an oral agreement to buy Santa Clara at a below-market price in exchange for an exclusive partner arrangement for future property acquisitions.

The jury found that Intercontinental breached the written contract but answered "0" on damages, though it did award KB Home $66,000 in attorney's fees.[5] The jury rejected Intercontinental's oral-agreement claim and consequently did not answer the conditional question about Intercontinental's attorney's fees related to that claim. Both parties moved for judgment, claiming attorney's fees as the "prevailing party." The trial court sided with KB Home and signed a judgment in its favor for $66,000, concluding that KB Home "should recover its damages against [Intercontinental] as found by the jury . . . ." The court of appeals affirmed.[6]

II. Is KB Home the Prevailing Party?

Under the American Rule, litigants' attorney's fees are recoverable only if authorized by statute or by a contract between the parties.[7]

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[5] Specifically, the jury was asked: "Did Intercontinental Group Partnership fail to comply with the Santa Clara Lot Contract?" and separately "What sum of money, if any, if paid now in cash, would fairly and reasonably compensate KB Home Lone Star, L.P. for its damages, if any, that resulted from such failure to comply with the Santa Clara Lot Contract?"

[6] ___ S.W.3d ___, ___.

[7] *MBM Fin. Corp. v. Woodlands Operating Co.*, __ S.W.3d __, __ ("Texas has long followed the 'American Rule' prohibiting fee awards unless specifically provided by contract or statute." (citing *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006) ("Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party's fees.")).

A. Applicability of Chapter 38 to KB Home's Breach Claim

We first address the applicability of the discretionary attorney's-fees provision in Chapter 38 of the Civil Practice and Remedies Code.[8] As seen here, the statutory and contract provisions are similar in general but dissimilar in particular:

THE CONTRACT	CHAPTER 38
If either party named herein brings an action to enforce the terms of this Contract or to declare rights hereunder, the prevailing party . . . shall be entitled to his reasonable attorney's fees to be paid by losing party as fixed by the court.	A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract.

We held in *Green International, Inc. v. Solis* that before a party is entitled to fees under section 38.001, that "party must (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages."[9] If *Green* and Chapter 38 applied to this case, KB Home could not recover attorney's fees since it did not recover any damages. But *Green*, while instructive, is not controlling, nor is Chapter 38.

Parties are free to contract for a fee-recovery standard either looser or stricter than Chapter 38's, and they have done so here. As KB Home points out, Chapter 38 permits recovery of attorney's fees "in addition to the amount of a valid claim," while nothing in the contract expressly requires that a party receive any "amount" of damages. The triggering event under the contract is that a party

[8] TEX. CIV. PRAC. & REM. CODE § 38.001.

[9] 951 S.W.2d 384, 390 (Tex. 1997).

prevail in an action "to enforce the terms of this Contract or to declare rights hereunder . . . ." True enough, but the question remains: what does "prevailing party" mean under the contract?

B. Attorney's Fees Under the Contract

The contract leaves "prevailing party" undefined, so we presume the parties intended the term's ordinary meaning.[10] We have found the United States Supreme Court's analysis helpful in this area.[11] In *Hewitt v. Helms*, the Court was faced with the question of whether a plaintiff who obtained a favorable judicial pronouncement in the course of litigation, yet suffered a final judgment against him, could be a prevailing party.[12] Helms had sued several prison officials alleging a violation of his constitutional rights.[13] The district court granted summary judgment against him on the merits of his claim, but the court of appeals reversed, holding that he had a valid constitutional claim.[14] On remand, the district court still rendered summary judgment against him, finding that the defendants were shielded by qualified immunity.[15] Helms then sought his attorney's fees, claiming that the court of appeals' decision made him the prevailing party.[16] The Supreme Court disagreed, saying "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the

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[10] *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005).

[11] *See, e.g.*, *Dallas v. Wiland*, 216 S.W.3d 344, 358 n.61 (Tex. 2007); *Sw. Bell Mobile Sys., Inc. v. Franco*, 971 S.W.2d 52, 55-56 (Tex. 1998); *Grounds v. Tolar Indep. Sch. Dist.*, 856 S.W.2d 417, 423 (Tex. 1993).

[12] 482 U.S. 755, 757 (1987).

[13] *Id*.

[14] *Id*. at 757-58.

[15] *Id*. at 758.

[16] *Id*. at 759.

merits of his claim before he can be said to prevail."[17] And since Helms did not obtain a damages award, injunctive or declaratory relief, or a consent decree or settlement in his favor, he was not a prevailing party.[18] Five years later in *Farrar v. Hobby*, a federal civil-rights case, the Court elaborated:

> [T]o qualify as a prevailing party, a . . . plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affect the behavior of the defendant toward the plaintiff." Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.[19]

The Court concluded that the plaintiff "prevailed" in *Farrar* because he was awarded one dollar in damages: "A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay."[20] *Farrar* did not speak to whether a plaintiff awarded zero damages can claim prevailing-party status, but under the *Farrar* Court's analysis, a plaintiff who receives no judgment for damages or other relief has not prevailed.

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[17] *Id*. at 760.

[18] *Id*.

[19] 506 U.S. 103, 111-12 (1992) (reviewing attorney's fees awarded pursuant to 42 U.S.C. § 1988) (citations omitted).

[20] *Id*. at 113-14 (noting that "the prevailing party inquiry does not turn on the magnitude of the relief obtained").

The trial-court judgment in today's case recited the jury's finding that "[t]he sum of zero dollars would fairly and reasonably compensate KB" for its damages, if any, resulting from Intercontinental's breach, and that "[t]he sum of sixty-six thousand dollars and zero cents" constituted a reasonable fee for the necessary services of KB Home's attorneys. The judgment continued, however:

> It appearing to the Court that, based upon the verdict of the jury, KB Home Lone Star should recover its *damages* against the International Group Partnership as found by the jury, and the Court so finds.
>
> IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that KB Home Lone Star have and recover from the International Group Partnership judgment for the sum of sixty-six thousand dollars and zero cents ($66,000.00).[21]

The court erred in making that award. The jury answered "0" on damages, and KB Home sought no other type of relief, so the trial court should have rendered a take-nothing judgment against KB Home on its contract claim.[22]

It seems beyond serious dispute that KB Home achieved no genuine success on its contract claim. Whether a party prevails turns on whether the party prevails upon the court to award it something, either monetary or equitable. KB Home got nothing except a jury finding that Intercontinental violated the contract. It recovered no damages; it secured no declaratory or injunctive relief; it obtained no consent decree or settlement in its favor; it received nothing of value

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[21] (Emphasis added).

[22] *Cf. State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437-38 (Tex. 1995) (rendering take-nothing judgment against party who recovered no damages on claim alleging violation of Insurance Code article 21.21, even assuming *arguendo* the party prevailed on the article 21.21 claim).

of any kind, certainly none of the relief sought in its petition.[23] No misconduct was punished or deterred, no lessons taught. KB Home sought over $1 million in damages, but instead left the courthouse empty-handed: "That is not the stuff of which legal victories are made."[24] Nor do we perceive any manner in which the outcome materially altered the legal relationship between KB Home and Intercontinental.[25] Before the lawsuit, Intercontinental was selling lots that were promised to KB Home. After the lawsuit, Intercontinental had sold the promised lots and was not required to pay a single dollar in damages or do anything else it otherwise would not have done.

As judgment should have been rendered in Intercontinental's favor, it is untenable to say that KB Home prevailed and should recover attorney's fees. A stand-alone finding on breach confers no

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[23] *See Helms*, 482 U.S. at 760.

[24] *Id*.

[25] *See Farrar*, 506 U.S. at 111-12.

benefit whatsoever.[26] A zero on damages necessarily zeroes out "prevailing party" status for KB Home.[27]

C. Declaration of Rights?

KB Home argues that it should nonetheless recover attorney's fees because it sued to "declare rights" under the contract and prevailed by obtaining a jury verdict that Intercontinental breached the contract. We disagree. In *Southwestern Bell Mobile Systems v. Franco* we noted that "[i]t is the

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[26] *See id*. at 111 (to be a prevailing party, "[w]hatever relief the plaintiff secures must directly benefit him . . . ."). It is difficult to conclude a breach-of-contract plaintiff has prevailed when the jury says the plaintiff was wholly uninjured and denies all requested relief. As the dissent recognizes, money damages are essential in contract claims seeking money damages (though not for contract claims seeking something else). ___ S.W.3d ___, ___. Every single court of appeals has likewise held that one of the required elements in a breach-of-contract suit seeking money damages is that the plaintiff was in fact damaged by the breach. *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1997, no pet.); *Fieldtech Avionics & Instruments, Inc. v. Component Control.com, Inc.*, 262 S.W.3d 813, 825 (Tex. App.—Fort Worth 2008, no pet.); *Roundville Partners, L.L.C. v. Jones*, 118 S.W.3d 73, 82 (Tex. App.—Austin 2003, pet. denied); *Killeen v. Lighthouse Elec. Contractors, L.P.*, 248 S.W.3d 343, 349 (Tex. App.—San Antonio 2007, pet. denied); *Reynolds v. Nagley*, 262 S.W.3d 521, 527 (Tex. App.—Dallas 2008, pet. denied); *West v. Brenntag Sw., Inc.*, 168 S.W.3d 327, 337 (Tex. App.—Texarkana 2005, pet. denied); *Domingo v. Mitchell*, 257 S.W.3d 34, 39 (Tex. App.—Amarillo 2008, pet. denied); *Hovorka v. Cmty. Health Sys., Inc.*, 262 S.W.3d 503, 508-09 (Tex. App.—El Paso 2008, no pet.); *Sullivan v. Smith*, 110 S.W.3d 545, 546 (Tex. App.—Beaumont 2003, no pet.); *Bank of Am., N.A. v. Hubler*, 211 S.W.3d 859, 864 (Tex. App.—Waco 2006, pet. granted, judgm't vacated w.r.m.); *United Plaza-Midland, L.L.C. v. First Serv. Air Conditioning Contractors, Inc.*, No. 11-05-00382-CV, 2007 WL 4536525, at *7 (Tex. App.—Eastland Dec. 20, 2007, pet. denied) (mem. op.); *Lake v. Premier Transp.*, 246 S.W.3d 167, 173 (Tex. App.—Tyler 2008, no pet.); *Pegasus Energy Group v. Cheyenne Petroleum*, 3 S.W.3d 112, 127 (Tex. App.—Corpus Christi 1999, pet. denied); *West v. Triple B Servs., L.L.P.*, 264 S.W.3d 440, 446 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

[27] We said in a 1998 decision discussing *Farrar* that two plaintiffs who proved retaliatory discharge under Texas law "prevailed" even though the jury awarded no money damages. *Sw. Bell Mobile Sys. v. Franco*, 971 S.W.2d 52, 56 (Tex. 1998) (per curiam). Unlike today's case, however, one of the plaintiffs in *Franco* received equitable relief: reinstatement. As to that plaintiff, *Franco* correctly decided that he was a prevailing party. However, like KB Home in this case, the other *Franco* plaintiff received no relief whatsoever. As we noted in *Franco*, under the United States Supreme Court's reasoning in *Farrar,* "'the only reasonable fee'" when a plaintiff fails to prove damages is usually "'no fee at all.'" *Id*. at 55-56 (quoting *Farrar*, 506 U.S. at 115). Also, our 1998 *Franco* decision predated the United States Supreme Court's 2001 decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Services*, 532 U.S. 598, 603 (2001), which refined its earlier analysis and basically held: "no money judgment, no fees." Accordingly, we disagree with *Franco* that a plaintiff who recovers no money and receives no equitable relief can be a prevailing party. Instead, a plaintiff must receive affirmative judicial relief to be considered a prevailing party.

judgment, not the verdict, that we must consider in determining whether attorney's fees are proper."[28] The United States Supreme Court has likewise reasoned that the *judgment* is critical to the prevailing-party determination.[29] In this case, the trial court should have rendered a take-nothing judgment on KB Home's contract claim. Neither law nor logic favors a rule that bestows "prevailing party" status upon a plaintiff who requests $1 million for actual injury but pockets nothing except a jury finding of non-injurious breach; to prevail in a suit that seeks only actual damages — compensation for provable economic harm — there must be a showing that the plaintiff was actually harmed, not merely wronged.

If KB Home had brought its breach-of-contract case and obtained favorable answers on the same "failure to comply" questions, but the jury also found that an affirmative defense barred KB Home's claim, a take-nothing judgment in favor of Intercontinental would have been rendered. There would be no dispute that KB Home had not prevailed, despite jury findings that Intercontinental breached. No rational distinction exists between that scenario and the one before us. In both, the end result is a take-nothing judgment with no meaningful judicial relief for KB Home. Its only "relief" in either case is the gratification that comes with persuading a jury that Intercontinental behaved badly. But vindication is not always victory. However satisfying as a matter of principle, "purely technical or *de minimis*" success affords no actual relief on the merits

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[28] 971 S.W.2d at 56.

[29] *Buckhannon*, 532 U.S. at 603-04.

that would materially alter KB Home's relationship with Intercontinental.[30] Accordingly, KB Home, while perhaps a "nominal winner"[31] in convincing the jury that it was "wronged,"[32] cannot be deemed a "prevailing party" in any non-Pyrrhic sense.[33]

III. Is Intercontinental the Prevailing Party?

If KB Home "lost" by receiving no damages does that mean Intercontinental "won" by remitting no damages? We cannot reach this question if it is not properly presented, and it is not. On the record before us,[34] it is undisputed that Intercontinental neither preserved the issue nor presented any evidence (either before, during, or after trial) regarding its attorney's fees for

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[30] *See Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 ("Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that" attorney's fees should be denied.).

[31] ABRAHAM LINCOLN, NOTES FOR LAW LECTURE (July 1, 1850), *reprinted in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN 142 (John G. Nicolay & John Hay eds. 1894) ("Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time.").

[32] *But see Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 389 (7th Cir. 2002) (Posner, J.) ("[A] breach of contract is not considered wrongful activity in the sense that a tort or a crime is wrongful. When we delve for reasons, we encounter Holmes's argument that practically speaking the duty created by a contract is just to perform or pay damages . . . .") (citing OLIVER WENDELL HOLMES, JR., THE COMMON LAW 300-02 (1881) and Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897)).

[33] *See Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 356 (D.C. Cir. 1978) (declining to define "substantially prevail" in the Freedom of Information Act but doubting "that plaintiffs could be said to have 'substantially prevailed' if they, like Pyrrhus, have won a battle but lost the war."). *See also Farrar v. Hobby*, 506 U.S. 103, 117, 119 (1992) (O'Connor, J., concurring) (noting that a plaintiff who achieves a purely technical victory, something Justice O'Connor labels "[c]himerical accomplishments," has in reality "failed to achieve victory at all, or has obtained only a pyrrhic victory for which the reasonable fee is zero.").

[34] In this Court, both the clerk's and reporter's records are partial.

defending KB Home's breach-of-contract claim.[35] This failure, along with others discussed below, waives any right to recovery.[36]

Intercontinental contends that the phrase "fixed by the court" in the contract means the trial judge, not the jury, decides the proper measure of attorney's fees after trial ends, thus "there was no need for Defendant to have submitted a question on attorneys fees." Reading "fixed by the court" to mean "fixed by the judge" is a straightforward construction.[37] But a contract's overriding purpose is to capture the parties' intent, meaning we must construe it in light of how the parties meant to construe it. In this case, the parties' trial conduct is itself instructive.

In this case, KB Home submitted the attorney's-fees issue, like other fact issues, to the jury, not to the court, and the record contains no indication that Intercontinental objected.[38] Intercontinental's lone pleading requesting attorney's fees is its original counterclaim, where it

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[35] As its briefing makes clear, the only evidence Intercontinental introduced on attorney's fees, and the only jury question it submitted on attorney's fees, concerned "its *separate counterclaim* for breach of an *oral* agreement by Plaintiff" (emphasis in original), not its defense of KB Home's breach-of-contract claim. Intercontinental concedes that since it lost on that affirmative claim, "the jury rightfully denied Defendant's request for attorneys fees on that claim, and Defendant does not complain about that finding."

[36] *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) (noting that reasonableness and necessity of fees are "question[s] of fact for the jury's determination'") (quoting *Trevino v. Am. Nat'l Ins. Co.*, 168 S.W.2d 656, 660 (Tex. 1943)).

[37] Somewhat analogous to this contract provision is the attorney's-fees provision in the Texas Declaratory Judgment Act (DJA): "[T]he court may award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. One court of appeals has recently noted that, "[o]n the face of this provision, it would appear that the trial court, not the jury, determines the amount of attorneys' fees . . . ." *Ogu v. C.I.A. Servs. Inc.*, No. 01-07-00933-CV, 2009 WL 41462, at *3 (Tex. App.—Houston [1st Dist.] Jan. 8, 2009, no pet.) (mem. op.). But, the court continued, "the amount of the attorneys' fees is a question of fact for the jury to decide." *Id*. (citing *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367 (Tex. 2000)). We express no view on the matter.

[38] In Texas courts, the reasonableness of attorney's fees is normally "a fact issue for the jury." Scott A. Brister, *Proof of Attorney's Fees in Texas*, 24 ST. MARY'S L.J. 313, 349 (1993) ("Texas law treats attorney's fees as a fact issue for the jury rather than as a collateral matter usually determined by the court after the trial has been concluded and the loser determined."). Obviously, parties can contract otherwise if they wish.

asserts Chapter 38, not the written contract, as a basis for recovering fees related to its oral-contract counterclaim. The one time that Intercontinental mentioned fees spent defending KB Home's written-contract claim came during a post-trial hearing for entry of judgment when Intercontinental argued, "If they're not the prevailing party, then we successfully defended. And . . . we're entitled to attorney's fees. And I'm prepared to present evidence today to that effect." The trial court did not respond, and Intercontinental neither pressed the issue nor made any offer of proof. The record contains no mention of a jury-charge conference or any pretrial conference, much less one indicating that the manner of setting attorney's fees was in question. Intercontinental never argued the contract was ambiguous. Moreover, there is no indication that Intercontinental asked the trial court to take judicial notice of trial testimony concerning its attorney's fees,[39] or that Intercontinental offered any fees-related testimony in the post-trial hearing.

Both KB Home as plaintiff on its written-contract claim and Intercontinental as counter-plaintiff on its oral-contract claim submitted an attorney's fees question on their affirmative claims, apparently because they understood that the jury would hear evidence and decide what fee award, if any, was proper. Thus, the parties, given how they and the trial court actually tried the case, interpreted "fixed by the court" to mean that fees in this case would be determined by a court proceeding (for example, a court judgment effectuating the jury's verdict). This reading is not unreasonable. The contract does not reserve fees specifically to the trial judge, but to the court, and both parties submitted all fact questions to the jury. In short, any reading of "fixed by the court"

[39] TEX. CIV. PRAC. & REM. CODE § 38.004 ("The court may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence in: (1) a proceeding before the court; or (2) a jury case in which the amount of attorney's fees is submitted to the court by agreement.").

must be informed by the record and by how the parties chose to present fees to the jury on their respective claims.

In any case, even assuming the written contract reserved attorney's fees exclusively to the judge and not the jury, Intercontinental has certainly waived that argument and its rights to recover fees under the contract. Intercontinental did not plead for attorney's fees under the contract, and never sought to amend its pleadings to do so.[40] Nor, apparently, did Intercontinental ever object, either before the case went to the jury or post-trial, that KB Home's jury question on attorney's fees was immaterial because the contract left that issue to the judge. As noted above, Intercontinental first raised its "fixed by the court" argument during a post-trial hearing for entry of judgment, after the case (including Intercontinental's jury request for fees on the oral contract) had been fully tried to the jury. Nothing indicates that Intercontinental made the trial court aware of its position before the jury charge was submitted or raised *any* issue about the contract's meaning as to attorney's fees. Nor did Intercontinental offer any evidence when it made its oral, post-trial request that the trial court award it fees under the contract.

Given that both parties tried questions of breach and attorney's fees to the jury, Intercontinental cannot be excused for failing to submit a jury question on attorney's fees incurred in defending KB Home's lawsuit on the written contract, or otherwise preserving the issue for appellate review.[41] The issue of whether a breaching-but-nonpaying defendant can be a "prevailing

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[40] TEX. R. CIV. P. 301 (providing that the court's judgment shall conform to the pleadings).

[41] TEX. R. CIV. P. 279 ("Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived."); *cf. Wilz v. Fluornoy*, 228 S.W.3d 674, 676-77 (Tex. 2007) (per curiam); *Hunt Constr. Co. v. Cavazos*, 689 S.W.2d 211, 212 (Tex. 1985) (per

party" under an attorney's-fees provision like this is interesting legally, but not before us procedurally.[42]

IV. Response to the Dissent

The dissent accuses the Court of ignoring the contract's language in order to reach an easy-to-apply answer. Nothing could be further from the truth. Since the contract leaves "prevailing party" undefined, we must do our best to effectuate the parties' intent. We believe the most sensible interpretation is that a plaintiff prevails by receiving tangible relief on the merits.

Despite what the dissent contends, the Court is not saying a plaintiff must recover a money judgment in every breach-of-contract action. Quite the opposite. The dissent cites a variety of situations where we agree the plaintiff would "prevail": when the plaintiff obtains rescission of the contract, specific performance, an injunction, or a declaratory judgment. Today's decision is not grounded on the fact that KB Home received no money damages, but rather on the fact that KB Home received nothing at all.[43]

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curiam).

[42] Some might argue that not every lawsuit produces a winner (even cases that go to verdict); the parties could battle to what amounts to a draw, pay their own fees and expenses, and go home. Here, a jury finds there was breach but not injurious breach; the wronged plaintiff gets nothing and the wrongdoing defendant gives nothing. If "receiving no damages" means the plaintiff did not prevail, does "remitting no damages" necessarily mean the breaching defendant prevailed? When defining litigation success, some might argue that while relief is required for plaintiffs to prevail, a finding of "no breach" is required for defendants — that is, a desired finding on breach is insufficient for plaintiffs but indispensable for defendants.

[43] Citing cases from 1917 and earlier, the dissent also argues that KB is the prevailing party because it is entitled to nominal damages. ___ S.W.3d ___, ___. Nothing in the record shows that KB Home requested nominal damages in the trial court or that it appealed any non-award of nominal damages, so that scenario is simply not before us today. More to the point, as the Court makes clear in another case decided today, the modern Texas rule is that "nominal damages are not available when the harm is entirely economic and subject to proof (as opposed to non-economic harm to civil or property rights)." *MBM Fin. Corp. v. Woodlands Operating Co.*, ___ S.W.3d ___, ___ (Tex. 2009). KB Home asked the jury to award damages to remedy an "entirely economic" harm that was "subject to proof": lost profits.

The reason we focus on money damages is because KB Home focused on money damages. Had KB Home pursued nominal damages, rescission, specific performance, injunctive relief, or declaratory relief, that would be another case.[44] But since KB Home's sole goal at trial was actual damages, it cannot declare victory without recovering any, a point the dissent seems to concede: "Money damages may be indispensable in contract claims *seeking money damages*. . . ."[45] This is exactly such a claim.

The jury's verdict delivered KB Home a stand-alone finding on breach, but a breach-of-contract plaintiff who seeks nothing beyond economic damages cannot receive a judgment based on breach alone.[46] In *CU Lloyd's of Texas v. Feldman*, the court of appeals granted the plaintiff a partial summary judgment on liability and rendered judgment for him.[47] We reversed, holding:

> When the relief sought is a declaratory judgment, an appellate court may properly render judgment on liability alone. In this case, however, Feldman sought no declaratory relief and no evidence of damages was submitted or considered. . . . Thus, the court of appeals erred in rendering judgment for Feldman.[48]

Feldman was a summary-judgment case (where the plaintiff submitted no evidence of damages), and today's case arises in a jury-verdict context (where the plaintiff submitted evidence of damages that the jury rejected), but the common thread is plain: Absent tangible relief, either monetary or

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[44] To this end, the dissent is mistaken in saying we are requiring parties to wait until they are damaged in order to seek a declaration of their respective rights.

[45] ___ S.W.3d ___ at ___.

[46] *See CU Lloyd's of Tex. v. Feldman*, 977 S.W.2d 568, 568 (Tex. 1998) (per curiam).

[47] *Id*. at 569.

[48] *Id*. (internal citations omitted).

equitable, a judgment on liability alone is improper. Where a party seeks only damages, as here, damages are a precondition to "prevailing."

It is unconvincing to construe KB Home's suit as one seeking declaratory relief. The DJA, like the contract, covers an action "to declare rights,"[49] and as explained above, authorizes an award of attorney's fees. A declaratory judgment, by its nature, is forward looking; it is designed to resolve a controversy and prevent future damages.[50] It affects a party's behavior or alters the parties' legal relationship on a going-forward basis. Here, however, KB Home's suit was decidedly focused on the past, seeking backward-looking money damages for prior breaches of contract. The dissent is right that "[a]n action to 'declare rights' is not an action for money damages,"[51] but this case was never the former and always the latter. KB Home could have brought a declaratory-judgment action and "prevailed" (and thus recovered attorney's fees) had the trial court rendered judgment on liability.[52] It chose not to, opting instead to seek actual damages from the jury. The attorney's-fees provision does not require a monetary recovery in every case, but KB Home made it necessary in this case by demanding only monetary, not declaratory, relief.

The dissent contends the judgment declares the parties' rights, but the part of the judgment the dissent quotes from merely incorporates the jury verdict. KB Home's petition sought jury

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[49] TEX. CIV. PRAC. & REM. CODE § 37.003.

[50] *See Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) ("A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought.").

[51] ___ S.W.3d ___, ___.

[52] *CU Lloyd's of Tex. v. Feldman*, 977 S.W.2d 568, 569 (Tex. 1998) ("When the relief sought is a declaratory judgment, an appellate court may properly render judgment on liability alone.").

findings on breach, damages and attorney's fees. Taken at face value, the lawsuit asks the jury to "enforce the terms of this Contract"; it does not ask the court to declare rights. Intercontinental's attorney noted as much at a post-trial hearing, stating that "an action to enforce a contractual provision" is "exactly what we're dealing with here." There are cases where parties who disagree over a contract's meaning have asked the courts to declare their respective rights,[53] but these cases are typically brought as declaratory-judgment actions. One exception is *Feldman*, which strengthens our decision today as illustrated in *Feldman*'s opening paragraph:

> In this insurance case, we consider whether a court of appeals may properly render judgment on a party's liability for breach of contract without evidence of damages and when no declaratory judgment has been sought. We conclude that it cannot . . . .[54]

Finally, the dissent resurrects an old version of Black's Law Dictionary to define "prevailing party" as the one who prevails on the "main issue" of the case. The dissent then states there was "no doubt the main issue was defendant Intercontinental's counterclaim," and because the jury found for KB Home on that counterclaim, KB Home must be the prevailing party. But this analysis does precisely what the dissent accuses the Court of doing: It disregards the language of the contract.

The attorney's-fees provision makes clear that the prevailing party is judged by "an action to enforce the terms of *this Contract* or to declare rights *hereunder*."[55] The problem with the

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[53] *See* TEX. CIV. PRAC. & REM. CODE § 37.004; *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 641 (Tex. 2005); *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 161 (Tex. 2004); *CU Lloyd's of Tex. v. Feldman*, 977 S.W.2d 568, 569 (Tex. 1998) (per curiam); *Firemen's Ins. Co. of Newark, N.J. v. Burch*, 442 S.W.2d 331, 332 (Tex. 1968); *Hoover v. Gen. Crude Oil Co.*, 147 Tex. 89, 90, 212 S.W.2d 140, 141 (1948).

[54] 977 S.W.2d at 568.

[55] (Emphasis added).

dissent's analysis is that Intercontinental's counterclaim was not rooted in the parties' written contract, but rather in an alleged separate oral agreement. Under the dissent's "main issue" test, the interpretation of "prevailing party" in "this Contract" is controlled by the fate of a claim brought under a separate oral contract.

Displacing the parties' agreed-to language with the dissent's "main issue" analysis would yield an anomalous result: Plaintiff sues for $1 million-plus, winds up empty-handed, but nonetheless "prevails." That cannot be right. Focusing on what KB Home walked away with post-trial – no relief whatsoever – we cannot say it emerged the prevailing party.

V. Conclusion

Whether seeking attorney's fees under Chapter 38 (which impliedly requires a claimant to first recover damages)[56] or under this contract (where the jury denied the claimant's sole basis for recovery), the bottom line is the same: As there was no award to the client, there can be no attorney's fee award either.[57] KB Home obtained nothing of value from its breach-of-contract lawsuit — certainly no judgment acknowledging compensable injury — and thus cannot recover its attorney's fees under the contract: "to recover those fees, the [claimant] had to recover damages for breach of contract."[58] On these uncommon facts, we adopt a "no harm, no fee" rule, meaning a stand-alone finding of breach unaccompanied by any tangible recovery (either monetary or equitable relief) cannot bestow "prevailing party" status. As for Intercontinental, it waived any claim for attorney's

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[56] *MBM Financial Corp. v. Woodlands Operating Co.*, ___ S.W.3d ___ (Tex. 2009).

[57] *See id*. at ___ ("a client must gain something before attorney's fees can be awarded.").

[58] *Id*. at ___.

fees defending KB Home's breach-of-contract claim by not submitting the issue to the factfinder. Accordingly, we reverse the court of appeals' judgment and render judgment that KB Home take nothing.

_____
Don R. Willett
Justice

OPINION DELIVERED: August 28, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0815

INTERCONTINENTAL GROUP PARTNERSHIP, PETITIONER,

v.

KB HOME LONE STAR L.P., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued March 12, 2009

JUSTICE BRISTER, joined by JUSTICE O'NEILL, JUSTICE WAINWRIGHT and JUSTICE MEDINA, dissenting.

You would hardly know it from the Court's opinion, but the only question in this case is what the parties intended in a contract providing attorney's fees for "the prevailing party." In the rush to find a simple answer, the Court grabs the nearest tool at hand: federal and state laws using the same words. But legislative intent (which forms the basis of the companion case decided today[1]) is not the same as the parties' intent, unless the parties intended to adopt the same meaning—and there is

[1] *See MBM Fin. Corp. v. Woodlands Operating Co.*, ___ S.W.3d ___ (Tex. 2009).

no evidence here that they did. To the contrary, we must presume they did not, as the defendant filed only a partial reporter's record with no statement of points.[2]

The judgment here granted the plaintiff KB Home no damages, but, as the Court admits, "nothing in the contract expressly requires that a party receive any amount of damages" before recovering its fees.[3] The contract provided fees to the prevailing party in an action "to declare rights hereunder," and the judgment here declared that the defendant Intercontinental breached the contract. This alone was enough to justify the fee award.

KB Home's victory in the trial court was not Pyrrhic—that is, a victory "won at excessive cost."[4] Until now, this suit cost KB Home nothing because the jury assessed fees against its opponent. It hardly seems fair to declare that KB Home gained nothing by this suit *after* setting aside the part of the jury verdict and judgment in which it gained something.

I agree with the court of appeals that under this contract, "liability, not damages, is the appropriate indicator of which party has prevailed in litigation."[5] Accordingly, I would affirm the judgment for the plaintiff; because the Court does otherwise, I respectfully dissent.

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[2] *See Feldman v. Marks*, 960 S.W.2d 613, 614 (Tex. 1996) (per curiam) ("If an appellant fails to present a complete statement of facts on appeal, the appellate court must presume that the omitted portions are relevant and support the trial court's judgment."); TEX. R. APP. P. 34.6(c)(1).

[3] ___ S.W.3d at ___ (quotation marks omitted).

[4] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1855 (2002).

[5] ___ S.W.3d at ___.

I. "To Declare Rights Hereunder"

Texas follows "the American Rule" prohibiting recovery of attorney's fees unless provided by contract or statute.[6] As this fee award depends entirely on a contract, we must start with the contract's terms:

> Attorney's Fees. If either party named herein brings an action to enforce the terms of this Contract or to declare rights hereunder, the prevailing party in any such action, on trial or appeal, shall be entitled to his reasonable attorney's fees to be paid by [the] losing party as fixed by the court.

Even if "prevailing party" status usually requires an award of money damages (which, as shown below, it does not), this contract precludes such an interpretation for three reasons. First, the contract provides fees for a prevailing *defendant* as well as a prevailing *plaintiff*. A defendant with no counterclaim could never recover money damages, yet under this contract would be entitled to recover its attorney's fees anyway.

Second, the contract provides for fees in actions "to declare rights hereunder." An action to "declare rights" is not an action for money damages; a declaratory judgment may be rendered on liability alone without any reference to damages.[7] The Court says KB Home did not obtain a judgment declaring its rights, but that is not what the judgment itself says. After detailing the jury's verdict, the judgment explicitly states on page 4 that Intercontinental "failed to comply with the Santa Clara Lot Contract" and its "failure to comply was not excused." What more could a judgment say to declare the parties' contractual rights?

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[6] *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006).

[7] *CU Lloyd's of Tex. v. Feldman*, 977 S.W.2d 568, 569 (Tex. 1998) (per curiam) ("When the relief sought is a declaratory judgment, an appellate court may properly render judgment on liability alone.").

Third, a party with no damages can still bring an action "to enforce the terms" of a contract. Since its earliest days, Texas law has provided that a party who has suffered no damages may still obtain nominal damages for breach of contract.[8] A party with no damages may also seek rescission or specific performance.[9] Money damages may be indispensable in contract claims *seeking money damages*, but not for contract claims seeking something else.

The Court says "[a] stand-alone finding on breach confers no benefit whatsoever."[10] But this judgment did not rescind the contract or render it void, and there was no evidence all the lots in Santa Clara had been sold. While KB Home did not request specific performance, that does not mean either party no longer has to perform. Before suit was filed, Intercontinental acted as if it were excused from the contract; this judgment says it is not. That seems to me precisely the kind of "judicially sanctioned change in the legal relationship of the parties"[11] that makes KB Home at least partly the winner.

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[8] *See, e.g.*, *Lubbock Mfg. Co. v. Sames*, 598 S.W.2d 234, 237 (Tex. 1980); *Malakoff Gin Co. v. Riddlesperger*, 192 S.W. 530, 532 (Tex. 1917); *Porter v. Kruegel*, 155 S.W. 174, 175 (Tex. 1913); *Raymond v. Yarrington*, 73 S.W. 800, 804 (Tex. 1903); *Davis v. Tex. & P. Ry.*, 44 S.W. 822, 823 (Tex. 1898); *Seibert v. Bergman*, 44 S.W. 63, 64 (Tex. 1898); *East Line & Red River R.R. v. Scott*, 10 S.W. 99, 102 (Tex. 1888); *Stuart v. W. Union Tel. Co.*, 18 S.W. 351, 352 (Tex. 1885); *Moore v. Anderson*, 30 Tex. 224, 231 (1867); *Hope v. Alley*, 9 Tex. 394, 395 (1853); *McGuire v. Osage Oil Corp.*, 55 S.W.2d 535, 537 (Tex. Comm'n App. 1932, holdings approved); *see also* Note, *Pleading—Necessity of Damage to Cause of Action*, 9 TEX. L. REV. 111, 112 (1930) (citing cases).

[9] *See, e.g.*, *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 594 (Tex. 2008) (specific performance); *Country Cupboard, Inc. v. Texstar Corp.*, 570 S.W.2d 70, 73-74 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (rescission).

[10] ___ S.W.3d at ___.

[11] *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001); *id.* at 615 (Scalia, J., concurring) (stating that "prevailing party" has "traditionally" and "invariably" meant "the party that wins the suit or obtains a finding (or an admission) of liability").

The Court avoids the parties' contract by looking entirely to federal and state statutory law, but those laws are drafted differently. In Texas, statutory attorney's fees for breach of contract require a monetary recovery because the statute provides for fees only when recovered "in addition to the *amount* of a valid claim."[12] The federal Declaratory Judgment Act does not authorize attorney's fees,[13] so the Supreme Court cases said to be "helpful in this area" all concern federal statutes attaching attorney's fees to a damages claim.[14] Of course, the Supreme Court's views are not just "helpful" but *binding* when we construe those federal statutes. But that is not the case when we apply Texas law to construe a Texas contract whose terms differ from any existing federal or state law. As there is no evidence the parties contracted with reference to these statutes or cases, relying on them simply replaces the parties' intent with someone else's.

I agree that if a statute of limitations or some other affirmative defense barred KB Home's contract claim, it could not be the prevailing party. But the judgment in such a case would declare that KB Home had no contractual rights due to that affirmative defense. By contrast, the absence of damages does not preclude a declaration that KB Home has a right to contract performance.

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[12] TEX. CIV. PRAC. & REM. CODE § 38.001 (emphasis added); *see MBM Fin. Corp. v. Woodlands Operating Co.*, ___ S.W.3d ___, ___ (Tex. 2009); *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 201 (Tex. 2004) (per curiam); *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex. 1995).

[13] *See AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 701 (5th Cir. 2009) (noting the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, authorizes attorney's fees only if state substantive law provides for them); *see also Camacho v. Tex. Workforce Comm'n*, 445 F.3d 407, 409-12 (5th Cir. 2006) (holding Texas Declaratory Judgment Act does not represent "state substantive law").

[14] *See County of Dallas v. Wiland*, 216 S.W.3d 344, 358 n.61 (Tex. 2007) (addressing attorney's fees provided by 42 U.S.C. § 1988); *Sw. Bell Mobile Sys., Inc. v. Franco*, 971 S.W.2d 52, 55-56 (Tex. 1998) (per curiam) (addressing attorney's fees provided by Texas Labor Code § 21.259, a statute intended to effectuate Title VII of the federal Civil Rights Act, *see id.* § 21.001); *Grounds v. Tolar Indep. Sch. Dist.*, 856 S.W.2d 417, 423 (Tex. 1993) (Gonzalez, J., concurring) (addressing attorney's fees provided by 42 U.S.C. § 1988).

Reading this contract as a whole, the parties never intended zero damages to mean zero attorney's fees.

II. "Prevailing Party"

There is a another reason KB Home is entitled to attorney's fees under this contract and this judgment: it was the "prevailing party" as that term is understood in Texas law. The contractual context here shows the parties did not intend "prevailing party" to require damages, but the term itself would require the same conclusion regardless of context.

When looking for common and ordinary meanings of legal terms, we routinely refer to Black's Law Dictionary,[15] which defines "prevailing party" as "[a] party in whose favor a judgment is rendered, *regardless of the amount of damages awarded*."[16] By ignoring the second phrase and making the $0 damage award dispositive, the Court departs from the ordinary meaning of "prevailing party."

Earlier editions of Black's from the 1960s until the 1990s included an additional qualifier—that "prevailing party" should focus on the "main issue" in the litigation:

> **Prevailing party**. The party to a suit who successfully prosecutes the action or successfully defends against it, *prevailing on the main issue*, even though not necessarily to the extent of his original contention.[17]

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[15] *See, e.g.*, *Ingram v. Deere*, ___ S.W.3d ___, ___ (Tex. 2009); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437-38, 441 (Tex. 2009); *Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 916 n.6 (Tex. 2008); *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 751 n.33 (Tex. 2006); *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 158-59 (Tex. 2003).

[16] BLACK'S LAW DICTIONARY 1154 (8th ed. 2004) (emphasis added).

[17] BLACK'S LAW DICTIONARY 1188 (6th ed. 1990) (emphasis added); *see also* BLACK'S LAW DICTIONARY 1069 (5th ed. 1979); BLACK'S LAW DICTIONARY 1352 (4th ed. 1968).

This "main issue" qualification has been adopted by 11 of the 14 courts of appeals in Texas.[18]

In this litigation, there is no doubt the main issue was the defendant Intercontinental's counterclaim. The parties' contract reserved every lot in the Santa Clara subdivision for KB Home, and Intercontinental conceded it sold some of those lots to third parties. Thus, the main issue was not whether Intercontinental had breached the contract; it clearly had. Instead, the main issue was whether that breach was excused by KB Home's refusal to buy lots at high prices elsewhere in return

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[18] 1st: *Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682, 696-97 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Weng Enters., Inc. v. Embassy World Travel, Inc*., 837 S.W.2d 217, 222-23 (Tex. App.—Houston [1st Dist.] 1992, no writ).

2nd: *Taylor Elec. Servs., Inc. v. Armstrong Elec. Supply Co.*, 167 S.W.3d 522, 532-33 (Tex. App.—Fort Worth 2005, no pet.); *Head v. U.S. Inspect DFW, Inc*., 159 S.W.3d 731, 749 (Tex. App.—Fort Worth 2005, no pet.).

3rd: *Lay v. Whelan*, No. 03-03-00115-CV, 2004 WL 1469246, at *6 (Tex. App.—Austin July 1, 2004, pet. denied); *Cysco Enters., Inc. v. Hardeman Family Joint Venture, Ltd.*, No. 03-02-00230-CV, 2002 WL 31833724, at *6 (Tex. App.—Austin Dec. 19, 2002, no pet.).

4th: *City of Laredo v. Almazan*, 115 S.W.3d 74, 78 (Tex. App.—San Antonio 2003, no pet.).

5th: *Blockbuster, Inc. v. C-Span Enter., Inc*., 276 S.W.3d 482, 491 (Tex. App.—Dallas 2008, pet. granted); *In re M.A.N.M.*, 231 S.W.3d 562, 566 (Tex. App.—Dallas 2007, no pet.); *Probus Props. v. Kirby*, 200 S.W.3d 258, 265 (Tex. App.—Dallas 2006, pet. denied).

6th: *Moore v. Jet Stream Invs., Ltd.*, 261 S.W.3d 412, 431 n.15 (Tex. App.—Texarkana 2008, pet. denied); *In re Estate of Bean*, 206 S.W.3d 749, 764 (Tex. App.—Texarkana 2006, pet. denied).

7th: *Brent v. Field*, 275 S.W.3d 611, 622 (Tex. App.—Amarillo 2008, no pet.); *Dean Foods Co. v. Anderson*, 178 S.W.3d 449, 454 (Tex. App.—Amarillo 2005, pet. denied).

8th: *Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1*, 209 S.W.3d 146, 168 (Tex. App.—El Paso 2006), *rev'd on other grounds*, 263 S.W.3d 910 (Tex. 2008).

12th: *Robbins v. Capozzi*, 100 S.W.3d 18, 27 (Tex. App.—Tyler 2002, no pet.).

13th: *Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.*, 3 S.W.3d 112, 128 (Tex. App.—Corpus Christi 1999, pet. denied); *Norrell v. Aransas County Navig. Dist. No. 1*, 1 S.W.3d 296, 303 (Tex. App.—Corpus Christi 1999, pet. dism'd).

14th: *4901 Main, Inc. v. TAS Auto., Inc*., 187 S.W.3d 627, 634 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *Emery Air Freight Corp. v. Gen. Transp. Sys., Inc*., 933 S.W.2d 312, 316 (Tex. App.—Houston [14th Dist.] 1996, no pet.).

for buying at low prices in Santa Clara. The jury rejected that counterclaim, so KB Home was the prevailing party on the main issue in this litigation.[19]

The Court rejects main-issue analysis (although adopted by virtually every other Texas court) because Intercontinental's counterclaim was not "an action to enforce the terms of *this* Contract."[20] But to recover on this contract, KB Home had to prove it had not been orally amended by another. As we held in *Varner v. Cardenas*, attorney's fees for enforcing a contract include those incurred overcoming counterclaims raised in defense.[21]

Oddly, the Court's opinion today means Intercontinental was the prevailing party, even though it was the only party that breached. The Court avoids awarding Intercontinental attorney's fees on the ground that it failed to preserve error. But future contract breakers may not make the same mistake. It is hard to see the justice in reading this common contract provision to provide attorney's fees for the party that committed the breach.

The Court's rule also ignores the reality that everybody incurs costs when a contract fails. Breach of contract damages include lost profits (expectancy), out-of-pocket expenses (reliance), and restitution;[22] most litigants pursue only lost profits as that is normally the largest measure. But

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[19] *See Cysco Enters.*, 2002 WL 31833724, at *6 (holding defendant was prevailing party on main issue even though jury awarded it no damages on its counterclaim).

[20] ___ S.W.3d at ___.

[21] *See* 218 S.W.3d 68, 69 (Tex. 2007) (per curiam).

[22] RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981); *see Quigley v. Bennett*, 227 S.W.3d 51, 56 (Tex. 2007) (Brister, J., concurring in part and dissenting in part); Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 56 (1936).

today's ruling requires parties to sue for all of them, no matter how small, to make sure they will "prevail" by receiving some kind of money judgment.

The Court's no-damages/no-fees rule is certainly easy to apply, but making life easy for judges is not a rule of contract construction.[23] Whether a party prevailed in litigation is a mixed question of law and fact. Perhaps in some cases a $1 recovery represents a substantial victory for the plaintiff, but in most cases it represents a total loss; treating every plaintiff who wins $1 as a prevailing party is not what most people intend when they sign a contract like this.

The contract here called for attorney's fees to be "fixed by the court," and the trial judge awarded them to KB Home. With only a partial trial record, we must presume that was right.

IV. Conclusion

I agree there is little reason to encourage suits by those who have suffered no damages solely so an attorney can recover a large fee. But that is not the way litigation usually works, or what occurred here. Lost profits from a venture that failed are always hard to assess, so litigants often believe they have been damaged until a jury tells them they have not. I would not punish such litigants for failing to prove damages unless that is what their contract requires.

Markets, especially in real estate, can rise or fall substantially in a very short time. Under the Court's interpretation, the "prevailing party" entitled to attorney's fees may depend precisely upon those swings, not upon who was in the wrong. That may be a reasonable way to draft a statute,

[23] I do not know what the Court means when it says the Supreme Court's opinion in *Buckhannon* "basically held 'no money judgment, no fees.'" ___ S.W.3d at ___ n.26. The question in *Buckhannon* was not money judgments but collateral consequences—whether legislative action apart from any judgment could make a litigant the prevailing party.

but that is not what the parties contracted for here. Accordingly, I would affirm the judgment of the trial court and court of appeals.

_____
Scott Brister
Justice

OPINION DELIVERED: August 28, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0896

THE STATE OF TEXAS, PETITIONER,

v.

BRISTOL HOTEL ASSET CO., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

PER CURIAM

In this condemnation case, the State of Texas challenges the damages awarded to Bristol Hotel Asset Company. Because the trial court admitted evidence of noncompensable damages, we remand the case for a new trial.

In order to widen part of Loop 410 in San Antonio, the State condemned 0.107 acres of a 5.003-acre hotel property owned by Bristol near the airport. Before the taking, the hotel had three entrance driveways: an eastern driveway with a very steep grade, a center main driveway that was also fairly steep and led to the hotel's porte cochere, and a western driveway with a flat, two-way drive. The State's taking shortened the length of the eastern and center driveways, making them so steep as to be unusable.

Two engineers testified regarding modification projects required to restore the hotel's driveways to functioning condition. While the eastern driveway could be regraded and cured, the

center driveway, the hotel's primary entry point, was permanently lost. Therefore, the engineers' plan was to convert the western driveway into the hotel's primary driveway entrance. The hotel also had two service drives at the rear of the hotel that would remain unchanged.

The engineers estimated that the driveway reconstruction project would take six months. During the four-month western driveway phase, eighty of the hotel's 380 parking spaces would be unavailable. During the two-month eastern driveway phase, forty-three spaces would be unavailable.

David Bolton testified as the hotel's valuation expert. Using an income method of valuation, he calculated that the difference in market value between the entire hotel property before the taking and the remainder property after the taking was $1.26 million. He also testified that Bristol sustained $509,211 in damages as the cost to make necessary driveway modifications to the remainder property. Bolton's testimony and his summary appraisal report, admitted into evidence, also noted that Bristol had suffered $723,492 in "temporary damages," which Bolton described to the jury as "temporary damages for the parking spaces being out of service." The State objected to Bolton's valuation of the remainder property, and also to the $723,492 in temporary damages. The jury found a $1.26 million difference in value between the property before the taking and the remainder property after the taking. The trial court rendered judgment for Bristol on the jury's verdict, and the court of appeals affirmed. __ S.W.3d __.

First, the State challenges Bolton's testimony regarding temporary damages. We agree that this testimony was flawed. The Property Code instructs that a condemnation proceeding should consider "the effect of the condemnation on the value of the property owner's remaining property." TEX. PROP. CODE § 21.042(c). However, when a taking occurs, all damages associated with the

taking are not necessarily compensable, *County of Bexar v. Santikos*, 144 S.W.3d 455, 459 (Tex. 2004), and "diminished value is compensable only when it derives from a constitutionally cognizable injury," *State v. Dawmar Partners, Ltd.*, 267 S.W.3d 875, 878 (Tex. 2008) (per curiam). Compensability for a particular type of condemnation damage is a question of law the Court reviews de novo. *Santikos*, 144 S.W.3d at 459.

Remainder property damages "are generally calculated by the difference between the market value of the remainder property immediately before and after the condemnation, considering the nature of any improvements and the use of the land taken." *Id*. While various methods can be used to determine the market value of a remainder property, the income approach is especially appropriate when, as with the hotel here, property would be valued on the open market according to the amount of income it already generates. *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 183 (Tex. 2001). The income approach consists of estimating the net operating income stream of a property and applying a capitalization rate to determine the property's present value. *Id*.

Using the income approach, Bolton arrived at a fair market value of the remainder tract. But his testimony and his apprisal report also included the $723,492 he calculated as temporary damages for loss of use of some parking spaces. To reach this figure, Bolton assigned a net income to each space by taking the total hotel revenue, deducting certain expenses, and calculating the net income per space per month. Using this figure he calculated damages for the temporary loss of forty-three spaces during the eastern driveway phase of the reconstruction and eighty spaces during the western driveway phase. Bristol's own brief describes Bolton's calculation as a loss of "net income"

attributable to the loss of parking spaces during the reconstruction. Bristol, therefore, offered evidence of lost profits to establish its claimed temporary damages.

We have held that lost profits or injury to a business are not compensable over and above the value of the land taken and the diminution in the value of the remainder tract. *State v. Travis*, 722 S.W.2d 698, 698-99 (Tex. 1987) (per curiam); *City of Dallas v. Priolo*, 242 S.W.2d 176, 179 (Tex. 1951). To the extent the temporary loss of parking spaces resulted in a temporary loss of business revenues or profits, those losses are not compensable.

Further, to the extent that the taking affected access to the remainder property, we have held that a partial, temporary disruption of access is not sufficiently "material and substantial" to constitute a compensable taking. *City of Austin v. The Avenue Corp.*, 704 S.W.2d 11, 13 (Tex. 1986). We have also held that "disruption of use due to construction activities" of the condemning authority during a roadway expansion project are not compensable. *State v. Schmidt*, 867 S.W.2d 769, 777 (Tex. 1993). We similarly hold today that the partial, temporary loss of some parking spaces on Bristol's remainder property was not sufficiently material and substantial to qualify as compensable condemnation damages. Bristol never came close to losing all use of the remainder property, as occurred in *City of Austin v. Teague*, a case on which Bristol relies. 570 S.W.2d 389, 394 (Tex. 1978) (recognizing loss of rentals as appropriate measure of temporary damages where "plaintiffs lost all use of their land" and city had in effect acquired a scenic easement on plaintiffs' land at no cost).

Bristol argues that the temporary damages were "properly considered in estimating the damages sustained by the landowner in a temporary or partial taking to arrive at the ultimate issue

of diminution in the market value of the remainder." Bolton offered some testimony that the temporary damages were integrated into the calculation of the diminution in market value of the remainder property. For example, he agreed that in "the surreal world of condemnation," the temporary loss of parking spaces would affect what a buyer would pay for the property. But his testimony and report also treated the loss of parking spaces as a separate item of lost net income. Whether treated as a separate item of temporary lost business revenues or profits, or as part of the calculation of fair market value of the remainder property, Bristol asked the jury to include in its assessment of damages the partial, temporary loss of parking spaces, a loss that is not compensable as a matter of law.

Second, the state challenges Bolton's testimony regarding permanent damages. We agree that this testimony was flawed, too, as Bolton's permanent-damages testimony was based on diminished access to the remainder property that is not compensable. In determining the permanent diminution in value to the remainder hotel property as compared to the pre-condemnation property, Bolton testified that assuming the revenue stream to the hotel was the same before and after the taking, the discount or capitalization rate used in the present value calculation under the income approach should be increased to reflect a higher degree of risk that potential investors would perceive as a result of the condemnation. In other words, Bolton believed that investors would view the remainder tract as a riskier investment than the original hotel property. Assigning a higher capitalization rate to reflect this higher risk led Bolton to calculate a value for the remainder tract that was lower than the value of the original tract, even though the net revenue stream to the property remained the same.

In explaining why he applied a higher capitalization rate to the remainder property than to the original property, Bolton testified that he increased it primarily because of the loss of the center driveway. He pointed out that patrons would now have to make a ninety-degree turn from one of the remaining driveways to enter the new porte cochere, that there would be some interruption in "traffic patterns," and that new "site circulation characteristics" of the hotel would be atypical. Bolton's summary appraisal report likewise assigned a higher risk to the property in part because of diminished access resulting from the loss of the center driveway. Although the hotel lost one driveway, it remained reasonably accessible because it retained two other driveways fronting the hotel and modified to provide adequate access for patrons, as well as two service driveways in the rear. Bolton's appraisal summary assumed that net income to the hotel before and after the taking would be the same, further confirming that reasonable access to the property would remain after the driveway modifications were completed.

This testimony was improper because, in picking a capitalization rate, Bolton primarily considered the diminished ease of access to the property, a loss that is not compensable. We have held in analogous circumstances that diminished access to a landowner's remaining property is not compensable so long as reasonable access to the property remains. *See Santikos*, 144 S.W.3d at 460-61 (stating that diminished access to remainder property, including loss of access resulting in lost driveways or requiring "increased circuity of travel" is not compensable so long as reasonable access to the remainder property remains); *Archenhold Auto. Supply Co. v. City of Waco*, 396 S.W.2d 111, 114 (Tex. 1965). Generally, "a landowner is entitled to compensation when a public improvement destroys all reasonable access" to his property, but "no right to compensation extends to a property

owner who has reasonable access to property after the construction of the public improvement." *State v. Heal*, 917 S.W.2d 6, 9-10 (Tex. 1996). In this case, the hotel lost its center driveway but four driveways remained, as described above. In *Interstate Northborough Partnership v. State*, we held as a matter of law that a commercial property's loss of one driveway while four other driveways remained was not a sufficiently material and substantial impairment of access to be a compensable loss. 66 S.W.3d 213, 224 (Tex. 2001).

"It is well settled that damages to a condemnee's business which result merely from traffic being required to travel a more circuitous route to reach a condemnee's property are not compensable." *State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988). The same rule applies where the alleged decline in market value is due to a more circuitous route within the remainder property, from the access road to the condemnee's front door. *See Santikos*, 144 S.W.3d at 460 ("circuity of travel *within* a particular property is [no] more compensable than circuity of travel *around* it") (emphasis in original). "[A]ccess is not materially and substantially impaired merely because other access points are significantly less convenient." *Dawmar Partners*, 267 S.W.3d at 880.

Although couching his testimony in terms of the effect on "risk" and the capitalization rate from an investor standpoint, Bolton considered the diminished ease of access to the remainder property, a factor that is not compensable. If the alleged damage to the property is based on a partial loss of access, the landowner cannot transform such a noncompensable loss into a compensable one by recasting it as a change in the capitalization rate. *See Dawmar Partners*, 267 S.W.3d at 879-80 (holding that landowner cannot recover for loss of access by framing it as a change in the "highest

and best use"); *Santikos*, 144 S.W.3d at 462 (expert testimony couching loss in terms of "diminished market perception" does not make loss compensable when investor perception is based on noncompensable losses such as diminished access or diminished visibility).

In condemnation cases, the trial court must first determine if claimed damages are compensable, and admit evidence accordingly. *Interstate Northborough*, 66 S.W.3d at 220. If the damage award "is based on evidence of both compensable and noncompensable injuries, the harmed party is entitled to a new trial." *Id*. The jury in this case heard inadmissible evidence of temporary and permanent damages. Accordingly, and without hearing oral argument, we reverse the court of appeals' judgment and remand the case to the trial court for a new trial on condemnation damages. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: May 15, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0901

IN RE BANK OF AMERICA, N.A., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

JUSTICE JOHNSON did not participate in the decision.

In this contract dispute, we decide whether our holding in *In re Prudential*—which held that a contractual waiver of a jury trial is enforceable—creates a presumption against waiver that places the burden on the party seeking enforcement to prove that the opposing party knowingly and voluntarily agreed to waive its constitutional right to a jury trial. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 30–33 (Tex. 2004). On interlocutory appeal, the court of appeals applied such a presumption and reversed the trial court's enforcement order. 232 S.W.3d at 151–52. Today, we conditionally grant Bank of America's petition for writ of mandamus to clarify that *Prudential* does not impose a presumption against a contractual jury waiver.

Bank of America and Mikey's Houses executed a real estate contract and a two-page Bank of America Mortgage Addendum, which contains a jury-waiver provision. The addendum comprises twenty numbered and separately-spaced paragraphs, five of which contain bolded introductory

phrases that appear to be hand-underlined. Both parties signed the contract and afterwards separately executed the addendum. One paragraph in the addendum states:

> 13. **Waiver of Trial by Jury.** Seller and buyer knowingly and conclusively waive all rights to trial by jury, in any action or proceeding relating to this Contract.

(emphasis in original). Mikey's Houses then sued Bank of America over the execution of the real estate contract, claiming breach of contract, breach of warranty, misrepresentation, fraud, negligence, and violations of the Deceptive Trade Practices Act. When Mikey's Houses made a jury demand, Bank of America moved to enforce the jury waiver. The trial court agreed that the waiver should be enforced and issued an enforcement order. Mikey's Houses then filed an interlocutory appeal pursuant to section 51.014 of the Civil Practices and Remedies Code, seeking to reverse the trial court's enforcement order. The court of appeals reversed, holding that Bank of America did not meet its burden of producing prima facie evidence that the representatives of Mikey's Houses knowingly and voluntarily waived their constitutional right to a jury trial. 232 S.W.3d at 147.

The court of appeals imposed this burden on Bank of America by inferring a presumption against contractual jury waiver from our holding in *Prudential*, where we cited to *Brady v. United States*, 397 U.S. 742, 748 (1970), to recognize that the right to a trial by jury is a constitutional right. 148 S.W.3d at 149–50. But the court of appeals' inference is erroneous for two reasons. First, a presumption against waiver would incorrectly place the initial burden of establishing a knowing and voluntary execution on Bank of America, which is inapposite to our burden-shifting rule as articulated in *In re General Electric*. 203 S.W.3d 314, 316 (Tex. 2006) (per curiam) ("[A] conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the

burden to the opposing party to rebut it."). Second, a presumption against waiver would create an unnecessary distinction between arbitration and jury waiver clauses, even though we have expressed that our jurisprudence "should be the same for all similar dispute resolution agreements." *Prudential*, 148 S.W.3d at 134. For these reasons, we hold that the court of appeals abused its discretion in overturning the trial court's enforcement order.

As a general matter, the court of appeals misinterprets our decision in *Prudential* as imposing a presumption against contractual jury waivers. In *Prudential*, we held that contractual jury waivers do not violate public policy and are enforceable. 148 S.W.3d at 129–33. The court of appeals used our reasoning in *Prudential* to infer a initial presumption against the enforcement of a contractual jury waiver, holding that, "the Texas Supreme Court equated the Texas standard for a 'knowing and voluntary' prelitigation contractual jury waiver with the 'knowing and voluntary' standard utilized in criminal cases like *Brady* to assess the validity of a defendant's pretrial waiver of a jury trial via a guilty plea." 232 S.W.3d at 149. But we acknowledged *Brady*'s "knowing and voluntary" standard not to impose a presumption against jury trial waiver, but to address the argument that parties may be inclined to use contractual waivers "to take unfair advantage of others, using bargaining position, sophistication, or other leverage to extract waivers from the reluctant or unwitting." *Prudential*, 148 S.W.3d at 132. *Prudential*'s recognition of the *Brady* standard does not impose a burden on the enforcing party to produce evidence that a waiver was executed knowingly and voluntarily. Such a presumption would not only be contrary to the longstanding Texas contract principle that parties are free to enter into contracts without fear of retroactive

nullification, *see Wood Motor Co. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951), but is also erroneous for the two reasons discussed below.

First, a presumption against contractual jury waivers wholly ignores the burden-shifting rule articulated in *General Electric*, where we held that "a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it." *Id*. We have always presumed that "a party who signs a contract knows its contents." *In re Bank One, N.A.*, 216 S.W.3d 825 (Tex. 2007) (orig. proceeding) (quoting *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996)). As long as there is a conspicuous waiver provision, Mikey's Houses is presumed to know what it is signing. *See Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). Here, the provision was sufficiently conspicuous to serve as prima facie evidence of a knowing and voluntary waiver. *See Gen. Elec.*, 203 S.W.3d at 316. Section 1.201(b)(10) of the Texas Business and Commerce Code provides that "[c]onspicuous . . . means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it." In *Prudential*, we noted that the waiver provision was "crystal clear" because "it was not printed in small type or hidden in lengthy text" and "[t]he paragraph was captioned in bold type." 148 S.W.3d at 134. Notably, we disagreed with the opposing party in *Prudential* that the style of that waiver provision "could reasonably have diverted . . . attention or misled them into thinking that the provision meant the opposite of what it clearly said." *Id*. In *General Electric*, we reviewed a waiver provision that stated: "THE MAKER HEREBY UNCONDITIONALLY WAIVES ITS RIGHTS TO A JURY TRIAL . . ." and held that it was conspicuous because it was set apart from the rest of the text and printed in bold with all capital letters. 203 S.W.3d at 316.

In this case, the addendum is only two pages long, and each of the twenty provisions are set apart by one line and numbered individually. Five of the twenty provisions included bolded introductory captions similar to the waiver provision in *Prudential*, and the "Waiver of Trial By Jury" caption is one of the five. Furthermore, the introductory caption is hand-underlined, as is the word "waiver" and the words "trial by jury" within the provision. This bolded, underlined, and captioned waiver provision is no less conspicuous than those contractual waivers that we upheld in both *Prudential* and *General Electric*, and therefore serves as prima facie evidence that the representatives of Mikey's Houses knowingly and voluntarily waived their constitutional right to trial by jury.

"The general rule is that in the absence of a showing of fraud or imposition, a party's failure to read an instrument before signing it is not a ground for avoiding it." *Estes v. Republic Nat'l Bank of Dallas*, 462 S.W.2d 273, 276 (Tex. 1970). This means that an allegation of fraud or imposition connected to the waiver would shift the burden to Bank of America to prove that the conspicuous waiver provision was executed knowingly and voluntarily. It necessarily follows, then, that when no fraud or imposition with regard to the waiver is alleged, a conspicuous waiver of trial by jury is presumed to be knowing and voluntary. *Prudential*, 148 S.W.3d at 134; *see also Estes*, 462 S.W.2d at 276 .

Here, representatives from Mikey's Houses neither contended nor produced any evidence that there was any fraud or imposition connected with the execution of the waiver provision. In fact, the court of appeals recognizes:

> [The Mikey's Houses representative] agreed that she had an opportunity to review the addendum and could have reviewed it line for line if she had chosen to. She stated that Bank of America did not rush her into signing it and agreed that she probably could have retained counsel to review it if she had wished.

232 S.W.3d at 154. Mikey's Houses did not demonstrate that the conspicuous waiver was not executed knowingly and voluntarily, and since the representatives are presumed to have known what they signed, Mikey's Houses failed to rebut the presumption. Thus, the court of appeals erred when it required Bank of America to first prove the extent of Mikey's Houses' knowledge and voluntariness.

As for the extent of the allegation that would be necessary to shift the burden to Bank of America to prove knowledge and voluntariness, an allegation could be sufficient to shift the burden if there is fraud alleged in the execution of the waiver provision itself. *See Prudential*, 148 S.W.3d at 134. In *Prudential*, we noted that the party opposing the contractual jury-waiver provision did not "claim that they were tricked into agreeing" to the waiver, although they did claim that they were fraudulently induced to execute the contract when the enforcing party concealed facts that would have dissolved the entire contract. *Id*. We held that general allegations of fraud were not sufficient to shift the burden of proof to the enforcing party to prove that the opposing party knowingly and voluntarily waived the right to jury trial, reasoning that "[t]he purpose of [jury waiver] provisions—to control resolution of future disputes—would be almost entirely defeated if the assertion of fraud common to such disputes were enough to bar enforcement." *Id*. The same rationale applies here, where Mikey's Houses never alleges fraud connected to the execution of the waiver itself, but claims that the waiver was "the result of fraud in the inception of the transaction."

Such a general allegation of fraud is insufficient to shift the burden to Bank of America. If a party could simply allege fraud on the entire transaction in order to nullify a jury–waiver provision, there would hardly ever be a circumstance when waiver provisions could ever be enforceable.

We also note the similarity between arbitration clauses and jury–waiver provisions to clarify that a presumption against contractual jury waivers is antithetical to *Prudential*'s jurisprudence with regard to private dispute resolution agreements. In *Prudential*, we agreed with the United States Supreme Court that "arbitration and forum-selection clauses should be enforced, even if they are part of an agreement alleged to have been fraudulently induced, as long as the specific clauses were not themselves the product of fraud or coercion." 148 S.W.3d at 134–35 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)). Since *Prudential* indicates that the same dispute resolution rule expressed by the United States Supreme Court in *Scherk* should apply to contractual jury-waiver provisions, the court of appeals' analysis errs by distinguishing jury waivers from arbitration clauses, thereby imposing a stringent initial presumption against jury waivers. 232 S.W.3d at 151–52. Statutes compel arbitration if an arbitration agreement exists, *see* TEX. CIV. PRAC. REM. CODE Sec.171.021(a) (Texas General Arbitration Act), and more importantly, "Texas law has historically favored agreements to resolve such disputes by arbitration." *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008); *see also In re. D. Wilson Constr. Co.*, 196 S.W.3d 774, 782–83 (Tex. 2006) (recognizing presumption favoring arbitration clauses). We see no reason why there should be a different rule for contractual jury waivers.

We hold that *Prudential* does not impose a presumption against jury waivers that places the burden on Bank of America to prove that the waiver was executed knowingly and voluntarily.

Therefore, we conditionally grant the petition for writ of mandamus and direct the court of appeals to vacate and withdraw the opinion and judgment of May 3, 2007, and to reinstate the trial court order enforcing the parties' jury waiver. TEX. R. APP. P. 52.8(c); *see also Prudential*, 148 S.W.3d at 139–140 (holding that mandamus is appropriate remedy to enforce contractual jury waivers). We are confident the court of appeals will comply, and the writ will issue only if it fails to do so.

OPINION DELIVERED: February 27, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0919

IN RE REZA ZANDI

ON PETITION FOR WRIT OF HABEAS CORPUS

SUPPLEMENTAL OPINION ON REHEARING

In support of the motion for rehearing of the real party in interest, Kathleen Richardson, the Harris County Domestic Relations Office has submitted a brief as amicus curiae, requesting clarification of the Court's opinion. Amicus acknowledges that when a person appears at a status hearing set by the court in a contempt or commitment order as a condition of suspension of his sentence for failure to pay child support, without notice of any assertion that suspension will be revoked, the court cannot revoke suspension without notice and a second hearing. The amicus states:

> If the respondent appears at the compliance (status) hearing and the movant alleges noncompliance and requests revocation, the trial court must conduct a subsequent or second hearing. The trial court cannot revoke the suspension of commitment or impose sentence without affording the respondent a subsequent hearing, thereby satisfying the due process "hearing" requirement. . . . The subsequent or second hearing is required even if the "conditional" contempt or commitment order provides that failure to comply will result in confinement "without any further notice to the respondent."

This, of course, is what our opinion holds.

The amicus argues that respondent need not be given other notice of the status hearing besides the setting contained in the contempt or commitment order. Our opinion imposes no such requirement. We hold only that, as the amicus recognizes, respondent's suspension cannot be revoked at the status hearing without prior notice that revocation will be sought, affording the respondent an opportunity to prepare any defense to specific complaints. The amicus argues that relator Zandi "received notice of the compliance hearing at the contempt stage of the proceeding and neither case law nor statute require subsequent additional notice before proceeding with a compliance hearing." We agree. But Zandi did not receive written notice prior to the compliance hearing that Richardson intended to seek revocation, stating the reasons. It is for want of that notice that Zandi is entitled to discharge.

Richardson's motion for rehearing is denied.

Opinion delivered: December 19, 2008

IN THE SUPREME COURT OF TEXAS

NO. 07-0924

OLD FARMS OWNERS ASSOCIATION, INC. AND
SUSAN C. LEE, TRUSTEE OF THE TRUST CREATED UNDER ARTICLE IV
OF THE WILL OF KATHERINE P. BARNHART, DECEASED, PETITIONERS,

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

PER CURIAM

In this tax delinquency suit, we decide whether the 2001 amendments to section 33.04 of the Tax Code apply to a case originally filed in 1999, nonsuited, and then refiled in 2002. We hold that the amendments do not apply in this instance and, therefore, reverse the court of appeals and reinstate the trial court's judgment.

Respondents, multiple taxing units in the Harris County and Houston area ("Taxing Units"), sued Susan C. Lee, the trustee of a trust created under the will of Katherine P. Barnhart ("the Trust") for delinquent property taxes on a 4.3174 acre tract of land.[1] The Trust was the record owner of this

[1] The Taxing Units also sued Old Farms Owners Association, Inc. and Westheimer Old Farms I, Ltd. The Taxing Units sued these parties because they were the subsequent property owners after it was sold in 1997, the same year as the delinquent property tax bill at issue. The trial court assessed the 1997 taxes and apportioned them among the parties in accordance with the sales contract.

tract in 1996, when the Harris County Appraisal District's (HCAD) records listed the Trust's address as 1706 Post Oak Boulevard, an address maintained since 1993. In 1997, the Trust sold 4.2565 of the 4.3174 acres to Westheimer Old Farms I, leaving the Trust with only 0.0609 acres. Because the Trust still retained the full 4.3174 acres on the record date for purposes of property tax assessments in 1997, the entire tax bill for that year was to be mailed to the Trust. *See* TEX. TAX CODE §§ 22.01, 25.02, 32.07. However, after the sale but before the 1997 tax bill was mailed, HCAD unilaterally changed its records to list the Trust's address as 4550 Post Oak Boulevard, an address the Trust had last maintained ten years earlier. It is unclear exactly why HCAD reverted back to an old address, but nothing in the record suggests that the Trust requested the change. At any rate, the Taxing Units sent the 1997 tax bill to the old 4550 Post Oak Boulevard address, and it was returned as "undeliverable." The Trust subsequently failed to pay the 1997 taxes.

In 1999, HCAD discovered and corrected the address error to reflect the Trust's actual address. The Taxing Units then sued the Trust for the unpaid 1997 taxes. However, for reasons that are unclear in the record, the Taxing Units nonsuited the case in 2000.[2] The case was then refiled in 2002, at which time the Taxing Units sought to recover $51,211.78 in unpaid taxes, along with penalties and interest on those taxes of $44,194.75.

On November 4, 2003, a trial was held before a tax master. *See* TEX. TAX CODE tit. I, subtit. E, Ch. 33, subch. D (providing for the use of a tax master in tax delinquency cases). At trial, the Trust did not dispute the Taxing Units' entitlement to the underlying taxes. However, the Trust did

[2] It appears, though it is not entirely clear from the record, that the Taxing Units and the Trust resolved the back taxes from 1997 as to the 0.0609 acres, but not for the remaining 4.2565 acres that were sold in 1997.

dispute the Taxing Units' entitlement to the interest and penalties on those taxes on two alternative grounds: (1) because the Taxing Units delivered the Trust's 1997 tax bill to the wrong address, the tax never became delinquent, and penalties and interest could never begin to accrue; and (2) even if the tax was delinquent, the penalties and interest were waived because the Taxing Units failed to deliver the statutorily mandated five-year notice of delinquent taxes in 2000. *See* TEX. TAX CODE § 33.04(b), (c) (repealed 2001). The tax master found that the Taxing Units did not deliver the 1997 tax statement to the Trust,[3] and that the Taxing Units also failed to deliver the required five-year delinquency notice to the Trust in 2000. Based on these findings, the tax master concluded that, while the Taxing Units could recover the base amount of these taxes, it could not recover interest and penalties on those taxes. The district court upheld this decision. *See* TEX. TAX CODE § 33.74 (providing for appeal of tax master's findings to trial court).

A divided court of appeals reversed the district court's judgment on both grounds. 236 S.W.3d at 384. The court of appeals concluded that, under the Tax Code, a taxing unit is required to mail the tax bill to the address provided by the appraisal district. Because the evidence demonstrated that the Taxing Unit mailed the bill to the address provided by HCAD, the court of appeals held that the Taxing Unit had complied with the statute, despite the fact that it had mailed to bill to the incorrect address. With regard to the five-year delinquency notice, the court of appeals held that the Trust was not eligible for a waiver of penalties and interest because that Tax Code

[3] The Tax Master also found that the Trust did not receive statements from 1998–2001. Because the Trust was not record owner on most of the property following 1997, the 1998-2001 statements were for small amounts of no more than $3.03. *See* TEX. TAX CODE § 31.01(f) (providing that a tax bill need only be mailed once the total accrues to fifteen dollars). Thus, the dispute centers on the 1997 statement.

provision was no longer in effect and the new law applied retroactively to deprive the Trust of the pre-existing waiver. *Id*. at 381–82. The court of appeals held that a savings clause accompanying the 2001 repealing legislation did not apply to the Trust's case. *Id*. On appeal, the Trust argues that the court of appeals erred and that the trial court's judgment should be reinstated. We agree.

Section 33.04 of the Tax Code, as it existed in 1999, states, in relevant part:

> Notice of Delinquency.
>
> (b) In addition to [a yearly notice], the tax collector for each taxing unit in each year divisible by five shall deliver by mail a written notice of delinquency to each person who owes a tax that has been delinquent more than one year and whose name and mailing address are known to the collector or can be determined by the exercise of reasonable diligence . . . .
>
> (c) Penalties and interest on a tax delinquent more than five years or a multiple of five years are cancelled and may not be collected if the collector has not delivered the notice required by Subsection (b) of this section in each year that is divisible by five following the date on which the tax first became delinquent for one year.

Act of Jun. 14, 1985, 69th Leg., R.S., ch. 761, §1, 1985 Tex. Gen. Laws 2600, 2601. The tax master found, and the record demonstrates, that the required five-year notice was not delivered to the Trust as required in 2000. Thus, under former section 33.04 (c), penalties and interest on the 1997 taxes are waived. However, section 33.04 was amended in 2001 to remove the five-year notice requirement and the associated penalty and interest waiver provision.[4] But the 2001 legislation included a savings clause that continued the notice and waiver provisions in some cases:

> Section 33.04, Tax Code, as amended by this Act, does not apply to **taxes subject to a delinquent tax suit pending before the effective date of this Act**. Section 33.04, Tax Code, as amended by this Act, applies to all other taxes that became delinquent before the effective date of this Act or that become delinquent on or after that date.

[4] Act of June 17, 2001, 77th Leg., R.S., ch. 1430, § 11, 2001 Tex. Gen. Laws 5109, 5112.

> Penalties and interest on a delinquent tax are not canceled under Section 33.04, Tax Code, for failure to deliver any notice under that section as it existed immediately before the effective date of this Act. A delinquent tax that is the **subject of a collection suit filed before the effective date of this Act** is governed by Section 33.04, Tax Code, as that section existed immediately before the effective date of this Act, and the former law is continued in effect for that purpose.

Act of Jun. 17, 2001, 77th Leg., R.S., ch. 1430, § 40, 2001 Tex. Gen. Laws 5109, 5122 (emphasis added). The second and third sentences of this clause clearly remove any penalty on the part of the Taxing Units for failure to provide the five-year notice in the past in many cases. But the parties dispute the meaning of the first and last sentences, which do exempt some cases. This is because the delinquency suit was originally filed in 1999, nonsuited, then refiled in 2002 following the amendments. Both the first and last sentence support the Trust's argument that the former waiver provisions should apply to its case. The first sentence of the clause states that the amendment "does not apply to taxes subject to a delinquent tax suit *pending before* [September 1, 2001]." *Id*. (emphasis added). Although the 1999 case was nonsuited, it was a suit that was pending *before* September 1, 2001. Additionally, the Trust's delinquent tax was "the subject of a collection suit filed before the effective date of [the legislation]," as discussed in the last sentence of the clause. *Id*. Although the 1999 suit ended in a nonsuit, that does not change the fact that it was a collection suit filed before the effective date of the legislation.

We have held "a dismissal is in no way an adjudication of the rights of parties; it merely places the parties in the position that they were in before the court's jurisdiction was invoked just as if the suit had never been brought." *Crofts v. Court of Civil Appeals*, 362 S.W.2d 101, 104 (Tex. 1962). We do not modify that rule today, but we do recognize that this savings clause is broad

enough to apply to any collection suit filed prior to the revisions in the law, even if the suit was eventually nonsuited. This must be so because, otherwise, the last sentence of the savings clause would have no meaning. *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) (refusing to presume that the Legislature intended a redundancy); *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987) (noting that we must give effect to all a statute's words). As noted by the dissent in the court of appeals, "[t]he savings clause cannot be reasonably read to bar the prosecution only of suits taxing authorities had prosecuted to *completion* under prior law because these suits were *already* barred by the law of *res judicata*." 236 S.W.3d at 388 (Keyes, J. dissenting) (emphasis in original). The Taxing Units argue that it is possible the last sentence was meant to apply to cases such as those that reach judgment, those pending appeal, or those disposed of for want of prosecution. But this clause could not have been intended to apply to a case disposed of due to judgment or one pending appeal because those cases would have already applied the statute in effect at the time of trial. And as to those cases dismissed for want of prosecution, we agree that this clause would apply to them, as long as they were dismissed without prejudice, in which case they are treated the same as a nonsuit. *See Crofts*, 362 S.W.2d at 104*; Webb v. Jorns*, 488 S.W.2d 407, 409 (Tex. 1972). There is no indication that the Legislature intended to include a dismissal for want of prosecution under this clause, but not a nonsuit.

The Taxing Units also argue that the clause's last sentence acts as an instruction as to whether to apply the 1985 version of the section 33.04,[5] which treated the waiver as mandatory, or

[5] *See* Act of Jun. 14, 1985, 69th Leg., R.S., ch. 761, §1, 1985 Tex. Gen. Laws 2600, 2601.

the 1999 version of the statute, which treated the waiver as an affirmative defense.[6] We do not see this instruction in the savings clause. Regardless, penalties and interest would not be recoverable under either version.

For these reasons, we reverse the court of appeals, and reinstate the trial court's judgment.[7]

OPINION DELIVERED: February 13, 2009

[6] *See* Act of Jun. 19, 1999, 76th Leg., R.S., ch. 1481, § 16, 1999 Tex. Gen. Laws 5097, 5101.

[7] Because we hold that the interest and penalties are waived under former section 33.04, we do not consider whether they are waived due to the Taxing Units' failure to deliver the 1997 tax bill to the Trust's correct address.

IN THE SUPREME COURT OF TEXAS

NO. 07-0987

IN RE UNION CARBIDE CORPORATION, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this case, family members who survived John Hall intervened in a pending personal injury suit filed by Kenneth Moffett. Union Carbide, a defendant in both the pending suit and the intervention, filed a motion to strike the intervention. Instead of ruling on that motion, the trial court severed the Halls' claims into a new suit that then remained pending in the same court. We conclude that (1) the trial court abused its discretion by failing to rule on Union Carbide's motion to strike before considering whether to sever the intervention; (2) the trial court only had discretion to grant the motion to strike; and (3) Union Carbide does not have an adequate remedy by appeal. We conditionally grant mandamus relief.

On January 27, 2006, Kenneth Moffett filed a personal injury action in the 212th District Court of Galveston County. Moffett alleged that he was exposed to toxic chemicals distributed, marketed, or manufactured by fourteen defendants and that the exposure caused him to develop acute myelogenous leukemia. He claims to have been exposed to the chemicals from 1974 to 2000,

including short periods of time in the mid-1970s and in the 1980s when he worked at the Union Carbide facility in Texas City.

On March 5, 2007, family members who survived John Hall intervened in Moffett's lawsuit. They alleged that Hall died from myelodysplastic syndrome caused by his exposure between 1963 and 1998 to toxic chemicals at Union Carbide's Texas City facility. Some, but not all of the defendants sued by the Hall survivors were also defendants in Moffett's suit. Union Carbide was a defendant in both the Moffett and Hall suits. Union Carbide filed a motion to strike the Halls' intervention because the Halls failed to show that they possessed a justiciable interest in the Moffett suit. The trial court conducted a hearing on the motion to strike but did not rule on it. Instead, the trial court severed the Halls' claims into a separate suit and directed the suit to be docketed and maintained on the regular docket of the court. Union Carbide petitioned the court of appeals for a writ of mandamus directing the trial court to rule on and grant its motion to strike. The court of appeals denied the petition. __ S.W.3d __.

In this Court, Union Carbide argues that the trial court abused its discretion by both refusing to rule on its motion to strike the intervention and refusing to grant the motion because the Halls did not show a justiciable interest in the Moffett suit. Union Carbide also urges it does not have an adequate appellate remedy and that the benefits of mandamus review outweigh the detriments.

Texas Rule of Civil Procedure 60 provides that "[a]ny party may intervene by filing a pleading subject to being stricken out by the court for sufficient cause on the motion of any party." The rule authorizes a party with a justiciable interest in a pending suit to intervene in the suit as a matter of right. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex.

1990). Because intervention is allowed as a matter of right, the "justiciable interest" requirement is of paramount importance: it defines the category of non-parties who may, without consultation with or permission from the original parties or the court, interject their interests into a pending suit to which the intervenors have not been invited. Thus, the "justiciable interest" requirement protects pending cases from having interlopers disrupt the proceedings. The parties to the pending case may protect themselves from the intervention by filing a motion to strike. *Id.* If any party to the pending suit moves to strike the intervention, the intervenors have the burden to show a justiciable interest in the pending suit. *Mendez v. Brewer*, 626 S.W.2d 498, 499 (Tex. 1982).

To constitute a justiciable interest, "[t]he intervenor's interest must be such that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought" in the original suit. *King v. Olds*, 12 S.W. 65, 65 (Tex. 1888). In other words, a party may intervene if the intervenor could have "brought the [pending] action, or any part thereof, in his own name." *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657.

In this case, the Halls' petition in intervention only briefly addressed their interest in the Moffett suit:

> In the original action, Moffett claims exposure to benzene and benzene-containing products at premises including Union Carbide in Texas City and against some, if not all, of the Defendants that Intervenors are making claims. Intervenors are entitled to a recovery against the defendants and Intervenors' claims [that] arise out of the same transaction and/or series of transactions and have common questions of law and/or fact with the claims in the original action.

Neither party introduced evidence at the hearing on Union Carbide's motion to strike. In their brief the Halls claim to have met their burden of showing that they had a justiciable interest in the Moffett suit. They primarily base their argument on allegations that Hall and Moffett suffered from similar blood disorders resulting from exposure to benzene at Union Carbide's facilities. Yet the Halls do not assert that they could have brought any part of Moffett's claim. While there is a real controversy between the Halls and Union Carbide—whether John Hall's exposure to toxic chemicals while working at Union Carbide caused his disease—the Halls make no claim that their controversy will be affected or resolved by resolution of the Moffett case. Accordingly, the Halls fail to demonstrate a justiciable interest in Moffett's suit and are not entitled to intervene in the Moffett suit.

The Halls assert that even if they did not properly intervene in Moffett's suit, the trial court had discretion to sever their claims rather than striking them. First, the Halls claim that their petition met the standard for permissive joinder found in Texas Rule of Civil Procedure 40, and therefore, the trial court could properly sever their claims under Rule 41. *See* TEX. R. CIV. P. 41 (providing that "actions which have been improperly joined may be severed"). But the joinder standard does not control here because this was an intervention, and the two are distinct. *Compare* TEX. R. CIV. P. 40(a) (providing the requirements to join in an action as a plaintiff), *with Guar. Fed. Sav. Bank*, 793 S.W.2d at 657 (providing the requirements to intervene in an action). Permissive joinder relates to "proper parties to an action who may be joined or omitted at the *pleader's* election." 1 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 5:29 (2d ed. 2004) (emphasis added). Permissive joinder and intervention are authorized and permitted by separate rules, and the rules provide different processes for addressing the different situations. TEX. R. CIV.

P. 41, 60. Because interventions by uninvited participants have potential for disrupting pending suits, trial courts should rule on motions to strike interventions before considering other matters such as severance.

The Halls reference *Boswell, O'Toole, Davis & Pickering v. Stewart*, 531 S.W.2d 380, 382 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ), in which the court stated that a trial judge may "proceed to trial of the intervention claim; he may sever the intervention; he may order a separate trial; he may strike the intervention for good cause." *See also Saldana v. Saldana*, 791 S.W.2d 316, 320-21 (Tex. App.—Corpus Christi 1990, no writ).[1] However, Rule 60 does not provide for such options as equal alternatives; it provides only that an intervention is "subject to being stricken out by the court for sufficient cause on the motion of any party." TEX. R. CIV. P. 60.

The Halls further argue that mandamus relief is not proper because the Court cannot prescribe the manner in which the trial court exercises its discretion. *See Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (noting that mandamus relief is available to correct a trial court's clear abuse of discretion). The Halls' argument assumes that Rule 60 afforded the trial court discretion to refuse to rule on Union Carbide's motion to strike before it considered severing the Hall case from the Moffett case. It did not. The trial court abused its discretion in failing to first rule on the motion to strike. Furthermore, the Halls did not show that they possessed any justiciable interest in the Moffett lawsuit. They did not show that they had standing to have brought and recovered for any part of

[1] While *Stewart* and *Saldana* state that a trial court may sever an intervention, a severance was not granted in either of those cases. The trial court severed a petition in intervention in *Schwartz v. Taheny*, 846 S.W.2d 621, 623 (Tex. App.—Houston [14th Dist.] 1993, writ denied), but the parties agreed to the severance.

Moffett's claim. Accordingly, the trial court had no discretion to deny Union Carbide's motion to strike the petition in intervention.

For mandamus to issue, a relator must show that it has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004). "An appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments." *Id.* at 136. Union Carbide claims that the benefits of mandamus review outweigh the detriments because (1) the issue presented is one of law that is likely to recur, yet eludes an answer by appeal; (2) the trial court's action effectively establishes a template for circumventing procedures for random assignment of cases in multi-court counties[2]; (3) it will be difficult or impossible to show on appeal that the deprivation of a randomly assigned judge entitles Union Carbide to appellate relief; (4) the effective initiation of suit by intervention and severance deprived Union Carbide of procedural rights afforded to defendants in original actions; and (5) granting mandamus will not result in any, or at most, negligible detriment. We agree with Union Carbide.

Regardless of the other benefits claimed by Union Carbide, there is significant benefit from mandamus relief in regard to the random-assignment-of-cases question. Random assignment of cases is designed to prevent forum-shopping. Practices that subvert random assignment procedures breed "disrespect for and [threaten] the integrity of our judicial system." *See In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997). We need not consider whether the intervention was intended to circumvent Galveston County's local rule requiring random assignment of cases because regardless

[2] Cases such as the Halls' are subject to random assignment in Galveston County. *See* GALVESTON (TEX.) DIST. CT. LOC. R. 3.10.

of the Halls' intent, the intervention and the trial court's abuse of discretion in failing to rule on and grant the motion to strike resulted in circumvention of the random assignment rule. In regard to any detriment to the parties, the Halls' claims have now been filed as a separate lawsuit that is pending in Galveston County. There will be insignificant detriment to either party or the judicial system if mandamus relief is granted. On balance, mandamus review is warranted because the benefits of establishing the priority that trial courts must give to ruling on motions to strike interventions and re-emphasizing the importance of both appearance and practice in maintaining integrity of random assignment rules outweigh any detriment to mandamus review in this instance. Thus, Union Carbide does not have an adequate remedy by appeal.

Without hearing oral argument, we conditionally grant the writ of mandamus and direct the trial court to vacate its severance order and enter an order granting Union Carbide's motion to strike. *See* TEX. R. APP. P. 52.8(c). The writ will issue only if the trial court does not do so.

OPINION DELIVERED: November 14, 2008

IN THE SUPREME COURT OF TEXAS

NO. 07-1013

TEXAS DEPARTMENT OF TRANSPORTATION, PETITIONER,

v.

STEPHANIE GUTIERREZ AND RONNIE GUTIERREZ, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

PER CURIAM

This appeal poses the same question we answer in another case decided today, *Texas Department of Transportation v. York*, __ S.W.3d __ (Tex. 2009): whether loose gravel on a road is a "special defect" under Texas Civil Practice and Remedies Code section 101.022(b). Because the court of appeals' decision is incompatible with *York*'s holding that loose gravel is not a special defect as a matter of law, we reverse and dismiss the case for lack of subject-matter jurisdiction.

The morning of December 5, 2003, Stephanie Gutierrez (Gutierrez) was commuting to work on FM 624 in Jim Wells County. The previous night, the Texas Department of Transportation (TxDOT) had repaired portions of FM 624, but some excess gravel remained until the afternoon of December 5th.

Gutierrez passed a "Curve Ahead" sign with a speed advisory of 45 miles per hour. TxDOT had also placed a "Loose Gravel" sign at the site. Gutierrez lost control on the gravel and pulled off

the road to inspect her car for damage. A short time later, while standing near her vehicle, Gutierrez was struck by another driver that lost control on the same curve.

Gutierrez and her husband Ronnie Gutierrez sued TxDOT, asserting the loose gravel constituted a special defect. At trial, Gutierrez did not contest the presence of the "Curve Ahead" sign and the speed advisory. She initially disputed TxDOT's claim of a "Loose Gravel" sign posted at the scene, but just before closing arguments she stipulated to it. Given this stipulation, and after the jury returned a verdict for Gutierrez, TxDOT filed a post-trial plea to the jurisdiction asserting sovereign immunity, which was denied. TxDOT filed an interlocutory appeal,[1] but a divided court of appeals held (1) the loose gravel constituted a special defect, and (2) the jury found TxDOT failed to adequately warn of it. 243 S.W.3d 127, 130.

In general, the State of Texas retains sovereign immunity from suit, *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 3d 217, 224 (Tex. 2004), and can only be sued if the Legislature waives immunity in "clear and unambiguous language," TEX. GOV'T CODE § 311.034. One such waiver is the Tort Claims Act, which permits premise-liability suits and establishes that the State owes a claimant the same duty a private person owes a licensee. TEX. CIV. PRAC. & REM. CODE § 101.022(a). However, if the claim arises from a special defect, then the State's duty is judged under an invitee standard. *Id*. § 101.022(b).

The Tort Claims Act does not define "special defect" but likens it to "excavations or obstructions." *Id*. Thus, in *York* we stress that "the central inquiry is whether the condition is of the

[1] The appeal was interlocutory because the trial court granted a motion for new trial in favor of Ronnie Gutierrez on his bystander claim, and made clear in its new trial order that the remaining portion of the judgment in favor of Stephanie Gutierrez was interlocutory until the final adjudication of Ronnie's claim.

same kind or falls within the same class as an excavation." __ S.W.3d at __. As we hold today in *York*, loose gravel, unlike other conditions we have said are special defects, "does not form a hole in the road or physically block the road like an obstruction or excavation," *id*. at __, nor does it "physically impair a car's ability to travel on the road in the manner that an excavated road or obstruction blocking the road does," *id*. at __ (internal quotation and citation omitted). It thus falls outside the special-defect class as a matter of law. Instead it "falls in the same class as ordinary premise defects—those conditions that do not reach the level of an obstruction or excavation." *Id*. This case presents the same condition (loose gravel) due to the same re-paving procedure (a spot seal), and we reach the same result: loose gravel is a premise defect, not a special defect.[2]

Gutierrez also cannot recover under an ordinary premise-defect claim. The trial court submitted to the jury only a special-defect charge, with an invitee standard of care, that Gutierrez had prepared. The court overruled TxDOT's objection that a premise-defect charge with a licensee standard was the proper charge under the evidence, and refused TxDOT's proffered premise-defect charge that correctly set forth the elements of liability under that theory. To establish TxDOT's liability for an ordinary premise defect, Gutierrez was required to obtain findings that TxDOT had actual knowledge of the dangerous condition and that she did not. *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992). Because TxDOT objected to the omission of these elements in the jury charge (elements on which Gutierrez had the burden of proof), we cannot deem findings on the elements in her favor. *Id*. at 241; *see also* TEX. R. CIV. P. 279. The verdict

[2] We clarify in *York* that "a sizeable mound of gravel"—such that it amounts to an obstruction—*can* be a special defect. __ S.W.3d at __. However, nothing in the record suggests the gravel on FM 624 was "a sizeable mound" of the same character as an obstruction.

thus does not support a judgment in Gutierrez's favor. *Payne*, 838 S.W.2d at 241.

Gutierrez's suit falls outside the Tort Claims Act's limited immunity waiver for premise-liability claims. Accordingly, we grant the petition for review and without hearing oral argument, TEX. R. APP. P. 59.1, reverse the court of appeals' judgment and dismiss the case.

OPINION DELIVERED: May 22, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-1026

LOUIS M. DITTA, GUARDIAN OF THE ESTATE OF DORIS L. CONTE, AN INCAPACITATED PERSON, PETITIONER,

v.

SUSAN C. CONTE AND JOSEPH P. CONTE, JR., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued January 13, 2009

JUSTICE WILLETT delivered the opinion of the Court.

The court of appeals held that this trustee-removal suit was barred by the four-year statute of limitations applicable to breach-of-fiduciary-duty suits. We disagree and hold that no statutory limitations period restricts a court's discretion to remove a trustee. A limitations period, while applicable to suits seeking damages for breach of fiduciary duty, has no place in suits that seek removal rather than recovery. Accordingly, we reverse the court of appeals' judgment that the case was time-barred and remand to that court for further proceedings.

I. Background

In 1987, Joseph and Doris Conte created the Joseph P. Conte Family Trust, an inter vivos

trust. The Trust agreement named Joseph the original trustee. Upon Joseph's death in 1993, Doris began serving as co-trustee along with her two children, Susan and Joseph Jr. The co-trustees were obliged to create and fund three separate trusts for the primary benefit of Doris. The co-trustees were to distribute quarterly income from a management trust to Doris, as well as principal amounts requested by Doris for "her comfort, health, support and maintenance, in order to maintain" the equivalent lifestyle to which Doris was accustomed at the time of Joseph's death.

Initially, Joseph Jr. managed the Trust's day-to-day affairs. About two years later, Susan and Doris discovered that Joseph Jr. was not administering the Trust in accordance with its terms. This discovery heralded a proliferation of litigation, including eight separate lawsuits between Susan and Joseph Jr. In the course of one of these suits, Doris was declared mentally incapacitated. Susan was made guardian of Doris' person, and Louis Ditta, the petitioner in this case and an attorney, was eventually made guardian of Doris' estate. Due to the declaration of incapacity, Doris was removed as a trustee of the Trust.

In August 1998, Ditta sought appointment of a receiver to take over the Trust, claiming that the discord between Joseph Jr. and Susan was materially injuring the Trust assets. Instead of appointing a receiver, the probate court appointed a temporary successor trustee, Paula Miller. At that time, the trustee powers of both Susan and Joseph Jr. were temporarily suspended. In June 2000, Miller filed an accounting for the Trust with the court that covered March 8, 1993 (the date of Joseph's death) to December 31, 1999. The accounting revealed that both Susan and Joseph Jr. had become significantly indebted to the Trust by using Trust assets for personal expenses.

Susan contested the accounting, but eventually the parties entered into an agreed judgment in January 2001. The agreed judgment approved Miller's accounting of more than $400,000 that Susan owed to the Trust and a similar debt owed by Joseph Jr. The agreed judgment provided that collection of the amounts owed by Susan and Joseph Jr. would be deferred during Doris' lifetime, unless the probate court later found that Doris' "financial needs" required earlier repayment.

In January 2003, Ditta persuaded the probate court to remove Joseph Jr. as trustee based on his violations of the Trust agreement. Thereafter, only Susan (whose trustee powers were suspended) and Miller (the temporary successor trustee) remained as trustees. On April 5, 2004, Ditta filed this suit, seeking Susan's removal as trustee. On both April 27 and November 3 of that same year, Susan and Joseph Jr., in their capacity as beneficiaries of the Trust, signed documents, pursuant to the terms of the Trust,[1] to reappoint Susan as trustee if she were removed by the court in the removal proceeding initiated by Ditta.

Following a bench trial, the probate court removed Susan as trustee, modified the terms of the Trust regarding trustee succession, and appointed Frost Bank as successor trustee. Susan appealed and the court of appeals reversed, holding that Ditta's removal action was barred by the four-year statute of limitations governing breach-of-fiduciary-duty claims.[2] The court of appeals reasoned that because "Susan's alleged breach of fiduciary duty formed the underlying basis for

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[1] The Trust provided that, should the position of trustee become vacant, a series of persons would have an opportunity to appoint the successor trustee. If neither Joseph Conte Sr. nor Doris Conte appointed a successor in the first sixty days after the position of trustee was vacated, the majority of adult beneficiaries had a thirty-day window within which they could appoint a successor trustee.

[2] __ S.W.3d __.

Ditta's removal action," and "both parties . . . briefed the instant appeal as one to which a four-year statute of limitations applies," Ditta was required to bring his removal action no later than four years after the cause of action for removal accrued.[3] The court of appeals also held that the probate court erred in modifying the terms of the Trust and appointing a successor trustee because it took those actions based on a time-barred petition.[4]

II. Preservation of Error

In a post-submission brief, Susan asserts that Ditta has waived the argument that no limitations period should apply to the removal action. While Ditta did not make that precise argument, his entire brief to this Court assiduously detailed numerous reasons why the statute of limitations should not apply to his action.[5] We have held that "[w]hen . . . the only issue is the law question of which statute of limitations applies, the court of appeals should apply the correct limitations statute even if the appellee does not file any brief."[6] Further, a question is properly before this Court if it is subsidiary to, and fairly included within, an issue raised in a litigant's petition for review.[7] This requirement is to be applied "reasonably, yet liberally," so that an appellate court can

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[3] *Id.* at ___.

[4] *Id.* at ___.

[5] Specifically, Ditta asserted limitations did not bar his claims because: (1) the discovery rule or legal-injury rule delayed accrual of the claim; (2) Doris' mental incapacity tolled the running of limitations; and (3) a continuing conflict of interest between Susan and the Trust tolled the running of limitations.

[6] *Williams v. Khalaf*, 802 S.W.2d 651, 658 (Tex. 1990). Of course, this rule does not eliminate a litigant's initial obligation to raise the statute of limitations as an affirmative defense. *See* TEX. R. CIV. P. 94.

[7] TEX. R. APP. P. 53.2(f), 55.2(f).

reach the merits of an appeal whenever it is "reasonably possible" to do so.[8] In order to see that "a just, fair[,] and equitable adjudication of the rights of the litigants"[9] is obtained, we broadly construe Ditta's issues to encompass the core question of whether a statute of limitations should be applied at all.

III. Timeliness of Trustee-Removal Claim

Ditta sought removal of Susan as trustee and reformation of the Trust to appoint a successor trustee. He asserted no cause of action giving rise to a claim for monetary damages such as breach of fiduciary duty. Therefore, we limit our analysis to the question of what, if any, statute of limitations should apply to a claim solely for removal of a trustee.

Neither the Texas limitations statutes[10] nor Texas caselaw (save for the court of appeals' decision in this case) address what, if any, limitations period applies to a trustee-removal cause of action.[11] Scant caselaw exists elsewhere on the issue.[12]

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[8] *See Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (applying Texas Rule of Appellate Procedure 38.1, governing briefs to the intermediate appellate courts).

[9] *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *see also In re M.N.*, 262 S.W.3d 799, 801 (Tex. 2008).

[10] *See generally* TEX. CIV. PRAC. & REM. CODE §§ 16.004-.037.

[11] Nor have we held the four-year residual limitations period applicable to removal suits. *See* TEX. CIV. PRAC. & REM. CODE § 16.051.

[12] An Indiana decision imposed a statute of limitations on a removal action, holding that the claim was time-barred because it was based on two underlying breach of trust claims for which the applicable limitations period had run. *Mack v. Am. Fletcher Nat'l Bank & Trust Co.*, 510 N.E.2d 725, 740 (Ind. Ct. App. 1987). The court reasoned, "because [the removal] claim for relief *is* hinged on [the underlying] alleged injuries, we are bound by the same statutes of limitations." *Id.* We decline to follow the Indiana court of appeals' approach.

The court of appeals applied the four-year statute of limitations applicable to suits for breach of fiduciary duty.[13] Susan's removal as trustee, however, was not based solely on discrete breaches of fiduciary duty that occurred in the past. The probate court gave three reasons for removing Susan: (1) her indebtedness to the Trust and concurrent responsibility to collect on that debt if Doris needed the funds created an inherent and continuing conflict of interest; (2) Susan's prior use of Trust funds to pay off personal debts materially violated the terms of the Trust; and (3) Susan's tenuous relationship with Joseph Jr. impaired the performance of her trustee duties. Susan does not persuade us that any of these three reasons could not be considered by the probate court as grounds for her removal as trustee.[14] The Trust Code provides courts wide latitude in deciding whether to remove a trustee:

> A trustee may be removed in accordance with the terms of the trust instrument, or, on the petition of an interested person and after hearing, a court may, in its discretion, remove a trustee . . . if: (1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust; (2) the trustee becomes incapacitated or insolvent; (3) the trustee fails to make [a required] accounting . . . ; or (4) the court finds *other cause* for removal.[15]

More fundamentally, even if the probate court's removal of Susan had been based solely on a conclusion that she committed a discrete breach of fiduciary duty, we conclude that the court's discretion to remove a trustee for such a breach is not subject to a statutory limitations period

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[13] TEX. CIV. PRAC. & REM. CODE § 16.004(a)(5).

[14] We note, however, that we recently held that a conflict of interest does not always necessitate removal of a trustee. *Kappus v. Kappus*, ___ S.W.3d ___, ___ (Tex. 2009).

[15] TEX. PROP. CODE § 113.082(a) (emphasis added).

running from a specified period after the breach. Instead, the removal decision turns on the special status of the trustee as a fiduciary and the ongoing relationship between trustee and beneficiary, not on any particular or discrete act of the trustee.

A trust is not a legal entity;[16] rather it is a "fiduciary relationship with respect to property."[17] High fiduciary standards are imposed upon trustees,[18] who must handle trust property solely for the beneficiaries' benefit.[19] A fiduciary "occupies a position of peculiar confidence towards another."[20] Accordingly, a trustee's association with the trust is that of a relationship or a status. Because a trustee's fiduciary role is a status, courts acting within their explicit statutory discretion should be authorized to terminate the trustee's relationship with the trust at any time, without the application of a limitations period.

By analogy, the marital relationship between spouses is a fiduciary relationship.[21] That special relationship is of course more than the sum of discrete actions taken by one spouse toward another. If, for example, cruelty and adultery are recognized grounds for divorce,[22] a spouse suing for divorce on those grounds should not be tasked to sue for divorce within a specific statutory

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[16] *Huie v. DeShazo*, 922 S.W.2d 920, 926 (Tex. 1996) ("The term 'trust' refers not to a separate legal entity but rather to the *fiduciary relationship* governing the trustee with respect to the trust property.").

[17] TEX. PROP. CODE § 111.004(4).

[18] *Humane Soc'y of Austin & Travis County v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975).

[19] *See* TEX. PROP. CODE § 111.004(4).

[20] *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512 (Tex. 1942).

[21] *See Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998).

[22] *See* TEX. FAM. CODE §§ 6.002-.003.

limitations period. The effect of that conduct on the special relationship of trust and confidence between spouses may continue and change over time. And indeed, Texas law recognizes marriage as a status,[23] and there is no statutory limitations provision expressly directed at divorce actions.

A trustee-removal action can also be analogized to a real-property action to remove a cloud on title. We have held that as long as an injury clouding the title remains, so too does an equitable action to remove the cloud; therefore, a suit to remove the cloud is not time-barred.[24] As we recently noted in *Ford v. Exxon Mobil Chemical Co.*, if removal of the cloud depends on a tort or contract claim, it must be brought within the applicable limitations period.[25] But if a cloud on title is void or has expired by its own terms, there is no limitations period on the equitable claim to declare the existing status.[26]

Here, the probate court found that Susan, in her role as trustee, committed a breach of trust, and that her role as trustee was compromised due to her indebtedness to the Trust and her tenuous relationship with Joseph Jr. and Doris. These findings indicate that the potential for injury to the Trust would remain as long as Susan continued in her role as trustee; therefore, we hold that Ditta's claim for Susan's removal was not time-barred. Unlike *Ford*, Ditta is not merely attempting to recast a potentially time-barred claim (breach of fiduciary duty) as a claim for equitable relief (removal of

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[23] *See Saltarelli v. Saltarelli*, 670 S.W.2d 785, 785 (Tex. App.—Fort Worth 1984, no writ) ("marriage is not a contract, but a status created by the mutual consent of two people"); *see also In re M.S.B.*, 611 S.W.2d 704, 706 (Tex. Civ. App.—San Antonio 1980, no writ) (also describing marriage as a status).

[24] *Tex. Co. v. Davis*, 254 S.W. 304, 309 (Tex. 1923).

[25] *Ford v. Exxon Mobil Chem. Co.*, 235 S.W.3d 615, 618-19 (Tex. 2007) (per curiam).

[26] *Id.*

Susan as trustee). The remedy Ditta seeks in this action is removal of Susan as trustee, not monetary or other relief. While removal actions are sometimes premised on a trustee's prior behavior, they exist to prevent the trustee from engaging in further behavior that could potentially harm the trust. Any prior breaches or conflicts on the part of the trustee indicate that the trustee could repeat her behavior and harm the trust in the future. At the very least, such prior conduct might lead a court to conclude that the special relationship of trust and confidence remains compromised. Like cloud-on-title cases, as long as potential harm to the trust remains, an action to remove the trustee should be allowed to proceed.

We therefore hold that a trustee removal action, regardless of the underlying grounds on which it is brought, is not subject to a limitations analysis.[27] However, limitations periods continue to dictate when claims for fiduciary breaches must be brought. While the four-year limitations period proscribes whether an interested person can obtain monetary recovery from a trustee's fiduciary breach, it does not affect whether the interested person can seek that trustee's removal. To hold otherwise would allow trustees who previously harmed the trust relationship to remain in their fiduciary roles, regardless of their past transgressions.

IV. Conclusion

No statute of limitations period applies in a trustee-removal suit. Trusts are fiduciary relationships, and as such, their nature and character often change throughout the years of administration, as the Trust here did. Because the court of appeals decided this case on the

[27] We do not pass on whether equitable defenses, such as laches or estoppel, may apply to removal actions.

limitations issue, it did not reach issues relating to the merits of Ditta's removal action, the reformation of the Trust, or the appointment of Frost Bank as successor trustee. Accordingly, we reverse the court of appeals' judgment and remand the case to that court for consideration of those issues.[28]

_____

Don R. Willett
Justice

OPINION DELIVERED: June 5, 2009

[28] *See Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 566 (Tex. 2006).

IN THE SUPREME COURT OF TEXAS

NO. 07-1028

FORT BROWN VILLAS III CONDOMINIUM ASSOCIATION, INC. D/B/A FORT BROWN CONDOSHARES AND LRI MANAGEMENT, INC., PETITIONERS,

v.

COY GILLENWATER, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

PER CURIAM

JUSTICE JOHNSON did not participate in the decision.

In this premises liability case, we decide whether Texas Rule of Civil Procedure 193.6, which provides for the exclusion of evidence due to an untimely response to a discovery request, applies in a summary judgment proceeding. We hold that it does and, therefore, reverse the court of appeals' judgment.

In April 2004, Coy Gillenwater and his wife rented a condominium at the Fort Brown Condoshares in Brownsville. While visiting the condominium swimming pool, Gillenwater attempted to sit down in a pool-side chair. As he lowered himself into the chair, the tip of Gillenwater's right ring finger was severed by what Gillenwater alleged to be a broken weld on the

chair's frame. Gillenwater filed a premises liability claim against Fort Brown. The parties entered into, and the trial court approved, an "Agreed Level III Scheduling Order," which set August 19, 2005, as the deadline for expert disclosure. *See* TEX. R. CIV. P. 190.4(a) (permitting the trial court to establish a "discovery control plan tailored to the circumstances of the specific suit"). The order contained all the requirements of a level three discovery plan. *See id*. Fort Brown subsequently agreed to two extensions of the expert disclosure deadline, to August 25, 2005, and September 22, 2005, respectively. Gillenwater failed to disclose an expert by any of these deadlines. On February 10, 2006, Fort Brown filed a no-evidence motion for summary judgment, alleging that Gillenwater presented no evidence that (1) the condition of the chair posed an unreasonable risk of harm; and (2) Fort Brown knew or reasonably should have known of any danger presented by the chair. Gillenwater's response to this no-evidence motion included an affidavit of a previously undisclosed expert, Paul Carper, P.E. Fort Brown objected to the motion for summary judgment, arguing that (1) the expert was not timely disclosed under the scheduling order; and (2) regardless of the scheduling order's application, the expert's affidavit was conclusory. In response, Gillenwater argued that Carper's affidavit was competent summary judgment evidence, that Texas Rule of Civil Procedure 193.6 did not apply in a summary judgment setting, and that even if it did, Fort Brown was not unfairly surprised or prejudiced by the affidavit. The trial court sustained the objections, excluded the expert's affidavit, and granted Fort Brown's no-evidence motion for summary judgment. The court of appeals reversed, holding that the trial court abused its discretion in striking the expert's affidavit because Rule 193.6 does not apply in a summary judgment proceeding. ___

S.W.3d ___. The court also held that the expert's affidavit was not conclusory and that it was sufficient evidence to preclude summary judgment. *Id*. at ___.

Under Rule 193.6, discovery that is not timely disclosed and witnesses that are not timely identified are inadmissible as evidence. TEX. R. CIV. P. 193.6(a). A party who fails to timely designate an expert has the burden of establishing good cause or a lack of unfair surprise or prejudice before the trial court may admit the evidence. TEX. R. CIV. P. 193.6(b). "A trial court's exclusion of an expert who has not been properly designated can be overturned only upon a finding of abuse of discretion." *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994) (citing *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297, 298 (Tex. 1986)). Before the no-evidence motion for summary judgment was introduced to Texas trial practice, courts did not apply evidentiary sanctions and exclusions for failure to timely designate an expert witness in a summary judgment proceeding. *See*, *e.g.*, *State v. Roberts*, 882 S.W.2d 512, 514 (Tex. App.—Austin 1994, no writ) ("Discovery rules and sanctions for failure to designate expert witnesses do not apply to summary judgment proceedings."); *see also Purvis Oil Corp. v. Hillin*, 890 S.W.2d 931, 939–40 (Tex. App.—El Paso 1994, no writ); *Gandara v. Novasad*, 752 S.W.2d 740, 743 (Tex. App.—Corpus Christi 1988, no writ). However, in 1997, the no-evidence summary judgment motion was introduced to the Texas Rules of Civil Procedure as Rule 166a(i),[1] and in 1999, pretrial discovery rules were amended to include evidentiary exclusions under Rule 193.6. *Id*. at §193.6.[2] Since that time, most courts of appeals have applied Rule 193.6 to summary judgment proceedings. *See Thompson v. King*, 2007 WL 1064078, *2 (Tex.

[1] TEX. R. CIV. P. 166a (1949, amended 1997).

[2] TEX. R. CIV. P. 193.6 (1998).

App.—Tyler Apr. 11, 2007, pet denied) (mem. op.); *Blake v. Dorado*, 211 S.W.3d 429, 432 (Tex. App.—El Paso 2006, no pet.); *Chau v. Riddle*, 212 S.W.3d 699, 704–05 (Tex. App.—Houston [1st Dist.] 2006), *rev'd on other grounds*, 254 S.W.3d 453, 455 (Tex. 2008); *Cunningham v. Columbia/St. David's Healthcare Sys., L.P.*, 185 S.W.3d 7, 12–13 (Tex. App.—Austin 2006, no pet.); *F.W. Indus., Inc. v. McKeehan*, 198 S.W.3d 217, 221 (Tex. App.—Eastland 2005, no pet.); *Villegas v. Tex. Dep't. of Transp.*, 120 S.W.3d 26, 34–35 (Tex. App.—San Antonio 2003, pet. denied); *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268, 274 (Tex. App.—Austin 2002, pet. denied). *But see Alaniz v. Hoyt*, 105 S.W.3d 330, 340 (Tex. App.—Corpus Christi 2003, no pet.); *Johnson v. Fuselier*, 83 S.W.3d 892, 897–98 (Tex. App.—Texarkana 2002, no pet.) (both declining to apply Rule 193.6 to a summary judgment proceeding). Because we have already held that evidentiary rules apply equally in trial and summary judgment proceedings, *Longoria v. United Blood Services*, 938 S.W.2d 29, 30 (Tex. 1995), we also hold that the evidentiary exclusion under Rule 193.6 applies equally.

Our conclusion is based on the changes made to the pretrial discovery rules and the introduction of the no-evidence motion for summary judgment. The former pretrial discovery rules established a fluid deadline for discovery disclosure, which could be modified based on a change in the date of trial. *Ersek*, 69 S.W.3d at 272. Thus, it was possible that an exclusionary rule based on an untimely disclosure used at the summary judgment stage could exclude evidence that would later be admissible at trial. *Id*. at 272–73. However, the new discovery rules establish a date certain for the completion of discovery, which depends on the discovery plan level and not on the trial date. *See id*. at 273; *see also* TEX. R. CIV. P. 190.2–.4 (providing specific time periods for the end of

discovery, depending on the discovery plan level). Under the new rules, there is no longer a concern that discovery will be incomplete at the summary judgment stage. *See Ersek*, 69 S.W.3d at 273–74. In fact, the no-evidence rule, by its very language, is to be used following discovery. TEX. R. CIV. P. 166a(i) ("*After adequate time for discovery*, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence . . . .") (emphasis added). Combined with the no-evidence motion for summary judgment rule, the "hard deadline" established by the pretrial discovery rules ensures that the evidence presented at the summary judgment stage and at the trial stage remains the same. *See id.*; Tex. R. Civ. P. 190.3. Accordingly, the 193.6 exclusionary rule applies equally to both proceedings.

Here, Gillenwater did not timely disclose his expert pursuant to the deadline provided for in the agreed scheduling order and subsequent extension agreements. The trial court struck the expert's affidavit and did not consider it in granting the summary judgment. ___ S.W.3d at ___. Because Rule 193.6 provides for the exclusion of an untimely expert affidavit, we hold that the trial court did not abuse its discretion in striking it.[3] We also hold that Gillenwater failed to satisfy his burden of establishing good cause or a lack of unfair surprise or prejudice against Fort Brown. *See* TEX. R. CIV. P. 193.6(b). Gillenwater did not designate its expert until three days before the end of discovery and more than five months after the expert designation deadline.

Having held that the expert's affidavit was properly excluded, we must review the remaining evidence to determine whether the trial court appropriately granted Fort Brown's motion for

[3] Because the expert's affidavit is inadmissible on this point, we need not consider whether the affidavit was conclusory.

summary judgment. As an invitee, Gillenwater must prove, under his premises liability claim, that (1) a condition of the premises created an unreasonable risk of harm to the invitee; (2) the owner knew or reasonably should have known of the condition; (3) the owner failed to exercise ordinary care to protect the invitee from danger; and (4) the owner's failure was a proximate cause of injury to the invitee. *State Dep't of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992). Fort Brown argues there is no evidence that Fort Brown had actual or constructive knowledge of the chair's condition. We agree. Other than expert evidence, Gillenwater offers the following evidence in support of the knowledge element:

- Gillenwater's unchallenged explanation of the how the occurrence happened (by lowering himself into the chair while grabbing the sides). Gillenwater argues this allows an inference that the chair was already broken.

- Photographs of the chair taken by an insurance adjuster after the injury.

- A deposition from Frank Collins, the condominium manager, testifying that:
  - It was the condominium's responsibility to maintain the outdoor lawn equipment in a safe condition;
  - Collins first became aware of the injury the day after the incident;
  - Collins has an associate's degree in welding;
  - Collins knew the combination of chlorine and salt water in the air had a corrosive effect on metal chairs by the pool; and
  - Collins had an employee inspect, wash, and clean all the outdoor lounge chairs by the pool (including the chair at issue) six days a week.

- Collins and Gillenwater inspected the chair the day after the injury. The broken weld was visible to both men and was on the same side of the chair where Gillenwater had placed his hand. After the incident, Collins inspected the other chairs by the pool and found "hairline cracks" in those chairs, which he subsequently repaired or replaced.

Gillenwater argues that this evidence proves the broken welds were easily visible to the naked eye prior to the accident. We disagree. Instead, it only establishes that the chairs were

inspected regularly because of the awareness of possible corrosion, that Gillenwater was injured, and that Collins first became aware of the injury and the chair's condition the day after the injury occurred. This evidence has no bearing on whether broken welds was visible prior to the injury. Gillenwater also argues it is reasonable to infer the dangerous condition was present and seen by employees when the chairs were washed because "common sense dictates that the hairline cracks and broken rungs visible on the chair at issue and the other chairs surrounding the pool did not occur over night." But this conclusion is precluded by our holding in *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97 (Tex. 2000). In *CMH Homes*, Daenen was injured when he stepped off a truck onto an unstable loading platform, while carrying a heavy load. *Id*. at 98. Evidence showed that CMH had previously replaced the platform and steps a number of times after discovering that they had become unstable. *Id*. at 99. We held that the evidence was legally insufficient to prove that CMH had actual or constructive notice of the risk of the shaky platform, noting that "an owner or occupier is not liable for deterioration of its premises unless it knew of or by reasonable inspection would have discovered the deterioration." *Id*. at 101–03. We acknowledged that "Daenen would be entitled to recover if he presented evidence that CMH actually knew that the platform and step unit had become unstable or if a reasonable inspection would have revealed that the unit was no longer safe." *Id*. at 102. As to the type of evidence necessary to demonstrate a reasonable inspection that would have revealed the danger, we explained:

> [T]here was no evidence or even contention that CMH had failed to inspect as frequently as it reasonably should. Similarly, there is no evidence that the instability in the step and platform unit had existed for a sufficient time that CMH had constructive notice of the unreasonable risk of harm.

Id. Here, no evidence was presented that Fort Brown actually knew the chair had become dangerous or that Fort Brown failed to reasonably inspect the chairs. The record demonstrates that Fort Brown inspected and washed the chairs six days a week out of concern for the corrosive effect of the pool chlorine and salt water in the air. Gillenwater also offered no evidence that the broken welds existed on the chair for any length of time prior to the accident. The fact that Gillenwater's fingertip was severed and that the chair broke is evidence that a dangerous condition existed, but it offers no evidence as to how long it existed. The only possible evidence that a broken weld existed in the chair for any length of time is Collins' testimony that he repaired other chairs with hairline cracks after the accident. But not only does a hairline crack not present the same degree of danger as a broken weld, this argument addresses knowledge of *other chairs*, not the one that actually broke. Therefore, we reverse the court of appeals' judgment and render a take-nothing judgment in favor of Fort Brown.

OPINION DELIVERED: April 17, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-1030

TEXAS DEPARTMENT OF TRANSPORTATION, PETITIONER,

v.

SERGIO GARCIA, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

PER CURIAM

Sergio Garcia sued the Texas Department of Transportation (TxDOT) under the Texas Whistleblower Act, alleging that he was forced to resign based on two incidents in which he reported violations of law to the "enforcement authorities within [TxDOT]." TxDOT filed a plea to the jurisdiction based on immunity from suit, claiming that the trial court lacked subject-matter jurisdiction because Garcia failed to make a good faith report of a violation of law to an appropriate law enforcement authority. *See* TEX. GOV'T CODE § 554.002(a). The trial court denied the plea to the jurisdiction and TxDOT took an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (permitting appeal from an interlocutory order that denies a plea to the jurisdiction by a governmental unit). The court of appeals affirmed, holding that the section 554.002(a) elements are not jurisdictional prerequisites but rather go to the merits of the claim. 243 S.W.3d 759, 762–63;

see also TEX. GOV'T CODE § 554.0035. However, in *State v. Lueck*, ___ S.W.3d ___, ___ (Tex. 2009), we held that "the elements of section 554.002(a) can be considered to determine both jurisdiction and liability." Accordingly, whether Garcia's report of violations of the law to "enforcement authorities within [TxDOT]" was a good faith report to an appropriate law enforcement authority is a jurisdictional question. Therefore, without hearing oral argument, TEX. R. APP. P. 59.1, and for the reasons explained in *Lueck*, we reverse and remand to the court of appeals to determine whether Garcia has alleged a violation under the Act. *See* TEX. GOV'T CODE § 554.002(a).

OPINION DELIVERED: August 28, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-1031

CITY OF DESOTO, TEXAS, PETITIONER,

v.

JUSTIN WHITE, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued December 11, 2008

JUSTICE GREEN delivered the opinion of the Court.

A police officer who has been suspended from duty has a right to appeal that action to either a civil service commission or to an independent, third-party hearing examiner. If the officer appeals to a hearing examiner, his ability to seek further review in a district court is severely limited. The suspended police officer in this case elected to appeal to a hearing examiner, but the City failed to inform him of the appeal limitation, as it was required to do by statute. The court of appeals concluded that the notification requirement is jurisdictional, and that its omission deprives a hearing examiner of authority to hear an appeal. 232 S.W.3d 379, 383–84. However, we hold that the pre-appeal notice provision is not jurisdictional. Accordingly, we reverse the court of appeals' judgment.

I

Justin White, a member of the DeSoto Police Department, was suspended following two internal investigations which the Department alleged revealed improper conduct. The police chief delivered a letter of indefinite suspension to White, alleging that he abused sick time policy, lied to an investigator, and interfered with a prosecution, all of which violated numerous department policies. The letter met almost all of the applicable requirements required by statute. *See generally* TEX. LOC. GOV'T CODE §§ 143.001–.363. It was issued timely, and it notified White that an appeal had to be filed with either the Civil Service Commission or an independent third-party hearing examiner within ten days of receipt. *See id*. §§ 143.052(c), (d); .057(a). However, the letter did not notify White that an appeal to a hearing examiner would limit his ability to seek further review with a district court, as required by the Code. *See id*. § 143.057(a), (j).

White elected to appeal the suspension to a hearing examiner, where he was represented by counsel. As soon as the hearing began, White complained that the examiner was without jurisdiction to hear his appeal because the City's letter failed to notify him of the appeal limitation, as required by the Code. In an attempt to rectify the omission, the examiner offered White an abatement, a continuance, and the opportunity to change his election, all of which White refused. The examiner then proceeded with the hearing, finding that jurisdiction was proper, as the City had substantially complied with the notice requirements under the Code. After the hearing, the examiner upheld White's suspension.

White filed suit in district court, arguing that the examiner was without jurisdiction to hear his appeal. *See id*. § 143.057(j) (permitting judicial review of hearing examiner decision on grounds

that the examiner was without jurisdiction). The trial court agreed, granting summary judgment in favor of White and ordering the City to reinstate White, correct his employment records, and pay his attorney's fees. The court of appeals affirmed, holding that the notice requirements under the Code were jurisdictional, and that substantial compliance with those requirements did not suffice. 232 S.W.3d at 383–84. The court of appeals also held that White could recover attorney's fees under the Code. *Id*. at 384.

The City petitioned the Court, arguing: (1) the notice provision is not jurisdictional; (2) even if it is jurisdictional, substantial compliance satisfies the notice requirements under the Code; and (3) if White is entitled to relief, the trial court's grant of attorney's fees exceeded the remedies available under the Code. We agree with the City that notice of the appeal limitation as required by section 143.057(a) is not jurisdictional. Therefore, we need not reach the City's other two issues.

II

Chapter 143 of the Local Government Code, known as the Fire Fighter and Police Officer Civil Service Act, outlines the disciplinary process by which a municipality may suspend an officer and how that officer may appeal the suspension. TEX. LOC. GOV'T CODE §§ 143.051–.057.[1] A police department may suspend an officer for a violation of civil service rules. *Id*. § 143.052(b). The

[1] The Code distinguishes between municipalities with a population of less than 1.5 million, and those with a population of 1.5 million or more. *See, e.g.*, TEX. LOC. GOV'T CODE §§ 143.201–.209; 143.101–.135 (both subchapters addressing municipalities with population of 1.5 million or more). While there are some differences between the two schemes, the appellate process provisions are similar. *Compare id*. §§ 143.053, .057, *with id*. §§ 143.1015, .1016. Thus, our holding with regard to the non-jurisdictional nature of the notice provision applies with equal force under each scheme. *See City of Houston v. Clark*, 197 S.W.3d 314, 317 n.4 (Tex. 2006) (noting that, even though the case implicated a municipality a with a population of more than 1.5 million, the decision also applied to those municipalities with less than 1.5 million people).

officer may then appeal the suspension to either the Fire Fighters' and Police Officers' Civil Service Commission, or an independent third-party hearing examiner. *Id*. §§ 143.010, .053, .057(b). If the officer appeals to the Commission, the officer may seek review of the Commission's decision with a district court, which conducts a *de novo* review. *Id*. § 143.015(b). However, if the officer appeals to a hearing examiner, the officer waives subsequent review by a district court, *id*. § 143.057(c), except "on the grounds that the [hearing examiner][2] was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion, or other unlawful means." *Id*. § 143.057(j).

The Code specifies how the officer makes this appellate election. Within 120 hours of the suspension, the department head "shall . . . file a written statement with the commission giving the reasons for the suspension," and also immediately deliver a copy of the statement to the suspended officer. *Id*. § 143.052(c). The statement, also referred to as a letter of disciplinary action,[3] "must point out each civil service rule alleged to have been violated . . . and must describe the alleged acts of the person that the department head contends are in violation of the civil service rules." *Id*. § 143.052(e). It must inform the suspended officer that if he chooses to appeal, he must file a written

[2] This provision uses the term "arbitration panel," rather than "hearing examiner." TEX. LOC. GOV'T CODE § 143.057(c). However, we have noted that "arbitration panel" is synonymous with "hearing examiner" in this context. *Clark*, 197 S.W.3d at 318 n.5.

[3] The Code refers to a "written statement" and a "letter of disciplinary action." *Compare, e.g.*, TEX. LOC. GOV'T CODE § 143.057(a), *with id*. § 143.052(d). These terms appear to refer to the same document. For purposes of this opinion, we will not make a distinction between the two and will refer to the document provided to White as a "letter of disciplinary action." *See id*. § 143.057(a).

appeal within ten days[4] of receiving the letter, *id.* § 143.052(d), and that he "may elect to appeal to an independent third party hearing examiner instead of to the commission." *Id.* § 143.057(a). Of importance to this case, the letter must also inform the officer "that if [he] elects to appeal to a hearing examiner, [he] waives all rights to appeal to a district court," *id.* § 143.057(a), except on the grounds that "the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion, or other unlawful means." *Id.* § 143.057(j).

Here, it is undisputed that the letter of disciplinary action failed to inform White that if he elected to appeal to a hearing examiner, his rights of review by a district court were waived, except under limited circumstances. *See id.* § 143.057(a), (c), (j). The question is whether that omission deprived the hearing examiner of jurisdiction to hear the appeal.

III

A

"The failure of a jurisdictional requirement deprives the court of the power to act (other than to determine that it has no jurisdiction), and ever to have acted, as a matter of law." *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 359 (Tex. 2004).[5] If the requirement is not jurisdictional, however, the tribunal may hear the case, although other consequences may flow from a party's failure to comply with the requirement. *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71,

[4] An officer working for a municipality with a population of 1.5 million or more has fifteen days to file an appeal. TEX. LOC. GOV'T CODE § 143.1015(a).

[5] We recently noted in that "[a]lthough the Legislature subsequently provided that the notice requirement at issue in *Loutzenhiser* was jurisdictional, the Court's reasoning [with regard to statutory analysis of alleged jurisdictional provisions] remains valid." *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78, 84 (Tex. 2008).

75–77 (Tex. 2000); *see also Loutzenhiser*, 140 S.W.3d at 359 ("The failure of a non-jurisdictional requirement mandated by statute may result in the loss of a claim, but that failure must be timely asserted and compliance can be waived."). We recognized in *Dubai* that deeming a provision jurisdictional "opens the way to making judgments vulnerable to delayed attack for a variety of irregularities that perhaps better ought to be sealed in a judgment." *Dubai*, 12 S.W.3d at 76 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. b, at 118 (1982)). "[T]he modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction." *Id*. (citing RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e, at 113 (1982)). Because of these consequences, we have been reluctant to conclude that a provision is jurisdictional, absent clear legislative intent to that effect. *Id*. at 75–76; *see also Igal v. Brightstar Info. Tech Group, Inc.*, 250 S.W.3d 78, 83 (Tex. 2008).

As an initial matter, White argues that *Dubai*'s reasoning does not apply here because *Dubai* dealt with a court of general jurisdiction, whereas a hearing examiner is a tribunal of very limited jurisdiction as prescribed by statute. *Dubai* was a wrongful death action in which the deceased was a foreign citizen. 12 S.W.3d at 73. The plaintiff filed suit under a statute, which permitted the claim as long as the deceased's country had "equal treaty rights" with the United States. *Id*. at 74. We held that the plaintiff did not have to establish "equal treaty rights" to invoke the jurisdiction of the trial court. *Id*. at 73. In reaching this conclusion, we rejected an earlier distinction we had made when reviewing jurisdictional questions, where we differentiated between specially-created statutory claims and common-law claims. *Id*. at 76 (overruling *Mingus v. Wadley*, 285 S.W. 1084 (1926), "to the extent that it characterize the plaintiff's failure to establish the statutory prerequisite as

jurisdictional"). Instead, we adopted an approach to jurisdictional questions designed to strengthen finality and reduce the possibility of delayed attacks on judgments, regardless of whether the claim was anchored in common law or was a specially-created statutory action. *Id*. at 75–76. Thus, White misses our focus, post-*Dubai*. We recognize that a hearing examiner is a tribunal of very limited jurisdiction, and that it exercises special functions as dictated by statute. *See* TEX. LOC. GOV'T CODE § 143.057. But even though the examiner hears a limited type of case, consistent with *Dubai*, our focus is to avoid a result that leaves the decisions and judgments of the hearing examiner in limbo and subject to future attack, unless that was the Legislature's clear intent. *See Igal*, 250 S.W.3d at 84.

White argues that in an administrative context, the possibility of a delayed attack on a judgment is not present, in part because a later challenge to subject-matter jurisdiction is limited to the appeal process outlined in the Code. *See* TEX. LOC. GOV'T CODE § 143.057(j) (permitting appeal to district court from hearing examiner "only on the grounds that the [hearing examiner] was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion, or other unlawful means"). White cites no authority for this proposition, and we are not convinced that a delayed attack on an administrative judgment is an illusory concern. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. e., at 123 (1982) ("There remain courts and administrative tribunals staffed by judges untrained in law or whose jurisdiction is so narrow as to be nearly ministerial. The opportunity to challenge subject matter jurisdiction in such a forum may therefore be inadequate. When this is so, a challenge to subject matter jurisdiction may properly be permitted

through subsequent attack on the judgment."); *see also Igal*, 250 S.W.3d at 83 (applying *Dubai*'s reasoning in an administrative context).

Consistent with *Dubai*, then, we begin with the presumption that the Legislature did not intend to make the notice under section 143.057(a) jurisdictional; a presumption overcome only by clear legislative intent to the contrary.

B

To determine whether a statutory requirement is jurisdictional, we apply statutory interpretation principles. *Igal*, 250 S.W.3d at 84. As with any statutory provision, our goal is to ascertain legislative intent by examining the statute's plain language. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 684 (Tex. 2007). We review this statutory interpretation question de novo. *Id*. at 683. "Since the Legislature is bound to know the consequences of making a requirement jurisdictional, one must ask, in trying to determine legislative intent, whether the Legislature intended those consequences." *Loutzenhiser*, 140 S.W.3d at 359.

We consider a number of factors in determining whether the Legislature intended that a provision be jurisdictional. *See generally Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 495 (Tex. 2001). But, as with any statute, we begin with the text. *Meritor Automotive, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 89 (Tex. 2001); *Helena Chem.*, 47 S.W.3d at 493. Section 143.057(a) provides:

> In addition to the other notice requirements prescribed by this chapter, the written notice for a promotional bypass or the letter of disciplinary action, as applicable, issued to a fire fighter or police officer must state that in an appeal of an indefinite suspension, a suspension, a promotional bypass, or a recommended demotion, the appealing fire fighter or police officer may elect to appeal to an independent third party hearing examiner instead of to the commission. *The letter must also state that*

> *if the fire fighter or police officer elects to appeal to a hearing examiner, the person waives all rights to appeal to a district court except as provided by Subsection (j).*

TEX. LOC. GOV'T CODE § 143.057(a) (emphasis added). Subsection (j) states the limited exception: "[a] district court may hear an appeal of a hearing examiner's award only on the grounds that the [hearing examiner] was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion, or other unlawful means." *Id.* § 143.057(j).

Section 143.057(a) clearly requires that the letter notify the officer of the appeal limitation. It provides that the letter *must* inform the officer of the limitation. *Id.* § 143.057(a). The Code Construction Act explains that "'must' creates or recognizes a condition precedent," TEX. GOV'T CODE § 311.016(3), and we have recognized that "must" generally means mandatory. *Helena Chem.*, 47 S.W.3d at 493. The rest of the Code and its apparent objective also indicate this provision is mandatory. *See id.* at 494 ("To determine whether the Legislature intended a provision to be mandatory or directory, we consider the plain meaning of the words used, as well as the entire act, its nature and object, and the consequences that would follow from each construction."). The Code establishes two alternative means for officers to appeal: to the Commission or to the hearing examiner. TEX. LOC. GOV'T CODE §§ 143.053, .057. These two avenues of appeal, however, diverge on the right to further judicial review. If the officer does not know of these limitations, then the officer is unable to properly assess which appeal route to take. This notice protects the officer's appellate rights. Thus, we hold that the notice provision under section 143.057(a) is mandatory.

But "just because a statutory requirement is mandatory does not mean that compliance with it is jurisdictional." *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999). The Code does

not contain any explicit language indicating that this notice requirement is jurisdictional. White points to another provision, section 311.034 of the Government Code, and argues that it provides the language necessary to deem this notice requirement jurisdictional. Section 311.034, part of the Code Construction Act, provides: "Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity." TEX. GOV'T CODE § 311.034. But this provision does not control in this case. First, this provision does not apply to the construction of all statutes. Section 311.034 specifically addresses waivers of sovereign immunity, an issue not implicated here. *See id.* ("In order to preserve the [L]egislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a *waiver of sovereign immunity* unless the waiver is effected by clear and unambiguous language." (emphasis added)). Also, the notice requirement here is not a statutory prerequisite to suit. As noted below, the statute requires notice, but it does not specifically mandate it as a prerequisite to suit or appeal. Thus, the text of the statute does not indicate that the Legislature intended the provision to be jurisdictional.

We have also looked for "the presence or absence of specific consequences for noncompliance" in determining whether a provision is jurisdictional. *Helena Chem.*, 47 S.W.3d at 495. Here, the statute does not provide a specific consequence for noncompliance. *See generally* TEX. LOC. GOV'T CODE §§ 143.001–.363. As a comparison, section 143.052(e) provides that the letter of disciplinary action provided to the officer "must point out each civil service rule alleged to have been violated . . . and must describe the alleged acts." *Id.* § 143.052(e). Subsection (f) provides the remedy: "If the department head does not specifically point out in the written statement the act

or acts of the . . . police officer that allegedly violated the civil service rules, the commission shall promptly reinstate the person." *Id*. § 143.052(f). By arguing that the City's failure to provide the required notice is jurisdictional, White seeks the same remedy provided for in section 143.052(f)—dismissal. In fact, the trial court dictated this very result in its order granting summary judgment in favor of White. However, "[w]hen the Legislature includes a right or remedy in one part of a code but omits it in another, that may be precisely what the Legislature intended," and "we must honor that difference." *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 84 (Tex. 2004). So, we must assume the Legislature did not intend that a dismissal be the consequence for noncompliance.

Finally, we look to "the consequences that result from each possible interpretation." *Helena Chem.*, 47 S.W.3d at 495. One possible interpretation is that section 143.057(a)'s notice requirement is jurisdictional. The consequence of this interpretation is evident in this very case. The trial court's order reinstated White, permitting him to rejoin the police force without an adjudication of the very serious allegations against him.[6] Reinstating an officer in this situation is troubling, given the vital role of police officers and fire fighters in our society, and the need for continued public trust in the exercise of their duties. *See* Code Construction Act, TEX. GOV'T CODE § 311.021(5) ("In enacting

[6] The City alleged White abused the Department's sick time policy during a holiday weekend and subsequently lied to a supervisor about his actions. The City states that, due to an internal investigation which found White was untruthful, the District Attorney's office was forced to alert defense counsel in all pending cases in which White was a potential witness, which the City states lead to the dismissal of twenty-one pending criminal cases. The City also alleges that White asked "an Assistant District Attorney to reduce or drop charges against an individual he had arrested for driving while under the influence of alcohol" and that after failing to appear at trial, White informed the prosecutor "that he had become friends with the suspect and despite having effectuated the arrest, he could no longer testify that the suspect was intoxicated."

a statute, it is presumed that . . . public interest is favored over any private interest"). This cannot be the result the Legislature intended, especially where an interpretation which concludes that the provision is not jurisdictional would still protect the officer's appellate rights, as discussed below.

C

White urges that our decision in City of Temple Firemen's and Policemen's Civil Service Commission v. Bender precludes a finding that the notice provision is non-jurisdictional. 787 S.W.2d 951 (Tex. 1990) (per curiam). *Bender* recognized the need for strict adherence to the Code when an officer invokes the Civil Service Commission appellate process. *See generally id*. at 951. In *Bender*, the question was "whether a civil service commission's jurisdiction has been invoked under section 143.010(b) of the Texas Local Government Code if a fire fighter's or police officer's notice of appeal fails to allege the basis of the appeal." *Id*. Section 143.010(b) provides:

> The appeal must include the basis for the appeal and a request for a commission hearing. The appeal must also contain a statement denying the truth of the charge as made, a statement taking exception to the legal sufficiency of the charge, a statement alleging that the recommended action does not fit the offense or alleged offense, or a combination of these statements.

TEX. LOC. GOV'T CODE § 143.010(b). Officer Bender was suspended indefinitely and attempted to appeal to the Civil Service Commission. *Bender*, 787 S.W.2d at 951–52. His attorney mailed a letter to the Commission, advising of Bender's intention to appeal, but the letter failed to list the specific grounds for appeal as required by section 143.010(b). *Id*. at 952. After the city attorney notified him of the omission, Bender submitted an amended notice, which the Commission refused as untimely under the ten-day deadline imposed by the Code. *Id*.; *see also* TEX. LOC. GOV'T CODE § 143.010(a). We held that "one of the statements contained within section 143.010(b) is required

to be included in a notice of appeal in order to invoke the jurisdiction of a civil service commission," and because his first notice did not, Bender failed to invoke the Commission's jurisdiction. *Bender*, 787 S.W.2d at 952. We then held that Bender's amended notice of appeal also failed to invoke the jurisdiction of the Commission because the ten-day deadline under section 143.010(a) "is mandatory and must be strictly followed." *Id*. at 953.

White argues *Bender* dictates that a failure to meet a particular statutory requirement must be jurisdictional. But *Bender* focused on whether the officer had timely and properly invoked the Commission's jurisdiction—ensuring the case was properly before the Commission. *Id*. at 951–53; *see also Essenberg v. Dallas County*, 988 S.W.2d 188, 189 (Tex. 1998) (per curiam) (citing *Morrow v. Corbin*, 62 S.W.2d 641, 644 (Tex. 1933) and noting that the hallmark of a jurisdictional provision is that it "seeks to assure the appropriate body adjudicates the dispute"). Under the Civil Service Code, only a police officer or fire fighter may invoke the appeals process. *See* TEX. LOC. GOV'T CODE §§ 143.010(a); .057(a); *see also City of Houston v. Clark*, 197 S.W.3d 314, 318 (Tex. 2006). Thus, when it comes to invoking the jurisdiction of the Commission or hearing examiner, the focus must always be on the officer's actions. The City's notice letter does not invoke the appeals process. It is similar to a pre-suit notice requirement, which is not jurisdictional. *See, e.g.*, *Hines v. Hash*, 843 S.W.2d 464, 469–70 (Tex. 1992) (holding that defendant had waived pre-suit notice requirement

under the Deceptive Trade Practices–Consumer Protection Act by failing to request an abatement). Thus, *Bender* is distinguishable.[7]

D

For these reasons, we hold that the City's failure to provide the mandatory notice under section 143.057(a) did not deprive the hearing examiner of jurisdiction to hear White's appeal.

IV

Having determined that the notice provision is not jurisdictional, we must determine the proper remedy, if any, for the City's failure to comply. "When the statute is silent as to the consequences for noncompliance, we look to the statute's purpose in determining the proper remedy." *Helena Chem.*, 47 S.W.3d at 493. Section 143.001(a) provides:

> The purpose of this chapter is to secure efficient fire and police departments composed of capable personnel who are free from political influence and who have permanent employment tenure as public servants.

TEX. LOC. GOV'T CODE § 143.001(a). As discussed above, dismissal of the case and the charges against the officer cannot be the remedy. The statute's purpose of seeking "efficient" and "capable" personnel is not served by dismissing the case and permitting potentially unfit officers to return to the force without a determination of the substance of the complaint against them. At the same time,

[7] Two other cases cited by White are distinguishable for the same reasons. *See City of Lubbock v. Elkins*, 896 S.W.2d 346, 352 (Tex. App.—Amarillo 1995, no writ) (citing *Bender*, 787 S.W.2d at 953, and holding that an officer's failure to file an appeal within ten days of receiving a copy of the written statement of charges deprived the Commission of jurisdiction under section 143.052(d)); *City of Plano Firefighters' & Police Officers' Civil Serv. Comm'n v. Maxam*, 685 S.W.2d 125, 128 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (holding that because the officer failed to list the specific basis for appeal as required under the Civil Service Code, the Commission lacked jurisdiction to hear the appeal). Each of these cases, including *Bender*, were issued prior to *Dubai*, where we extended the presumption against jurisdictional findings from common-law claims to statutory actions. *See Dubai*, 12 S.W.3d at 75. We note this, not to call into question *Bender*'s continuing applicability, but rather, to emphasize the proper focus in this jurisdictional inquiry.

the possibility of imposing no consequences is troubling, given that the required notice is intended to inform the officer of important appellate rights. The provision is certainly an important one: "The Legislature's apparent purpose in [enacting the provision] was to ensure that fire fighters and police officers are fully aware of a significant consequence that will result if they elect to have an independent hearing examiner, rather than the Commission, hear their appeal." *Clark*, 197 S.W.3d at 319–20. Thus, we believe the statute requires some remedy.

An abatement is generally appropriate to cure pre-suit notice deficiencies. *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 184 (Tex. 2004) (holding that abatement, for a reasonable period of time, rather than dismissal, is appropriate remedy until parties meet the pre-suit requirement that they are "unable to agree" on the amount of damages in a condemnation proceeding); *Hines*, 843 S.W.2d at 468 (holding that abatement is proper remedy for failure to give pre-suit notice in Deceptive Trade Practices–Consumer Protection Act case); *Schepps v. Presbyterian Hosp. of Dallas*, 652 S.W.2d 934, 938 (Tex. 1983) (holding that abatement is appropriate for failure to give notice in health care liability claim). We recognize the statute here is unique. Normally, the party that eventually files suit is required to provide pre-suit notice. *See, e.g.*, *Hines*, 843 S.W.2d at 465. Under the Civil Service Act, however, the City provides notice, and then the officer appeals. We nonetheless conclude that an abatement is the appropriate remedy because it cures the notice omission: it allows the City to notify White of his appellate rights without dismissing a case against a potentially unfit officer, and it allows White an opportunity to make an appellate election with full knowledge of the consequences of choosing each path.

White argues the statute does not permit an abatement because a ten-day election deadline is imposed on White, a deadline long since passed. *See* TEX. LOC. GOV'T CODE § 143.052(d) ("[T]he [fire fighter or police officer] must file a written appeal with the commission within 10 days after the date the person receives the copy of the [disciplinary] statement."). He contends that the abatement remedy, or a dismissal allowing him to make a new election after the City provides the appropriate notice, is precluded by our decisions in *Bichsel v. Carver*, 321 S.W.2d 284 (Tex. 1959), and *Bender*, 787 S.W.2d 951. We disagree, and hold that an abatement is appropriate under the Code, as well as under *Bichsel*'s and *Bender*'s analyses.

In *Bichsel*, we analyzed a City's ability to amend a written statement filed with the Civil Service Commission. 321 S.W.2d at 285. The chief of police suspended Officer Carver, alleging that he violated police department rules. *Id*. Carver appealed to the Commission, arguing that the charges were legally insufficient because the Code required an allegation that the officer violated the civil service rules. *Id*. The City agreed and withdrew the charges, reinstated Carver, and then the Chief re-suspended him the following day. *Id*. The City then filed a second set of charges, this time properly alleging a violation of the civil service rules. *Id*. Before the Commission could hold a hearing, Carver sought injunctive and mandamus relief in district court, which was granted. *Id*. We held that the City could not amend the original charges, as the Code prevented it: "In any Civil Service hearing hereunder, the department head [the Chief] *is hereby restricted to his original written statement and charges which shall not be amended*." *Id*. at 286 (citing section 16 of the

Fireman's and Policeman's Civil Service Act) (emphasis in original).[8] We reasoned that a second set of charges were equivalent to an amendment to the original written statement, which was prohibited under the Code. *See id*. at 286–87. We also stated that, even if the second set of charges were considered new, "original" charges, these would be barred by the 120-hour deadline for filing charges following the suspension. *Id*. at 287.[9] We summarized the barriers to any new or amended charges:

> If the new charges be regarded as corrections to the original charges arising out of the same incident, they were invalid under that part of the statute prohibiting amendment of the charges. If they were new 'original' charges arising out of the same incident, they came long after 120 hours from Carver's suspension on September 19. They were thus filed too late.

Id. The dissent pointed out a third barrier: new, "original" charges would likely be precluded by the rule that the department may not suspend an officer for acts that occurred more than six months (now 180 days) prior to the suspension. *Id*. at 290 (Culver, J. dissenting).[10] Thus, *Bichsel* laid out a strict rule against amended letters of disciplinary action, and recognized the strict time constraints preventing the use of replacement letters. 321 S.W.2d at 287.

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[8] *Bichsel* analyzed former section 16 of the Civil Service Act, which is now codified in substantially similar form at section 143.053(c) of the Local Government Code. 321 S.W.2d at 286; *see also* TEX. LOC. GOV'T CODE § 143.053(c).

[9] The 120-hour rule is now codified at section 143.052(c) of the Local Government Code. TEX. LOC. GOV'T CODE § 143.052(c) ("If the department head suspends a fire fighter or police officer, the department head shall, within 120 hours after the hour of suspension, file a written statement with the commission giving the reasons for the suspension. The department head shall immediately deliver a copy of the statement in person to the suspended fire fighter or police officer.")

[10] The 180-day rule is codified at section 143.052(h) of the Local Government Code. TEX. LOC. GOV'T CODE § 143.052(h) ("In the original written statement and charges and in any hearing conducted under this chapter, the department head may not complain of an act that occurred earlier than the 180th day preceding the date the department head suspends the fire fighter or police officer.").

Bender set out its own strict rules. As discussed above, we held in *Bender* that the ten-day deadline to elect whether to appeal to the Commission or to the hearing examiner "is mandatory and must be strictly followed." 787 S.W.2d at 953. Thus, *Bichsel* and *Bender* both require strict adherence to the Code's requirements.[11] *Bichsel* restricts the City to its original letter in proceedings before the Commission, while *Bender* requires that appellants (police officers and fire fighters) strictly adhere to the appeal invocation requirements. Nonetheless, an abatement is permissible under *Bichsel*'s and *Bender*'s frameworks. We find nothing under the Code to prevent the hearing examiner from doing what he did in this case—offering White an abatement and a chance to change his election, having full knowledge of the appeal limitations. An amended letter of disciplinary action is not necessary, as long as the officer has actual knowledge of the appeal limitation when he makes his election. The purpose of the notice provision is satisfied by ensuring the officer has this knowledge in some way, prior to making the election. *See Clark*, 197 S.W.3d at 319–20 (finding that the purpose of the provision "was to ensure that fire fighters and police officers are fully aware of a significant consequence"). During the abatement, should the officer choose to change his election and appeal to the Commission, the hearing examiner may dismiss the case, so that the officer is permitted a reasonable time to appeal to the Commission. The Code requires an appeal within ten days of the notice of suspension, a requirement strictly enforced in *Bender*. *See* TEX. LOC.

[11] We have recognized the Code's strict requirements in other contexts, stating that "[t]he full performance of all conditions established by the civil service laws is an essential prerequisite to the jurisdiction of the removing body over the subject matter of the removal of an officer." *City of Sherman v. Arnold*, 226 S.W.2d 620, 622 (Tex. 1950). In *Arnold*, the City of Sherman attempted to suspend Arnold before the newly-appointed Civil Service Commission had completed all of the steps necessary to set up the Commission—namely, promulgating rules and regulations to govern its functions. *Id*.

GOV'T CODE § 143.010(a); *Bender*, 787 S.W.2d at 953. But in interpreting this deadline, we must presume the Legislature intended "a just and reasonable result" and "a result feasible of execution." TEX. GOV'T CODE § 311.021(3), (4). Therefore, we hold that *Bender* applies when the officer's failure to appeal within the ten-day deadline is attributable to the officer, but when, as here, the officer's failure to appeal within the deadline is not attributable to the officer, the statute permits a reasonable extension of time.[12]

V

Officer White was given an opportunity to change his election by the hearing examiner before the hearing commenced. He declined. Generally, because we hold that the notice provision is not jurisdictional, we would also hold White waived any complaint of the omission, given that White had full knowledge of the appeal limitation under section 143.057(j). *See Loutzenhiser*, 140 S.W.3d at 358–59. However, we recognize that, in making his decision to decline the opportunity to change his election, White could have been reasonably relying on *Bender*'s strict enforcement of the ten-day election deadline. Under these circumstances, White should be given an opportunity to make a new election. Although not directly applicable, section 16.064 of the Texas Civil Practice and Remedies Code provides us guidance. Section 16.064 suspends the limitations period when a party mistakenly,

[12] We are not presented with a situation where the officer first became aware of the appellate limitations during the midst of the hearing, or after the hearing examiner's judgment was issued. White argued from the start that the hearing examiner was without jurisdiction, at which time the examiner offered an abatement. We see nothing in the Code preventing a hearing examiner from informing the police officer or fire fighter of the appellate limitations at the start of the hearing, so as to avoid this type of situation. We also note that the Code grants the hearing examiner discretion in conducting the hearing. *See* TEX. LOC. GOV'T CODE § 143.010(g) ("the commission shall conduct the hearing fairly and impartially as prescribed by this chapter and shall render a just and fair decision"); § 143.057(f) ("the hearing examiner has the same duties and powers as the commission").

and in good faith, files suit in one court, when jurisdiction was only proper in another, so that the plaintiff has an opportunity to re-file the case. TEX. CIV. PRAC. & REM. CODE § 16.064. We conclude that the same policy reasons behind section 16.064 apply here to permit White an opportunity to make a new election. For these reasons, we remand the case to the district court with instructions to remand to the hearing examiner, so that White has an opportunity to make an appellate election with full knowledge of his appellate rights and with knowledge of our guidance in this opinion.

VI

We reverse the court of appeals' judgment and remand the case to the district court for further proceedings in accordance with this opinion. *See* TEX. R. APP. P. 60.3 (permitting remand in the interest of justice).

_____
Paul. W. Green
Justice

OPINION DELIVERED: June 19, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-1051

GALBRAITH ENGINEERING CONSULTANTS, INC.,
PETITIONER,

v.

SAM POCHUCHA AND JEAN POCHUCHA,
RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued December 11, 2008

JUSTICE MEDINA delivered the opinion of the Court.

Section 33.004(e) of the Civil Practice and Remedies Code purports to revive claims otherwise "barred by limitations" under certain limited circumstances. The issue in this summary judgment appeal is whether this statute applies to revive a claim otherwise barred by a statute of repose, as distinguished from a statute of limitations. The court of appeals concluded that the statute was capable of reviving claims barred by either statutes of limitations or statutes of repose. 243 S.W.3d 138, 141. We conclude that the Legislature did not intend for this statute to revive claims

extinguished by a statute of repose. Accordingly, we reverse the court of appeals' judgment and render judgment dismissing the plaintiffs' claim in this case.

I

The underlying litigation concerns the design and construction of a house. Sam and Jean Pochucha purchased the house from Chase Manhattan Mortgage Corporation in April 2003. Bill Cox Constructors, Inc. had built the house about eight years before the Pochuchas' purchase. After moving into their new home, the Pochuchas noticed that moderate to heavy rainfall would cause water damage in the lower rooms. An investigation revealed a problem with the french drain system.

The Pochuchas thereafter sued the builder, Bill Cox, for negligence and violations of the Texas Deceptive Trade Practices Act. In response, the builder answered and filed a motion for leave to designate Galbraith Engineering Consultants, Inc. and Swientek Construction Company as responsible third parties for purposes of proportionate responsibility under chapter 33 of the Civil Practice and Remedies Code. According to the builder, Galbraith had designed and inspected the installation of the french drain system, while Swientek had performed the actual installation.

After the trial court approved Galbraith and Swientek's designation as responsible third parties, the Pochuchas amended their pleadings to join them as defendants. *See* TEX. CIV. PRAC. & REM. CODE § 33.004(e). Galbraith responded by moving for summary judgment under the applicable statute of repose, contesting its joinder because more than ten years had elapsed since the completion of the improvement. *See id.* § 16.008 (barring suits against engineers for their design, plan, or inspection of the construction of an improvement to real property ten years after its

substantial completion). The trial court granted Galbraith's motion, severed the Pochuchas' claims against Galbraith, and dismissed that part of the case with prejudice. The court of appeals, however, reversed the summary judgment and remanded the case against Galbraith for further proceedings. 243 S.W.3d 138.

II

Section 16.008 of the Civil Practice and Remedies Code is a statute of repose. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 654 (Tex. 1989) (per curiam). It bars a claim for damages relating to the design, plan, or inspection of the construction of an improvement to real property ten years after the substantial completion of the improvement by an engineer, among others.[1] Because the Pochuchas joined Galbraith as a defendant in this suit more than ten years after the completion of the improvement, Galbraith argues that the statute must be applied to foreclose the Pochuchas' claims against it.

The court of appeals concluded, however, that the claim was not foreclosed, but rather had been revived under section 33.004(e)[2] of the Civil Practice and Remedies Code. 243 S.W.3d at 141. Section 33.004(e) is a part of chapter 33, the statutory scheme for the apportionment of responsibility in tort and deceptive trade practice actions. *See* TEX. CIV. PRAC. & REM. CODE § 33.001-.017.

[1] The statute also applies to architects, interior designers, and landscape architects.

[2] "If a person is designated under this section as a responsible third party, a claimant is not barred by limitations from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person not later than 60 days after that person is designated as a responsible third party." TEX. CIV. PRAC. & REM. CODE § 33.004(e).

Chapter 33 provides, among other things, that a defendant in such an action may seek to designate a person, who has not been sued by a claimant, as a responsible third party. *Id.* § 33.004(a). A responsible third party may include any person who is alleged to have caused in any way the harm for which the claimant seeks damages. *Id.* § 33.011(6). When such a designation is made, a claimant may also be able to join that person as a defendant, and, if joinder is sought within sixty days of the designation, limitations cannot be raised as a bar. *Id.* § 33.004(e). Because the Pochuchas joined Galbraith as a defendant within the sixty-day window provided under section 33.004(e), the court of appeals concluded that the claim had been revived. 243 S.W.3d at 141.

Galbraith argues, however, that section 33.004(e) only revives claims "barred by limitations." Because the revival statute does not mention repose, Galbraith contends that it cannot be used to revive a claim extinguished by a statute of repose. The court of appeals concluded, however, that the revival statute applied both to statutes of repose and statutes of limitations, reasoning that the Legislature had used the term "limitations" to refer to both types of statutes. 243 S.W.3d at 141 (noting that Civil Practice and Remedies Code chapter 16, entitled "Limitations," contains both statutes of limitations and statutes of repose). Although the Legislature has grouped statutes of limitation and statutes of repose together in chapter 16 of the Civil Practice and Remedies Code under the general heading of "Limitations," there are significant differences between the two.

Statutes of repose typically provide a definitive date beyond which an action cannot be filed. *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003). "Unlike traditional limitations provisions, which begin running upon accrual of a cause of action, a statute of repose runs from a

specified date without regard to accrual of any cause of action." *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 261 (Tex. 1994). Repose then differs from limitations in that repose not only cuts off rights of action after they accrue, but can cut off rights of action before they accrue. *Holubec*, 111 S.W.3d at 37. And while statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time. *See Trinity River Auth.*, 889 S.W.2d at 261. Thus, the purpose of a statute of repose is to provide "absolute protection to certain parties from the burden of indefinite potential liability." *Holubec*, 111 S.W.3d at 37.

The court of appeals has concluded, however, that reviving a claim otherwise barred by a statute of repose is not essentially contrary to this purpose because the revival statute in this instance merely provides for a limited sixty-day extension. 243 S.W.3d at 141. The Legislature can, of course, provide for the extension of a period of repose. *See, e.g.,* TEX. CIV. PRAC. & REM. CODE § 16.008(c) (providing that presenting a written claim for damages to an engineer within the ten-year period extends the period "for two years from the day the claim is presented"). But applying the revival statute to revive a period of repose does more than merely extend the period for two months. It effectively renders the period of repose indefinite by attaching the claim's revival to the existence of some other claim and party that may not be subject to the same or similar period of repose.

Here, both the original defendant, Bill Cox, and the subsequently designated responsible third party, Galbraith, worked on the same improvement to real property and were subject to similar ten-

year statutes of repose.[3] Hence, the court of appeals viewed section 33.004(e) as extending the period only by sixty days. But in other cases a responsible third party may be subject to a longer period of repose or none at all, creating an opportunity for revival many months or years beyond the ten-year period of repose prescribed by section 16.008. A products liability claim would be an example of this.

We have held that section 16.008 was not intended to grant repose to manufacturers in product liability suits and only precludes suits against persons or entities in the construction industry that annex personalty to realty. *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 478-83 (Tex. 1995). Moreover, products claims now have their own statute of repose, a fifteen-year period to which exception is made for products with longer warranties and for products that cause latent diseases. *See* TEX. CIV. PRAC. & REM. CODE § 16.012(b)-(e). Thus, a manufacturer or seller of a defective product can be sued years after the ten-year period of repose at issue here. Assuming that this product was used in an improvement to real property, the seller or manufacturer named as a defendant might years later designate the party who installed its product as a responsible third party, and, under the court of appeals' view, invoke the sixty-day window in section 33.004(e) to revive a claim otherwise subject to section 16.008 many years after the running of the ten-year statute of repose.

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[3] There is a separate ten-year statute of repose for contractors who make improvements to real property. *See* TEX. CIV. PRAC. & REM. CODE § 16.009; *see also Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996) (per curiam). Whether the Pochuchas timely filed suit against Bill Cox is not at issue in this appeal.

III

Statutes of repose are created by the Legislature, and the Legislature may, of course, amend them or make exceptions to them. The question here, however, is whether the Legislature intended to make such an exception when it enacted section 33.004(e) as part of its proportionate responsibility scheme, that is, did the Legislature intend for the revival statute to operate as a general exception to periods of repose.

Statutory construction is a question of law we review de novo. *First Am. Title Ins. Co. v. Combs,* 258 S.W.3d 627, 631 (Tex. 2008). In construing statutes, our primary objective is to give effect to the Legislature's intent as expressed in the statute's language. TEX. GOV'T CODE § 312.005; *First Am. Title,* 258 S.W.3d at 631-32. If the words of a statute are clear and unambiguous, we apply them according to their plain and common meaning. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008).

It is unclear here, however, whether the Legislature intended the term "limitations" in section 33.004(e) to apply narrowly to statutes of limitations or more broadly to include statutes of repose because the term has been used in both contexts.[4] When the plain language of a statute does not

[4] The statutes of repose in chapter 16 of the Civil Practices and Remedies Code refer to limitations rather than a period of repose. *See* TEX. CIV. PRAC. & REM. CODE § 16.008(c) (mentioning "10-year limitations period"); *id.* § 16.009(c)(same); *id*. § 16.011(b) (same); *id*. § 16.012(d-1) (mentioning "limitations period under this section"). Only section 16.011 mentions repose. *Id*. § 16.011(c) ("This section is a statute of repose and is independent of any other limitations period."). Elsewhere in the Code the Legislature has used the phrase "limitations and repose" when referencing both statutes of limitations and statutes of repose rather than simply using the term "limitations" as it did in section 33.004(e). *See id.* § 150.002(f) (relating to a "certificate of merit" in actions against design professionals, such as architects and engineers, and stating: "This statute shall not be construed to extend any applicable period of limitation or repose."); *see also id.* § 147.043 (regarding the effect of legal disability, and explaining its application to "periods of limitation and repose"); *id.* § 147.044(b) (mentioning the "period of limitation or repose" under this section); TEX. INS.

convey the Legislature's apparent intent, we may resort to additional construction aids, such as the objective of the law, the legislative history, the common law or former statutory provisions, including laws on the same or similar subject, and the consequences of a particular construction. *Hughes*, 246 S.W.3d at 626; TEX. GOV'T CODE § 311.023.[5]

The consequence of construing "limitations" broadly here informs our decision. Such a construction would defeat the recognized purpose for statutes of repose, that is, the establishment of a definite end to the potential for liability, unaffected by rules of discovery or accrual. *Holubec*, 111 S.W.3d at 37; *Trinity River Auth.*, 889 S.W.2d at 261; *Johnson*, 774 S.W.2d at 654 n.1. As already observed, statutes of repose create a substantive right to be free from liability after a legislatively determined period. *Trinity River Auth.*, 889 S.W.2d at 261; *see also Cadle Co. v. Wilson*, 136 S.W.3d 345, 350 (Tex. App.—Austin 2004, no pet.). In contrast, statutes of limitations are procedural devices operating as a defense to limit the remedy available from an existing cause of action. *Cadle Co.*, 136 S.W.3d at 350. A statute of repose thus represents the Legislature's considered judgment as to the inadequacy of the traditional statutes of limitations for some types of claims. *Sowders v. M.W. Kellogg Co.*, 663 S.W.2d 644, 647 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.). The statute of repose at issue here is no different.

CODE § 462.309(c) (concerning "Stay of Proceedings" and stating: "Statutes of limitation or repose are not tolled during the stay, and any action filed during the stay is stayed upon the filing of the action.").

[5] While the language in today's statute is somewhat unclear, thus justifying cautious use of secondary construction aids, we recently reaffirmed that such aids "cannot override a statute's plain words." *In re Collins*, ____ S.W.3d _____, _____ (Tex. 2009) (citing *Alex Sheshunoff Mgmt.Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652 (Tex. 2006) ("Wherever possible, we construe statutes as written, but where enacted language is nebulous, we may cautiously consult legislative history to help divine legislative intent.")).

When first enacted in 1969, the stated purpose of this statute of repose was to eliminate "unlimited time liability" against engineers or architects. Act of May 27, 1969, 61st Leg., R.S., ch. 418, § 2, 1969 Tex. Gen. Laws 1379, 1379 (amended 1985) (current version at TEX. CIV. PRAC. & REM. CODE § 16.008). The statute has been amended since 1969 to extend protection to interior designers and landscape architects, but its purpose of defining a definite period for liability to attach has not changed. Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3253 (amended 1997) (current version at TEX. CIV. PRAC & REM. CODE § 16.008); Act of May 26, 1997, 75th Leg., R.S., ch. 860, § 1, 1997 Tex. Gen. Laws 2738, 2738 (current version at TEX. CIV. PRAC. & REM. CODE § 16.008).

The proportionate responsibility scheme of chapter 33, on the other hand, is a complex statutory scheme for the comparative apportionment of responsibility among parties in most tort actions in Texas. Although the scheme initially equated responsibility with liability to the plaintiff or claimant, this is no longer the case.[6] Thus, a defendant may designate a responsible third party even though that party possesses a defense to liability, or cannot be formally joined as a defendant, or both. Chapter 33 then is apparently unconcerned with the substantive defenses of responsible

[6] The proportionate responsibility chapter was enacted in 1995 and amended in 2003. The 1995 legislation contained a number of limitations on who might be named a responsible third party, such as a requirement for personal jurisdiction and a potential for liability to the claimant. Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 973 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 33.011). Certain potential parties, such as the claimant's employer and the bankrupt were expressly excluded. *Id.* The 2003 amendments substantially broadened the meaning of the term "responsible third party" to eliminate these restrictions. As one commentator has observed: "The thrust of the 2003 statute is that the jury should allocate responsibility among all persons who are responsible for the claimant's injury, regardless of whether they are subject to the court's jurisdiction or whether there is some other impediment to the imposition of liability on them, such as a statutory immunity." 19 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 291.03[2][b][i] at 291-24.1 (2009).

third parties, who are defined to include "any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these." TEX. CIV. PRAC. & REM. CODE § 33.011(6). But we have found nothing in section 33.004 or the proportionate responsibility scheme to convince us that the Legislature intended to revive claims extinguished by a statute of repose. *Cf. Shirley v. Reif*, 920 P.2d 405, 412 (Kan. 1996) (holding that a claim barred by a statute of repose cannot be revived by legislation enacted after the period of repose); *Farber v. Lok-N-Logs, Inc.*, 701 N.W.2d 368, 377-78 (Neb. 2005) (holding amendment to product liability statute of repose could not resurrect action which prior version of statute of repose had already extinguished). Because application of the revival statute in this instance effectively renders the period of repose indefinite, a consequence clearly incompatible with the purpose for such statutes, we conclude that the Legislature intended for the term "limitations" in section 33.004(e) to refer only to statutes of limitations.

* * * * *

The judgment of the court of appeals is reversed and judgment is rendered dismissing the Pochuchas' claim against Galbraith because it is barred by the applicable ten-year statute of repose.

David M. Medina
Justice

OPINION DELIVERED: June 26, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-1059

FINANCIAL INDUSTRIES CORPORATION, PETITIONER,

v.

XL SPECIALTY INSURANCE COMPANY, RESPONDENT

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argued April 1, 2008

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

This case comes before us on a certified question from the United States Court of Appeals for the Fifth Circuit. Pursuant to article V, section 3-c of the Texas Constitution and Texas Rule of Appellate Procedure 58.1, we answer the following question:

> Must an insurer show prejudice to deny payment on a claims-made policy, when the denial is based upon the insured's breach of the policy's prompt-notice provision, but the notice is nevertheless given within the policy's coverage period?

XL Specialty Ins. Co. v. Fin. Indus. Corp., 259 F. App'x 675, 678 (5th Cir. 2007), *certified question accepted*, 51 Tex. Sup. Ct. J. 298 (Jan. 14, 2008).

I
Background[1]

XL Specialty Insurance Company (XL) issued a claims-made, management liability policy to Financial Industries Corporation (FIC) for the policy period of March 12, 2005 to March 12, 2006. In exchange for a $475,000 premium, XL agreed to pay on behalf of FIC losses resulting from certain claims—including securities claims– "first made" against FIC during the policy period. The policy's notice provision, found in section VI under the heading "GENERAL CONDITIONS," provided: "As a condition precedent to any right to payment under this Policy with respect to any Claim, the Insured shall give written notice to the Insurer of any Claim as soon as practicable after it is first made."

On June 5, 2005, two plaintiffs sued FIC in Texas state court for breach of contract and fraud. FIC notified XL seven months after the suit was filed, but within the policy's coverage period. XL and FIC stipulate that this notification breached the policy's prompt-notice provision but did not prejudice XL. XL subsequently sued FIC in federal district court, seeking a declaratory judgment that the policy did not cover FIC for the lawsuit; XL also sent FIC a letter denying coverage. The district court granted XL's summary judgment motion, holding that under Texas law, an insurer need not demonstrate prejudice from late notice to avoid coverage on a claims-made policy. FIC appealed. 259 F. App'x at 676.

[1] We incorporate the facts as stated by the Fifth Circuit in its certification to this court. *XL Specialty Ins. Co.,* 259 F. App'x at 676; *see also* TEX. R. APP. P. 58.2.

II

Must an insurer show prejudice to deny payment on a claims-made policy, when the denial is based upon the insured's breach of the policy's prompt-notice provision, but the notice is nevertheless given within the policy's coverage period?

In *Prodigy Communications Corp. v. Agricultural Excess & Surplus Insurance Co.*, decided today, we hold that, "[i]n a claims-made policy, when an insured notifies its insurer of a claim within the policy term or other reporting period that the policy specifies, the insured's failure to provide notice 'as soon as practicable' will not defeat coverage in the absence of prejudice to the insurer." ___ S.W.3d ___, ___. *Prodigy* involved a claims-made policy with a notice provision requiring that the insured, "as a condition precedent" to its rights under the policy, give notice of a claim to its insurer "as soon as practicable . . ., but in no event later than ninety (90) days after the expiration of the . . . Discovery Period." *Id*. at __. Prodigy gave notice of its claim before the ninety-day reporting deadline, but the insurer denied the claim alleging that the notice was not given "as soon as practicable." *Id.* at ___. The insurer admitted it was not prejudiced by the delayed notice. *Id*. at ___.

Recognizing that, for the insurer, the inherent benefit of a claims-made policy is the insurer's ability "to 'close its books' on a policy at its expiration and thus to attain a level of predictability unattainable under standard occurrence policies," we concluded that Prodigy's alleged failure to give notice "as soon as soon as practicable" was immaterial because it did not interfere with this benefit. *Id.* at ___(citation omitted).

XL's claims-made policy differs slightly from the *Prodigy* policy in that XL's policy requires only that notice of a claim be given "as soon as practicable" and does not contain a clear-cut reporting deadline. *See id*. at ___ n.7 (discussing difference between standard "claims-made" and "claims-made-and-reported" policies). However, the same reasons for requiring the insurer to demonstrate prejudice apply: FIC gave notice of the claim within the policy's scope of coverage, i.e., before XL could "close its books" on the policy. Because XL was not denied the benefit of the claims-made nature of its policy, it could not deny coverage based on FIC's immaterial breach of the policy's prompt-notice provision. *See id*. at ___; *see also PAJ, Inc. v. The Hanover Ins. Co.*, 243 S.W.3d 630, 631 (Tex. 2008) (holding that "an immaterial breach does not deprive the insurer of the benefit of the bargain and thus cannot relieve the insurer of the contractual coverage obligation"); *Hernandez v. Gulf Group Lloyds,* 875 S.W.2d 691, 693 (Tex. 1994) ("In determining the materiality of a breach, courts will consider, among other things, the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance.").

III
Conclusion

For the reasons stated above and explained more fully in *Prodigy Communications Corp. v. Agricultural Excess & Surplus Insurance Co.,* ___ S.W.3d ____, we answer the certified question in the affirmative and hold that an insurer must show prejudice to deny payment on a claims-made

policy, when the denial is based upon the insured's breach of the policy's prompt-notice provision, but the notice is given within the policy's coverage period.

_____
Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: March 27, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-1065

RAOUL HAGEN, PETITIONER,

v.

DORIS J. HAGEN, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued January 14, 2009

JUSTICE JOHNSON delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE GREEN, and JUSTICE WILLETT joined.

JUSTICE BRISTER filed a dissenting opinion, in which JUSTICE O'NEILL and JUSTICE MEDINA joined.

Doris and Raoul Hagen's 1976 divorce decree awarded a percentage of Raoul's military retirement pay to Doris to be paid if, as, and when he received it. After Raoul's subsequent retirement from the Army, he was determined by the Veterans' Administration (VA) to have a service-connected disability. He then elected to be paid VA disability benefit payments, which are not subject to federal income taxes, in place of part of his military retirement payments, which are subject to income taxes. Raoul's election reduced the amount of military retirement pay he received. When Doris began receiving her percentage of the reduced Army retirement pay Raoul received, she

sought enforcement and clarification of the divorce decree. The trial court determined that the decree divided only the military retirement pay being received by Raoul, it did not divide his VA disability benefits, and Doris was entitled to only a percentage of the military retirement pay. The court of appeals reversed. The appeals court held that the trial court modified the 1976 decree instead of clarifying it, and the modification was barred by res judicata principles. ___ S.W.3d ___, ___. We hold that the trial court correctly clarified the unambiguous original decree, and its action was not a modification barred by res judicata principles. We reverse the court of appeals' judgment and affirm the judgment of the trial court.

I. Background

Doris and Raoul Hagen divorced in 1976. At the time of the divorce, Raoul was a member of the United States Army. The decree awarded Doris right, title, and interest to

> One-half of 18/20ths of all Army Retirement Pay or Military Retirement Pay, IF, AS AND WHEN RECEIVED, and the Petitioner RAOUL HAGEN shall be a Trustee of the One-half of 18/20ths of all Army Retirement Pay or Military Retirement Pay, for the use and benefit of DORIS J. HAGEN, and shall pay the same immediately upon each receipt of the same, to DORIS J. HAGEN.

When Raoul retired from the Army in 1992 his retirement compensation consisted solely of military retirement pay, which was subject to federal income taxes. In 2003, the VA determined Raoul had a service-connected disability rating of forty-percent. As allowed by federal statute, Raoul elected to waive part of his retirement pay and be paid VA disability in its place. *See* 38 U.S.C. § 5305. The VA disability pay is not subject to federal income taxes. *See id.* § 5301(a)(1). After Raoul made his election, payments to Doris were reduced to an amount calculated by applying the decree's formula to only the military retirement pay Raoul received.

Doris filed a combined motion for contempt, clarification of the decree, and petition for damages. She claimed that Raoul failed to comply with the 1976 decree because he failed to pay her the proper amount of his gross retirement pay, and in the alternative, she sought clarification of the decree. She also sought damages from Raoul alleging that by electing to be paid VA disability pay and waive part of his retirement pay, he breached a fiduciary duty to her and converted payments she should have received. Following a non-jury hearing, the trial court (1) ordered that "the military retirement pay now being received by Raoul Hagen shall be divided according to the formula stated in the Original Decree of Divorce," (2) found the amount subject to division under the decree did not include Raoul's disability pay, (3) awarded attorney's fees in the event of appeal, and (4) denied all other relief.

Doris appealed, and the court of appeals reversed. ___ S.W.3d ___. Relying in large part on *Berry v. Berry*, 786 S.W.2d 672 (Tex. 1990) (per curiam), the court of appeals held that res judicata barred Raoul's position as a collateral attack on the divorce decree, and the Uniformed Services Former Spouses' Protection Act (USFSPA)[1] could not be applied retroactively to collaterally attack the decree. ___ S.W.3d at ___. We hold that the trial court's action was a permissible clarification, not an impermissible modification, of the decree.

[1] The USFSPA provides state courts the authority to treat "disposable retired pay" as community property. *See* 10 U.S.C. § 1408(c)(1). The United States Supreme Court has held, however, that the USFSPA bars state courts from treating military retirement pay that has been waived to receive VA disability benefits as property divisible upon divorce. *Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989).

II. Interpreting Divorce Decrees

We interpret divorce decree language as we do other judgments of courts. *Shanks v. Treadway*, 110 S.W.3d 444, 447 (Tex. 2003). We construe the decree as a whole to harmonize and give effect to the entire decree. *Id.* If the decree is unambiguous, the Court must adhere to the literal language used. *Id.* If the decree is ambiguous, however, the decree is interpreted by reviewing both the decree as a whole and the record. *See Wilde v. Murchie*, 949 S.W.2d 331, 332 (Tex. 1997) (per curiam). Whether a divorce decree is ambiguous is a question of law. *Shanks*, 110 S.W.3d at 447.

As with other final, unappealed judgments which are regular on their face, divorce decrees and judgments are not vulnerable to collateral attack. *Berry*, 786 S.W.2d at 673. The decree must be void, not voidable, for a collateral attack to be permitted. *Id.* Errors other than lack of jurisdiction over the parties or the subject matter render the judgment voidable and may be corrected only through a direct appeal. *Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003).

The Family Code provides that trial courts may enter orders of enforcement and clarification to enforce or specify more precisely a decree's property division. TEX. FAM. CODE § 9.006(a) ("[T]he court may render further orders to enforce the division of property made in the decree of divorce or annulment to assist in the implementation of or to clarify the prior order."). But courts may not "amend, modify, alter, or change the division of property" originally set out in the decree. *Id.* § 9.007(a). Attempting to obtain an order that alters or modifies a divorce decree's property division is an impermissible collateral attack. *See Reiss*, 118 S.W.3d at 442 (holding that a trial court's correct construction of a divorce decree's award "does not impermissibly 'amend, modify,

alter, or change the division of property made or approved in the decree of divorce'" (quoting TEX. FAM. CODE § 9.007(a))).

III. The Decree in Question

A. The Decree's Language

The Hagens stipulated that their decree[2] awarded Doris "One-half of 18/20ths of all Army Retirement Pay or Military Retirement Pay, IF, AS AND WHEN RECEIVED," and directed Raoul to "pay the same immediately upon each receipt of the same, to DORIS J. HAGEN." Neither party claims the decree defined "Army Retirement Pay" or "Military Retirement Pay" to include any type of compensation or pay outside of the plain import of the words used. The decree language does not specifically reference VA disability compensation Raoul might receive, and the parties do not contend that VA benefits were referenced anywhere in the decree. We conclude the decree is unambiguous in dividing military retirement pay "if, as and when" Raoul received it. The question, then, is whether, at the time the decree was entered, military retirement pay included VA disability compensation. *See Shanks*, 110 S.W.3d at 447 (stating that we "must effectuate the order in light of the literal language used").

B. Retirement Pay and VA Disability Compensation

When the trial court entered the Hagens' decree on May 7, 1976, federal law provided two means by which a former service member could receive disability-related compensation: retirement pay for physical disability under Title 10 of the United States Code and VA disability compensation

[2] A copy of the decree was attached to Doris's brief in the court of appeals.

under Title 38. Armed Forces (Title 10), ch. 1041, 70A Stat. 91 (1956) (current version at 10 U.S.C. § 1201); Veterans' Benefits (Title 38), § 310, 72 Stat. 1119 (1958) (current version at 38 U.S.C. § 1110). Under Title 10, if a member was found to be disabled, the secretary of the applicable branch of the armed forces could "retire the member, with retired pay" computed under the statute. Armed Forces (Title 10), ch. 1041, 70A Stat. 91 (1956) (current version at 10 U.S.C. § 1201). Title 38, on the other hand, mentioned nothing about retirement. Veterans' Benefits (Title 38), § 310, 72 Stat. 1119 (1958) (current version at 38 U.S.C. § 1110). Instead, it compensated for "disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty." *Id.*; *see also* Veterans' Benefits (Title 38), § 331, 72 Stat. 1122 (1958) (current version at 38 U.S.C. § 1131) (providing VA disability compensation for peacetime injuries).

At the time the trial court entered the Hagens' decree, Texas courts recognized that only military disability pay that was an earned property right could be divided upon divorce, and VA disability compensation was not an earned property right. *Busby v. Busby*, 457 S.W.2d 551, 552-53 (Tex. 1970); *Dominey v. Dominey*, 481 S.W.2d 473, 475 (Tex. Civ. App.—El Paso 1972, no writ); *Ramsey v. Ramsey*, 474 S.W.2d 939, 941 (Tex. Civ. App.—Eastland 1971, writ dism'd). In *Busby*, we did not address the question of VA disability benefits; we addressed only the two types of military retirement pay—voluntary retirement benefits and disability retirement benefits. 457 S.W.2d at 554. We held that military retirement pay—whether based upon a member's voluntary election to retire after having served the required time or whether based on retirement for disability—is not a gift or gratuity but an earned property right divisible upon divorce. *Id.* at 552.

In *Ramsey*, the court of appeals applied *Busby* to VA disability benefits, holding that VA disability benefits are not an earned property right because they compensate "for personal injury or disease . . . for service-connected disability," and there is "no obligation or promise by the Veterans' Administration to remunerate" for service-connected disabilities. 474 S.W.2d at 941. VA disability benefits were, thus, characterized differently than military retirement pay. VA disability benefits were characterized as a gratuity based upon a service-connected disability rather than an earned property right based upon years of service. *Id.*; *see also Milliken v. Gleason*, 332 F.2d 122, 123 (1st Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965) (holding that because the payment of VA disability compensation is at the discretion of the United States Congress, such compensation is not considered property).

C. The Parties' Contentions

Citing *Dominey*, 481 S.W.2d 473, Doris nevertheless argues that at the time the decree was entered, Texas courts had established disability pay was an earned property right. *Dominey*, however, pertained to Navy disability retirement pay, not VA disability benefits. *Id.* at 474. In *Dominey*, the court expressly distinguished *Ramsey* and the VA benefits at issue there from military retirement benefits. *Id.* at 475. In doing so, the court held that although the retirement benefits being received by Dominey were military disability retirement benefits, they were nonetheless retirement benefits and thus property, unlike the VA disability retirement benefits at issue in *Ramsey. Id.* at 475-76.

Relying on *Baxter v. Ruddle*, 794 S.W.2d 761, 762-63 (Tex. 1990); *Berry*, 786 S.W.2d at 673; and *Jones v. Jones*, 900 S.W.2d 786, 789 (Tex. App.—San Antonio 1995, writ denied), Doris

also argues Texas courts have held that ex-spouses who make a post-divorce election to waive military retirement pay for VA disability benefits are in effect collaterally attacking the decree, and such an attack is barred by res judicata principles. We do not disagree that asserting the USFSPA as justification for violating provisions of a final divorce decree could constitute a collateral attack under some circumstances. But Raoul is not making such an assertion in this matter; rather, he relies on the specific language of the decree. And the cases Doris references do not support her position that Raoul's waiver was a collateral attack on the Hagens' decree.

In *Baxter*, the parties agreed to a property settlement and the agreed decree was not appealed. 794 S.W.2d at 762. The decree provided that the wife received

> All right, title and interest to thirty-seven and one-half percent (37 1/2%) of JAMES RUDDLE's gross U.S. Army retirement and/or disability benefits and/or V.A. disability benefits (including thirty-seven and one-half percent (37 1/2%) of all increases therein due to the cost of living) if, as and when received.

Id. Ruddle remained in the service after the divorce, so his retirement pay increased over the amount he would have received had he retired at the time of divorce. *Id.* He did not comply with the decree by paying his former wife, Judith Ann Baxter, the specified percentage of his actual gross retirement pay. *Id.* In considering Baxter's Motion for Contempt and Arrearage Judgment, the trial court determined Baxter was entitled to a percentage of benefits valued as of the time of the divorce. *Id.* This Court held that the unappealed, agreed divorce decree unambiguously provided for Baxter to receive thirty-seven and one-half percent of the *gross* retirement benefits received by Ruddle, including post-divorce increases; the parties agreed to the method of apportionment and their agreement should be enforced even if the court could not have ordered the division except for the

parties' agreement; the decree was binding on the parties; and the trial court's determination in contravention to the decree was barred by res judicata. *Id.* at 762-63. Unlike the Hagens' decree, the agreed, unappealed decree in *Baxter* specifically referenced and divided gross retirement benefits, VA disability benefits, and all cost of living increases. *Id.* at 762. And, unlike Raoul's situation, in which he seeks to *enforce* the language of the decree, Ruddle attempted to effect a substantive *change* to a prior final decree's express provisions.

In *Berry*, relied on in large part by the court of appeals in this case, the parties entered into an agreement and consent decree. 786 S.W.2d at 673. The decree specified the wife would receive "twenty-five percent of . . . *gross* Air Force disability retirement pay." *Berry v. Berry,* 780 S.W.2d 846, 847 (Tex. App.—Dallas 1989), *rev'd per curiam*, 786 S.W.2d 672 (Tex. 1990) (emphasis added). The husband later elected to accept VA disability benefits, and his retirement pay was reduced accordingly. *Berry*, 786 S.W.2d at 673. The wife began receiving a percentage of the reduced retirement pay and sought to enforce the decree's literal language that awarded her a portion of the husband's gross retirement pay. *Id.* At the enforcement hearing, the wife introduced a statement from the Air Force showing the husband's gross Air Force disability retirement pay had not changed, but the VA disability benefits were credited against the retirement pay as a deduction and reduced the gross pay to a net amount:

> As the statement clearly indicates, Husband received *gross* pay in the amount of $2,422 with a VA waiver of $1,355 and an A.L.M.T. reduction of $9. After subtracting this waiver and reduction, Husband was left with a *net* pay of $1,058.

Berry, 780 S.W.2d at 849. The trial court held the wife was entitled to twenty-five percent of the husband's net Air Force disability pay of $1,058. *Id.* at 847-48. The court of appeals affirmed. *Id.*

at 851. This Court noted that the original decree provided for the wife to receive twenty-five percent of the husband's *gross* pay, not *net* pay; the decree was final; the decree was not void; and the decree could not be substantively altered by using the USFSPA to collaterally attack it:

> This court has held that, as with other final, unappealed judgments which are regular upon their face, divorce judgments are not vulnerable to collateral attack. Although a final judgment may be erroneous or voidable, it is not void and thus subject to collateral attack if the court had jurisdiction of the parties and the subject matter. Because the final judgment is voidable as opposed to void, the rule of res judicata would apply. Under these cases, the subsequent adoption of the USFSPA cannot be used to collaterally attack the Berrys' final divorce decree.

786 S.W.2d at 673 (citations omitted). As a result, the Court enforced the divorce decree according to its literal language that awarded the wife a percentage of what she proved was the husband's gross retirement pay. *See id.* at 674.

And in *Jones*, 900 S.W.2d 786, the consent decree entered pursuant to an agreement between the parties provided as follows:

> [Wife is awarded] if, as, and when retirement is received by DONALD J. JONES, a monthly amount equal to twenty-five percent (25%) of that monthly amount that a retired Major with 20 years service will receive on the date DONALD J. JONES begins to receive his retirement, with the same percentage of any and all costs of living related increases to which DONALD J. JONES shall become entitled for the period beginning on the date of retirement and ending on the death of DONALD J. JONES.

Id. at 787. Donald Jones later retired, accepted a disability retirement amount in lieu of part of his regular retirement pay, and sought to preclude payment of any of the disability retirement pay to his former wife based on the USFSPA. *Id.* The trial court enforced the decree as written. *Id.* In affirming, the court of appeals held that Jones's attempt to apply the USFSPA to alter the substantive provisions of the decree was an attempt to avoid the effect of the unappealed decree and was thus

a prohibited collateral attack. *Id.* at 787-88. Similar to the outcome in *Berry*, the end result was that the decree was enforced according to its original language. *See id.*

In *Baxter*, *Berry*, and *Jones*, there were attempts to, in effect, modify or change a prior final decree's provisions. Here, Raoul does not attempt to attack, change, or alter the decree; he seeks enforcement according to its literal language. If a trial court order does not modify or amend the substantive division of property set out in a final decree, then the court merely construes the decree, and its order is properly classified as a clarification or enforcement order. *See* TEX. FAM. CODE §§ 9.006-.007. Only an attempt to judicially alter or change the substantive provisions of a final decree constitutes a prohibited collateral attack. *See Reiss*, 118 S.W.3d at 442. The trial court's clarification order in this case did not change the decree's substantive division of property and thus did not permit a collateral attack on the decree.

Doris also contends the decree awarded her a portion of Raoul's "gross" or "total" military pay because courts have held that language similar to language used in the Hagens' decree encompasses all types of military pay, including VA disability benefits. Her argument fails. First, "military pay" is different from and does not include VA disability pay as we have discussed above. Next, the literal language employed in this decree is unambiguous, does not specify division of gross military pay, and does not specify a division of VA disability benefits. *See Shanks*, 110 S.W.3d at 447. And, none of the cases Doris references—*Jones*, 900 S.W.2d 786; *Gallegos v. Gallegos*, 788 S.W.2d 158 (Tex. App.—San Antonio 1990, no writ); or *Ex parte Hovermale*, 636 S.W.2d 828 (Tex. App.—San Antonio 1982, no writ)—support her position. In *Jones*, the court of appeals did not consider whether "military retirement pay" means "gross" military pay. *See* 900 S.W.2d 786. It

enforced a decree that provided the wife was to receive an amount set by formula. *Id.* at 787-88 (wife was awarded "a monthly amount equal to twenty-five percent (25%) of that monthly amount that a retired Major with 20 years service will receive on the date DONALD J. JONES begins to receive his retirement," together with cost of living increases). In *Hovermale* and *Gallegos*, the decrees divided "gross military retirement pay," and because the decrees included the term "gross," the courts did not address whether a decree not including that term has the same meaning. *See Hovermale*, 636 S.W.2d at 829 (noting the final decree "requir[ed] relator to pay to his former wife a portion of his gross monthly military retirement pay, based on a formula set out in the decree of divorce"); *Gallegos*, 788 S.W.2d at 160 (the decree provided "IT IS ORDERED AND DECREED that [appellee] shall have judgment against and recover from [appellant] twenty-one and one-half percent (21.5%) of the gross present and future military retirement pay received each month by [appellant]").

IV. Response to the Dissent

The dissent says our holding today conflicts with *Berry* because the Hagens' decree is similar to the *Berry* decree in that neither specifically references VA disability compensation, yet we held the *Berry* decree divided VA disability while we hold the Hagen decree does not. With due respect, the dissent is mistaken. Neither the *Berry* decree nor the Hagens' decree divided VA disability compensation, nor did we hold in *Berry* that the decree there did so.

In *Berry*, the original decree specified the husband was to instruct a bank to "disburse to Wife monthly, as received, at a bank or other address of her choice, twenty-five percent (25%) of said Retirement Pay *computed on the gross amount thereof before any deductions*." *Berry*, 780 S.W.2d

at 847 (emphasis added). The decree did not limit or specify the type or amount of deductions that could be taken from the retirement pay. Under the language of the decree, the type or amount of deductions did not matter because the wife was to be paid an amount computed on the husband's gross retirement pay before deductions. *Id.* The decree's language made it clear the parties and the court contemplated the possibility that in the future some types of deductions or reductions might be applied to the gross retirement pay. They took that possibility into account and provided for it. *Id.* at 847-49. The husband later attempted to collaterally attack the final, unappealed decree. 786 S.W.2d at 673.

Contrary to the dissent's position, this Court did not hold that the decree divided VA disability benefits. The Court held that the husband was barred from using the USFSPA to collaterally attack the original decree, noting (1) the unappealed, final decree contained a formula calculating the wife's entitlement based on the "gross amount [of retirement pay] before deductions" language, and (2) a copy of one of the husband's Air Force Retiree Account Statements showed the term "gross" pay was used to indicate monthly pay before any deductions. *Id.* at 673 & n.1.

In the case before us, the Hagens' original decree did not award Doris amounts "calculated on" Raoul's gross, or even total, retirement pay before deductions, as the decree in *Berry* did. The Hagens' decree plainly entitled Doris only to part of the Army or military retirement pay Raoul received, if, as, and when he received it. As discussed previously, such military retirement pay did not include VA disability benefits. Thus, the trial court in this case did not modify the Hagens' decree; it only clarified that the decree did not divide VA disability pay that was or might become payable to Raoul because of disability resulting from service-connected personal injury or disease.

The trial court in this case did not allow an impermissible collateral attack on the decree, just as this Court did not allow an impermissible collateral attack on the decree in *Berry*. *See id.* at 673; *see also* TEX. FAM. CODE § 9.007(a) ("A court may not amend, modify, alter, or change the division of property made or approved in the decree of divorce or annulment."); BLACK'S LAW DICTIONARY 278 (8th ed. 2004) (defining "collateral attack" as "[a]n attack on a judgment in a proceeding other than a direct appeal").

Although the dissent urges that the Hagens' decree is void, neither of the parties have taken that position. To the contrary, Doris has asserted the decree is *not* void. Of course, whether a judgment or decree is void does not depend on what the parties say; it depends on legal principles. *See Brazzel v. Murray*, 481 S.W.2d 801, 803 (Tex. 1972) (quoting *Murchison v. White*, 54 Tex. 78 (1880)) ("A void act is one entirely null within itself, not binding on either party, and which is not susceptible of ratification or confirmation. Its nullity cannot be waived."). But in this case, the trial court in 1976 had jurisdiction over the parties and the subject matter, and it did not act outside its capacity as a court. *See Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003). The trial court did not issue an advisory opinion about VA disability benefits Raoul might later receive due to a disability emanating from his military service; it did not address them at all.

The dissent recognizes that divorce decrees divide future retirement benefits that are contingent on continued future employment but contrasts VA disability benefits from that type of compensation because "payments are not 'earned' during marriage and 'are not property.'" We do not disagree with the dissent's statement, but it is not relevant here because the Hagens' decree

simply did not divide Raoul's VA disability pay. It divided his Army or military retirement pay if, as, and when he received it.

Finally, the dissent says that because this Court held in *Berry* that a decree dividing military retirement pay also divided VA disability pay that arose later, we should overrule *Berry* and remand the case for Doris to reassert her claims for conversion and breach of fiduciary duty because she relied on *Berry*. We decline to do so for at least three reasons. First, as we have explained above, we do not agree that our decision in this case conflicts with *Berry* and we decline to overrule *Berry*. Second, Doris did not—as the dissent claims—rely on *Berry* in the trial court and court of appeals for the proposition that a decree dividing military retirement pay also divides VA disability pay arising later. In the trial court, the court of appeals, and this Court, Doris cited *Berry* only for the proposition that the Hagens' decree was final and could not be modified by the trial court. She did not include *Berry* in her brief of authorities to the trial court, nor did her counsel mention it at the hearing on her motion for contempt except one time in connection with res judicata:

> [This] case is protected by res judicata. No one ever appealed this case. And there are many, many cases on that. Two cases that I haven't included in my brief, one is Berry versus Berry, which is a Supreme Court of Texas case.

In her briefs at the court of appeals and this Court, Doris again cited *Berry* only once, and the reference was in regard to the res judicata issue:

> A trial court may not amend, modify, alter or change the division of property made or approved in a decree of divorce or annulment. It is limited to an order to assist in the implementation of or to clarify the prior order . . . . Berry v. Berry, 786 S.W.2d 672 (Tex. 1990).

Third, Doris asserted claims against Raoul for breach of fiduciary duty and conversion in the trial court. The claims were denied, and Doris has not presented the issues on appeal. The issue Doris pursued in the court of appeals was whether the trial court's order modified or clarified the Hagens' original decree.

V. Conclusion

The Hagens' 1976 divorce decree is unambiguous. It provides Doris is to receive a percentage of the Army Retirement Pay or Military Retirement Pay Raoul receives. It does not provide she is to receive payments calculated on any other basis, or that she is to receive part of his VA disability compensation. The trial court's order was a proper clarification of, and not an impermissible modification of, the decree.

On the surface, it appears that Raoul's election to receive VA benefits has worked an inequity on Doris. But the language used in divorce decrees is important, and we must presume the divorce court chose it carefully, especially given the frequency of attempts to enforce decrees—as was the case here—through contempt orders. The meager record before us shows that Doris did not appeal from the 1976 decree when it was entered over thirty years ago. There is no indication she did not then have full opportunity to present her legal and equitable positions, present her proof, and request the decree she wanted the trial court to enter.

We conclude Doris has had full opportunity to seek relief. The record does not justify a remand for further litigation of the issues. We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Phil Johnson
Justice

OPINION DELIVERED: May 1, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-1065

RAOUL HAGEN, PETITIONER,

v.

DORIS J. HAGEN, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued January 14, 2009

JUSTICE BRISTER, joined by JUSTICE O'NEILL and JUSTICE MEDINA, dissenting.

The Court says this divorce decree did not divide VA disability pay, and even if it did it is binding because it was voidable rather than void. I disagree on both counts.

I would also try a little harder to find an alternative to today's judgment, which allows an ex-husband to cut off a community asset awarded to his ex-wife. We should remand for Doris Hagen to pursue further proceedings; because the Court instead renders judgment against her, I respectfully dissent.

I. Did This Decree Divide VA Disability Pay?

Military retirement pay and Veterans Administration disability pay have different purposes and pedigrees.[1] Were we writing on a clean slate, I might agree that this decree dividing retirement pay did not divide VA disability pay. But we are not writing on a clean slate.

This Court held in 1990 in *Berry v. Berry* that a decree dividing military retirement pay *did* divide VA disability pay that arose later.[2] In *Berry*, we required a veteran to keep paying 25 percent of his total benefits to his ex-wife even after most of those benefits were converted to VA disability pay. The Court says that decree did not divide VA disability pay, but merely required that "the wife was to be paid an amount computed on the husband's gross retirement pay before deductions."[3] That is not what we said at the time, explicitly stating that the lower courts erred by "refusing to enforce the final divorce decree with respect to Veterans Administration disability benefits."[4] And to avoid admitting that *Berry* divided VA disability pay, the Court reinterprets it as a provision for alimony, which Texas courts cannot award.[5] The *Berry* decree effectively divided VA disability pay, no matter how hard the Court tries to deny it.

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[1] *See McCarty v. McCarty*, 453 U.S. 210, 211-12 (1981).

[2] 786 S.W.2d 672, 674 (Tex. 1990).

[3] ___ S.W.3d___,___.

[4] *Id*. at 672.

[5] *See Stubbe v. Stubbe*, 733 S.W.2d 132, 133 (Tex. 1987) ("Court ordered alimony, available in most other jurisdictions, is not available in Texas as it contravenes Texas public policy.").

The decree in *Berry* divided "Air Force disability retirement pay" while the decree here divided "Army Retirement Pay,"[6] but "disability retirement pay" is defined as "retirement pay,"[7] and the statute providing for it applies to all branches of the armed forces.[8] Because both decrees divided "retirement pay," it is hard to see why the decree in *Berry* divided VA disability pay but the decree here did not. Indeed, that was the precise conclusion of the court of appeals.[9]

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[6] The decree here awarded Doris Hagen:

> One-half of 18/20ths of all Army Retirement Pay or Military Retirement Pay, IF, AS, AND WHEN RECEIVED, and the Petitioner RAOUL HAGEN shall be a Trustee of the One-half of 18/20ths of all Army Retirement Pay or Military Retirement Pay, for the use and benefit of DORIS J. HAGEN, and shall pay the same immediately upon each receipt of the same, to DORIS J. HAGEN.

The decree in *Berry v. Berry* provided:

> The parties agree that husband's Air Force Disability Pay ("Retirement Pay") is Community Property of husband and wife . . . . Husband shall . . . disburse to Wife monthly, as received, at a bank or other address of her choice, twenty-five percent (25%) of said Retirement Pay computed on the gross amount thereof before any deductions.

[7] *See* 10 U.S.C. § 1201(a) ("***Retirement.***--Upon a determination by the Secretary concerned that a member described in subsection (c) is unfit to perform the duties of the member's office, grade, rank, or rating because of physical *disability* incurred while entitled to basic pay or while absent as described in subsection (c)(3), the Secretary may *retire* the member, with *retired pay* computed under section 1401 of this title . . . .") (emphasis added); *see also Ex parte Burson*, 615 S.W.2d 192, 193 (Tex. 1981) (referring to "Air Force disability retirement pay" as "military retirement pay"); *Busby v. Busby*, 457 S.W.2d 551, 554 (Tex. 1970) (holding military disability pay should be treated as military retirement pay).

[8] *See* 10 U.S.C. § 1201(c).

[9] ___ S.W.3d___,___.

The Court says the decree here is different because it did not divide "gross" retirement pay, as the *Berry* decree did. But this decree awarded Doris Hagen a portion of "*all* Army Retirement Pay." How can "all retirement pay" mean something less than "gross retirement pay"? Does "all income" mean less than "gross income"? Or "all sales" less than "gross sales"? The Court's hypertechnical distinction between "all" and "gross" may lead to problems in many areas of the law.

The Court finds it significant that in *Berry* a monthly pay stub included figures for gross retirement pay and then a deduction for VA disability pay. But this observation depends on an anachronism: the statute deducting VA disability pay from gross retirement pay was enacted in 1982,[10] several years *after* the divorce decrees in *Berry* and this case. Whatever was meant by "gross" or "all" retirement pay in either decree, it did not include a statutory construct that existed only in the future.

At the time these decrees were signed, any military retirement pay (whether standard retirement pay or disability retirement pay) had to be waived dollar-for-dollar to receive VA disability pay.[11] If the *Berry* decree dividing retirement pay included amounts later waived to receive VA disability pay, then so did this decree. We must either follow *Berry* or overrule it. For the reasons stated next, we should overrule it.

II. Can a Court Divide Disability Pay Before Disability Occurs?

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[10] *See* Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982).

[11] *See* Veterans Benefits Act, Pub. L. No. 85–857, 72 Stat. 1231 (1958) (codified at 38 U.S.C. § 5305).

Federal law prohibits division of VA disability pay upon divorce.[12] But because we construed the *Berry* decree to apply to VA disability pay and that decree was not appealed, we held the decree could not be collaterally attacked as it was voidable rather than void.[13]

It is generally true that a divorce decree cannot be collaterally attacked on the ground that it improperly divided community property.[14] But any decree can be collaterally attacked if the court issuing it had no jurisdiction.[15] The decree in *Berry* falls under both rules.

Many cases discuss whether a judgment is void or voidable, but in fact a judgment can be both. If a plaintiff with no standing obtains a judgment for negligent infliction of emotional distress, the decree is both voidable (negligent infliction is not a valid claim) and void (standing is jurisdictional). If a defendant fails to appeal a default judgment by a court with neither personal jurisdiction nor proper venue, the judgment is again both void and voidable. If an appellate court issues an advisory opinion that misinterprets the law, its judgment is both void and voidable. In all these cases, the judgment can be collaterally attacked because it is void, even if the ground that renders it voidable cannot be reached.

I agree the *Berry* decree was voidable because it divided VA disability pay in violation of federal law. But it was also void because it divided VA disability pay before any disability existed,

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[12] 38 U.S.C. § 5301(a)(1); *McCarty v. McCarty*, 453 U.S. 210, 211-12 (1981); *Ex Parte Burson*, 615 S.W.2d 192, 196 (Tex. 1981).

[13] 786 S.W.2d 672, 673.

[14] *Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003); *Baxter v. Ruddle*, 794 S.W.2d 761, 762–63 (Tex. 1990).

[15] *Reiss*, 118 S.W.3d at 443.

or anyone knew whether one ever would. Res judicata applies to issues that "were raised or could have been raised in the first action."[16] When a veteran's disability arises 27 years after divorce (as was the case here), it could not possibly have been raised in the divorce because no one knew then if any disability would ever occur, much less when it would begin or how extensive it would be.

Courts cannot decide hypothetical claims.[17] Doing so violates the constitutional provisions for separation of powers and open courts.[18] A judgment dividing VA disability pay when no disability has yet occurred is void under the rules of both ripeness and standing.[19] Ripeness prohibits suits involving "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all."[20] Standing prohibits suits by those who are not personally aggrieved,[21] as would be true when a person's ex-spouse suffers a disability after divorce.[22] Both ripeness and

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[16] *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78, 86 (Tex. 2008).

[17] *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008).

[18] *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004); *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001); *see* TEX. CONST. art. I, § 13 & art. II, § 1.

[19] *See Inman*, 252 S.W.3d at 304-05 (noting that, for standing, the claimant's alleged injury must not be "hypothetical"); *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 232 (Tex. 2001) ("The ripeness doctrine avoids premature adjudication on a hypothetical set of facts.").

[20] *Perry v. Del Rio*, 66 S.W.3d 239, 250 (Tex. 2001) (quoting 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532, at 104 (2001 Supp.)); *see also Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000).

[21] *Inman*, 252 S.W.3d at 304-05.

[22] *Cf.* TEX. FAM. CODE § 3.101 ("Each spouse has the sole management, control, and disposition of that spouse's separate property."); *Chu v. Hong*, 249 S.W.3d 441, 444 (Tex. 2008) (stating that "personal injury claims are the separate property of each spouse").

standing are components of subject-matter jurisdiction,[23] and thus can be raised in a collateral attack.[24]

Of course, divorce decrees often divide future retirement benefits if, as, and when received, including military retirement pay.[25] But pensions are a form of deferred compensation earned during marriage, and at the time of divorce constitute a contingent interest in property.[26] By contrast, post-divorce VA disability payments are not "earned" during marriage and "are not property."[27]

"Neither this Court, nor the trial court, has the power to counsel a legal conclusion on a hypothetical or contingent set of facts."[28] At the time of the divorce here and in *Berry*, the prerequisite for VA disability pay — a disability — was hypothetical. Other branches of government may decree that disability pay arising after divorce should be shared with a former spouse, but the

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[23] *McAllen Med. Ctr.*, 66 S.W.3d at 231 (noting "the constitutional requirement that the court of appeals have subject-matter jurisdiction, and both ripeness and standing are necessary components of that jurisdiction").

[24] *See Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008); *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000).

[25] *Shanks v. Treadway*, 110 S.W.3d 444, 446 (Tex. 2003); *Cearley v. Cearley*, 544 S.W.2d 661, 663 (Tex. 1976).

[26] *Cearley*, 544 S.W.2d at 665.

[27] *Ex parte Burson*, 615 S.W.2d 192, 194 (Tex. 1981) ("Veterans Administration benefits . . . are not property."); *see* 38 U.S.C. § 5301.

[28] *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 853 (Tex. 2000).

courts cannot.[29] Accordingly, *Berry* incorrectly held that such a decree was voidable rather than void.

III. Can Waived Retirement Pay Be Recovered?

In most states, a divorce court can order alimony or child support paid from VA disability benefits.[30] But in community-property states like Texas (as already noted), a divorce court cannot divide VA disability pay because it is not assignable property.[31] This problem can be mitigated when disability occurs *before* divorce by considering VA disability pay in dividing all the other property between the spouses in a manner that is just and right.[32] But when disability occurs *after* divorce, a just-and-right division of retirement benefits may be rendered neither just nor right by allowing one party to cut off the other's share of those benefits.[33]

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[29] *See, e.g.*, *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998) ("Under the separation of powers doctrine, courts are without jurisdiction to issue advisory opinions because such is the function of the executive department, not the judiciary.").

[30] *See Rose v. Rose*, 481 U.S. 619, 630-32 (1987); *Murphy v. Murphy*, 787 S.W.2d 684, 685 (Ark. 1990); *Allen v. Allen*, 650 So. 2d 1019, 1020 (Fla. Dist. Ct. App. 1994); *In re Marriage of Anderson*, 522 N.W.2d 99, 102 (Iowa Ct. App. 1994); *Wingard v. Wingard*, 11 Pa. D. & C.4th 343, 345 (1991).

[31] *See* 38 U.S.C. § 5301(a)(1).

[32] *See* TEX. FAM. CODE § 7.001; *U.S. v. Stelter*, 567 S.W.2d 797, 798 (Tex. 1978); *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 17 n.14 (Tex. App.—Waco 2002, no pet.); *Rothwell v. Rothwell*, 775 S.W.2d 888, 892 (Tex. App.—El Paso 1989, no writ); *see also* Maj. Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 MIL. L. REV. 40, 116 (2001) (noting that when disability exists at time of divorce, "courts grant former spouses a form of support or property in lieu of what their share of the retired pay would have been if not for the disability determination").

[33] *See* Michael T. Flannery, *Military Disability Election and the Distribution of Marital Property Upon Divorce*, 56 CATH. U. L. REV. 297, 302 (2007); Brad M. LaMorgese & Robert E.

"In most states, if a former service member unilaterally waives retired pay to receive VA disability pay, the courts will not stand idly by."[34] Surely that should be the rule in Texas too.

The decree here did not just award Doris part of Raoul's retirement pay; it also appointed him trustee of those funds for her use and benefit. As a result, it is hard to see how his decision to waive those funds did not breach his fiduciary duty as her trustee.[35] Nor is it clear why converting retirement pay to VA disability pay did not constitute conversion; while "money can be converted only if it is specifically identified and held in trust,"[36] this money was.

Of course, any judgment against Raoul could not be collected from his disability payments because they are exempt.[37] And they remain exempt after receipt so long as they are held in a form "readily available as needed for support and maintenance . . . and have not been converted into

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Holmes, Jr., *Division of Retirement Benefits: The Impact of Federal Preemption on Women in Texas*, 7 TEX. J. WOMEN & L. 207, 226 (1998) (describing this as "yet another inequity women in Texas are asked to bear").

[34] Bradley, *supra* note 32, at 116.

[35] TEX. PROP. CODE § 114.001; *see, e.g.*, *Brownsville-Valley Reg'l Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 756 (Tex. 1995); *Henry I. Siegel Co., Inc. v. Holliday*, 663 S.W.2d 824, 831 (Tex. 1984); *Hamm v. Drew*, 18 S.W. 434, 436 (Tex. 1892); *Votzmeyer v. Votzmeyer*, 964 S.W.2d 315, 325 (Tex. App.—Corpus Christi 1998, no pet.); *Ex parte Rodriguez*, 636 S.W.2d 844, 846 (Tex. App.—San Antonio 1981, no writ).

[36] *Chu v. Hong*, 249 S.W.3d 441, 444 (Tex. 2008).

[37] 38 U.S.C. § 5301(a)(1).

permanent investments."[38] But if Raoul has other assets or funds from which such a judgment could be collected, there is no reason to prevent Doris from trying.[39]

While Doris pleaded conversion and breach of fiduciary duty in the trial court, she briefed neither when she appealed the trial court's dismissal of her case. But she was relying on the continued validity of *Berry v. Berry*, under which she should prevail unless we overrule it. "When, as here, a party presents her case in reliance on precedent that has been recently overruled, remand is appropriate."[40] Accordingly, rather than rendering judgment against Doris, I would overrule *Berry* and remand in the interest of justice for her to pursue alternate means.[41]

Scott Brister
Justice

OPINION DELIVERED: May 1, 2009

[38] *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 162 (1962).

[39] *See* Bradley, *supra* note 32, at 117-22.

[40] *Twyman v. Twyman*, 855 S.W.2d 619, 626 (Tex. 1993).

[41] *See* TEX. R. APP. P. 60.3.

IN THE SUPREME COURT OF TEXAS

NO. 08-0016

DENTON COUNTY, TEXAS, PETITIONER,

v.

DIANNE BEYNON AND ROGER BEYNON, INDIVIDUALLY, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

JUSTICE WILLETT delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE GREEN, and JUSTICE JOHNSON joined.

JUSTICE O'NEILL filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA joined.

In this premise-liability case, we decide whether a seventeen-foot floodgate arm located approximately three feet off a two-lane rural roadway is a "special defect" under the Texas Tort Claims Act (TTCA). We hold the floodgate arm does not meet the TTCA's narrow definition of a special defect. Accordingly, we reverse the court of appeals' judgment and dismiss the case.

Rhiannon Beynon, a minor, was a backseat passenger in a car traveling at night along Old Alton Road—an unlit, undivided two-lane roadway in Denton County. When driver Mark Hilz noticed an oncoming vehicle approaching in the middle of the road with its bright lights on, he moved his car to the far right side of the road, which had a steep pavement edge drop-off. His right-

side tires then left the asphalt, dropping "around eight inches" off the edge and into some loose gravel and grass. The car briefly climbed back onto the road, but Hilz had lost control, and the car slid sideways into the grass where it was punctured by a seventeen-foot floodgate arm owned and maintained by Denton County.

The metal floodgate arm was unsecured and improperly pointed toward oncoming traffic,[1] with the tip of the arm about three feet from the edge of the roadway. The floodgate arm pierced the driver's side door and then entered the backseat area where it severely injured Rhiannon Beynon's leg before passing through the floorboard beneath her seat. Diane and Roger Beynon, individually and as Rhiannon's next friend, sued Denton County on premise-defect and special-defect theories of liability.

The trial court granted Denton County's plea to the jurisdiction on the premise-defect claim but not on the special-defect claim, prompting Denton County to challenge the latter ruling via interlocutory appeal.[2] The court of appeals affirmed the trial court's judgment, holding the floodgate arm to be "a condition that an ordinary user of the roadway would find unexpected and unusually dangerous."[3] Because the court of appeals' decision conflicts with our precedent as described below,

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[1] It was the normal practice of Denton County to secure the floodgate arm with a lock and chain and point it away from oncoming traffic. Denton County does not dispute that the floodgate arm was unsecured and facing the wrong direction. Rather, it contends that even in this position, the floodgate arm was not a special defect as a matter of law.

[2] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

[3] 242 S.W.3d 169, 175.

we have jurisdiction to decide whether the County's plea should have been granted on the special-defect claim.[4]

The TTCA does not define "special defect" but likens it to "excavations or obstructions" that exist "on" the roadway surface.[5] The existence of a special defect is a question of law that we review de novo.[6] Where a special defect exists, the State owes the same duty to warn as a private landowner owes to an invitee,[7] one that requires the State "to use ordinary care to protect an invitee from a dangerous condition of which the owner is or reasonably should be aware."[8]

This Court has never squarely confronted whether a hazard located off the road can (or can never) constitute a special defect, though we did note in *Payne* that some courts of appeals have held certain off-road conditions to be special defects.[9] However, as *Payne* clarified, "[w]hether on a road or near one,"[10] conditions can be special defects like excavations or obstructions "only if they pose

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[4] TEX. GOV'T CODE §§ 22.001(a)(2), 22.225(c).

[5] TEX. CIV. PRAC. & REM. CODE § 101.022(b).

[6] *State Dep't of Highways & Pub. Transp. v. Kitchen*, 867 S.W.2d 784, 786 (Tex. 1993) (per curiam).

[7] *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992).

[8] *Id*.

[9] *Id*. at 238-39 n.3.

[10] *Id*. at 238 n.3.

a threat to the ordinary users of a particular roadway."[11] More specifically, a court cannot "classify as 'special' a defect that is not like an excavation or obstruction on a roadway."[12]

The floodgate arm that injured Rhiannon Beynon is not of the same kind or class as an excavation or obstruction, nor did it pose a threat to "ordinary users" in the manner that an excavation or obstruction blocking the road does. It thus falls outside the TTCA's narrow special-defect class as a matter of law. The Beynons contend the floodgate arm is an obstruction "[b]y definition and by its very nature" because "[i]ts sole intended purpose is to obstruct vehicular traffic." This would be true had the arm been set in the roadway in a closed position to block traffic, but here it was in a resting position roughly three feet off the roadway, albeit unsecured and facing the wrong direction. Even still, the arm did not "pose a threat to the ordinary users of [Old Alton Road],"[13] or prevent ordinary users from traveling on the road (as opposed to skidding off the road). Our cases rest on the objective expectations of an "ordinary user," and such a driver would not be expected to careen uncontrollably off the paved roadway and into the adjoining grass, as Hilz

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[11] *Id*. A 1999 per curiam opinion from this Court appeared to add a second element to the definition, stating "[a] special defect must be a condition of the same kind or class as an excavation or roadway obstruction *and* present 'an unexpected and unusual danger to ordinary users of roadways.'" *State v. Rodriguez*, 985 S.W.2d 83, 85 (Tex. 1999) (per curiam) (citation omitted) (emphasis added). The TTCA itself says nothing about "unexpected and unusual danger." That phrase first appeared in 1992 in *Payne*. In that case, we observed that excavations and obstructions "present an unexpected and unusual danger to ordinary users of roadways." *Payne*, 838 S.W.2d at 238. The TTCA mandates no second prong, nor does *Payne* engraft one; the statutory test is simply whether the condition is of the same class as an excavation or obstruction. We used "unexpected and unusual danger" in *Payne* to *describe* the class, not to *redefine* it. Nor does the case upon which *Payne* rests, *County of Harris v. Eaton*, 573 S.W.2d 177, 179 (Tex. 1978), mandate that the condition, besides being like an excavation or obstruction, also pose an unexpected and unusual danger to ordinary roadway users.

[12] *Payne*, 838 S.W.2d at 239 n.3 (disapproving of cases "when the defect did not present a hazard to the ordinary users of a roadway").

[13] *Id*.

admitted when he stated that the "normal course of travel for [Old Alton Road] would be the asphalt pavement."

In any case, the arm was neither the condition that forced Hilz's car off the road initially nor the condition that caused the car to skid sideways and crash into the floodgate arm. The record is clear that Hilz completely lost control of the vehicle when he tried to navigate what he called a "fairly steep drop" along the road's edge and reenter the pavement. He testified that prior to the impact, he "didn't have any control of the car," that the car "was simply sliding sideways at a 45-degree angle" toward a clump of trees, and that the car came to rest in the trees after striking the floodgate arm.

The dissent stresses that few off-road conditions would qualify as special defects but "the particular circumstances presented in this case" qualify because the floodgate arm was unexpected and posed an unusual danger to ordinary travelers. First, the TTCA speaks of "special defects such as excavations or obstructions" that impede travel on the roadway. This condition was not of the same kind or class as those cited in the TTCA. Second, the TTCA does not posit an alternative basis for special-defect liability when a condition, while not an excavation or obstruction, is out of the ordinary.[14] We understand the dissent's sentiments but do not believe they track the statute or afford

[14] A per curiam decision from 1993, the year after *Payne* was decided, suggests that a special defect can be *any* condition that poses an unexpected and unusual danger, even if it is not an excavation or obstruction. *State Dep't of Highways & Pub. Transp. v. Kitchen*, 867 S.W.2d 784, 786 (Tex. 1993) (per curiam) ("Special defects are excavations or obstructions, or other conditions which 'present an unexpected and unusual danger to ordinary users or roadways.'") (quoting *Payne*'s description of how excavations and obstructions pose such hazards) (citations omitted). But waiving immunity for "other conditions," however uncommon, departs from the text's explicit focus on "excavations or obstructions."

much bright-line guidance, particularly in light of our focus on "ordinary users" and our requirement that immunity waivers be clear and unambiguous.[15]

The injuries sustained by Rhiannon Beynon are unquestionably tragic; however, it is the province of the Legislature, not the courts, to prescribe the parameters of premise- and special-defect claims.[16] The trade-offs inherent in governmental immunity are a uniquely legislative matter, and the Legislature has specifically limited special defects to conditions "such as excavations or obstructions on highways, roads, or streets."[17] Accordingly, we decline to expand the statutory definition beyond its terms.[18]

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[15] Besides the fact that a condition's unexpectedness is not a stand-alone basis for bringing a special-defect claim, such unexpectedness seems to matter little when a driver, as in this case, cannot steer the vehicle and is skidding uncontrollably. The dissent's approach also invites several follow-up questions—for example, who decides unexpectedness; is the test objective or subjective? Also, if this unsecured floodgate arm were positioned eight feet from the road's edge rather than three, would that extra sixty inches immunize the county? *See City of Dallas v. Giraldo*, 262 S.W.3d 864, 871-72 (Tex. App.—Dallas 2008, no pet.) (parked bulldozer eight to ten feet from the roadway edge is not a special defect). Or if the floodgate arm had been unsecured and pointed like this for years without incident—would that longstandingness cancel out any unexpectedness? We suspect the dissent would say it depends, that each case is different. True, each case has unique facts, but our decisions should aim for predictability that applies uniformly beyond the case at hand.

[16] *See Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996) ("we must look to the terms of the [TTCA] to determine the scope of its waiver"); *Giraldo*, 262 S.W.3d at 869 ("The *Legislature* has provided a limited waiver of immunity for . . . special defect claims under the Texas Tort Claims Act.") (emphasis added).

[17] TEX. CIV. PRAC. & REM. CODE § 101.022(b).

[18] The dissent asserts that our notion of an "'ordinary user' limits special defects to those that appear only within the lines between the shoulders of the road." __ S.W.3d __. While the TTCA by its terms speaks of "excavations or obstructions *on* highways, roads, or streets," TEX. CIV. PRAC. & REM. CODE § 101.022(b) (emphasis added), none of our previous cases grapples squarely with whether an off-road hazard can constitute a special defect, and we need not decide that issue today. Fact patterns obviously vary from case to case, but we are confident in holding that the complained-of condition in today's case—a floodgate arm located in a grassy area alongside a rural county road—does not constitute a special defect as a matter of law.

Because the floodgate arm was not a special defect, we grant the petition for review and without hearing oral argument,[19] reverse the court of appeals' judgment and dismiss the case.

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Don R. Willett
Justice

OPINION DELIVERED: May 1, 2009

[19] TEX. R. APP. P. 59.1.

IN THE SUPREME COURT OF TEXAS

NO. 08-0016

DENTON COUNTY, TEXAS, PETITIONER,

v.

DIANNE BEYNON AND ROGER BEYNON, INDIVIDUALLY, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

JUSTICE O'NEILL, joined by CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA, dissenting.

It is hard to imagine anything more dangerous than a seventeen-foot metal pole pointing like a spear in the direction of oncoming traffic. The Court doesn't appear to disagree. It concludes, however, that ordinary users of the roadway are not expected to veer off the asphalt pavement, so anything they might encounter if they do cannot be a special defect. I would agree with the Court if the particular hazard were farther from the road than the metal pole that impaled the plaintiff's vehicle here. But departing a mere three feet from the road to avoid a collision is not out of the ordinary, and the floodgate arm's close proximity to the road's edge posed a threat that normal users of the road would not expect. Because the Court concludes otherwise, I respectfully dissent.

Rhiannon Beynon was a passenger in the backseat of a vehicle driven by Mark Hilz. While driving on Old Alton Road in Denton County, Hilz observed an oncoming vehicle with its brights on driving down the center of the road. To avoid the oncoming car, Hilz steered his vehicle toward the edge of the road. As Hilz moved his car over, the right tires left the pavement and dropped about eight inches onto the unpaved, unimproved shoulder. Hilz quickly turned his wheels to the left and returned to the road briefly. But in his attempt to correct the path of the car, he lost control. Hilz turned the car left and then tried to correct by turning to the right. When he turned back to the right, the front wheels left the road and the car's undercarriage caught the edge of the pavement. The vehicle began to slide along the road at a forty-five degree angle with its rear wheels still on the pavement. While the car slid along the pavement, a floodgate arm punctured the driver's door. In its proper position the floodgate arm, a seventeen-foot metal pole attached to a base buried in the ground, would have been facing away from traffic and secured in place. However, the arm was unsecured and improperly pointing toward oncoming traffic when Hilz's car collided with it three feet from the pavement. The arm penetrated the driver's door, pierced Rhiannon's leg, and exited through the floorboard. The car stopped its slide at the base of the floodgate. Hilz did not see the floodgate arm or realize that the car had collided with it until he heard Rhiannon's screams. Rhiannon's injuries resulted in amputation of her leg below the knee.

The Court does not dispute that the floodgate arm was in the wrong position, that the floodgate arm impaled the vehicle[1], or that its open position was unexpected and dangerous. The

[1] The Court summarily concludes that the floodgate arm "is not of the same kind or class as an excavation or obstruction . . . ." It is hard to envision a more significant obstruction than a

Court concludes, however, that because Hilz veered three feet from the asphalt, he was no longer an ordinary user of the road and Denton County's plea to the jurisdiction should have been granted. I disagree.

Special defects are "defects of the same kind or class as 'excavations or obstructions on highways, roads, or streets' that present an 'unexpected and unusual danger to ordinary users of roadways.'" *City of Dallas v. Reed*, 258 S.W.3d 620, 622 (Tex. 2008) (citation omitted). To be a special defect, the condition must also "unexpectedly and physically impair a car's ability to travel on the road." *State v. Rodriguez*, 985 S.W.2d 83, 85 (Tex. 1999). A special defect need not occur on the surface of a road, but "[w]hether on a road or near one, . . . conditions can be [special defects] only if they pose a threat to the ordinary users of a particular roadway." *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 238 n.3 (Tex. 1992).

The Court concludes the floodgate arm is not a special defect because it was not blocking the road and the objective expectations of an "ordinary user" would not include veering off the road and onto the grass. But "ordinary users" of roads sometimes stray outside the lines, else there would be no need for shoulders. In my view, vehicle operators do not cease to be ordinary users every time they veer onto a shoulder. As the court of appeals observed, normal users of the road nearly always drive on the paved surface, yet "it is certainly not inconceivable that a normal user of the road might

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seventeen-foot metal pole piercing a vehicle's door and floorboard. Moreover, as we have noted, "The examples in the statute are not exclusive, and courts are to construe 'special defects' to include defects of the same kind or class as the ones expressly mentioned in the statute." *City of Grapevine v. Roberts*, 946 S.W.2d 841, 843 (Tex. 1997). In my view, a metal pole that pierced a vehicle, preventing it from traveling farther down the road, is similar enough to an obstruction to fall within the statute's ambit.

pull off or leave the edge of the road onto the unimproved shoulder for one reason or another, either intentionally or accidentally." 242 S.W.3d at 174. In the ordinary course of driving, hazards like road debris, livestock, or other drivers who don't respect their lanes are often encountered that require prudent drivers to take advantage of the shoulder, whether improved or unimproved. The Court's conclusion that a driver was no longer an ordinary user because two of his tires left the roadway as the result of his efforts to escape a head-on collision is inconsistent with what objectively reasonable drivers do every day.

The Court recognizes that the test for determining the expectations of an ordinary user is an objective one. Yet it fails to conduct an objective analysis, citing only Hilz's statement that "the 'normal course of travel for [Old Alton Road] would be the asphalt pavement.'" Hilz's testimony merely states the obvious: users of the road normally drive on the paved surface. That doesn't mean veering three feet from the asphalt to avoid a collision, with two wheels still on the road, places a driver beyond the normal course of travel. The Court's concept of "ordinary user" limits special defects to those that appear only within the lines between the shoulders of the road, contrary to our acknowledgment in *Payne* that a number of courts have recognized that "conditions threatening normal users of a road may be special defects even though they do not occur on the surface of a road." 838 S.W.2d at 238 n.3 (citations omitted); *see*, *e.g., Harris County v. Ciccia ex rel. Ciccia*, 125 S.W.3d 749, 754–55 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (holding that a culvert yards beyond the road's end where a "right-turn only" lane directed traffic is a special defect); *see also Tex. Dep't of Transp. v. Dorman*, No. 05-97-00531-CV, 1999 WL 374167 at *2–4 (Tex.

App.—Dallas June 10, 1999, pet. denied); *Morse v. State*, 905 S.W.2d 470, 474–76 (Tex. App.—Beaumont 1995, writ denied).

Not all off-road objects a driver might encounter in the ordinary course of travel qualify as special defects; to the contrary, few do. Obstructions like road signs, construction equipment in marked construction zones, and properly secured floodgate arms are not unexpected and do not pose an unusual danger to ordinary travelers. *See City of Dallas v. Giraldo*, 262 S.W.3d 864, 871 (Tex. App.—Dallas 2008, no pet.) (holding that a bulldozer parked eight to ten feet off the edge of the road is "not of the same kind or class as the excavations or obstructions the statute contemplates" and "did not pose a threat to the ordinary users of the roadway"); *Harris County v. Smoker*, 934 S.W.2d 714, 719 (Tex. App.—Houston [1st Dist.] 1996, writ denied) ("[A] longstanding, routine, or permanent condition is not a special defect."). But an unsecured floodgate arm pointing directly at oncoming traffic a mere three feet from the road's edge is out of the ordinary, unexpected, and extremely dangerous to ordinary users of the roadway.

Under the particular circumstances presented in this case, I consider the floodgate arm a special defect and would affirm the court of appeals' judgment. Because the Court does not, I respectfully dissent.

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Harriet O'Neill
Justice

OPINION DELIVERED: May 1, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0032

DOLGENCORP OF TEXAS, INC., D/B/A DOLLAR GENERAL STORE, PETITIONER,

v.

MARIA ISABEL LERMA, INDIVIDUALLY, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

PER CURIAM

This appeal arises from a post-answer default judgment entered against Dolgencorp of Texas, Inc., d/b/a Dollar General Store ("Dollar General") when its counsel failed to appear for trial because he was in a preferential trial setting in another county. Because Dollar General established it was entitled to a new trial pursuant to the factors set out in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939), we reverse and remand for a new trial.

On May 9, 2000, a fire damaged several stores at the Palm Village Shopping Center in Brownsville. Four tenants ("Lerma") sued Dollar General, alleging its negligence caused the fire. The case was originally set for trial in Cameron County on Monday, February 24, 2003. At docket call on the preceding Friday, Lerma announced ready. Dollar General's attorney, Clifford Harrison, had called earlier in the week and announced ready, but Harrison's associate, Christopher Sachitano, appeared at docket call and informed the court that Harrison was preferentially set for trial in Harris County on Tuesday, February 25. The trial judge instructed the parties to return on Monday for trial

but advised them that he had a full docket and would decide what to do when the case was reached. The court concluded by saying: "We'll see what happens when we get here on Monday. I don't ever object to people going to another Court."

On Monday, February 24, while the original trial court was hearing another matter, Lerma's counsel requested and obtained a transfer of the case to another district court for trial. Sachitano told the new trial judge that Harrison was the attorney prepared to try the case and that Harrison was in a preferential trial setting in another county. Sachitano also told the court that he personally was not qualified or prepared to try the case. Sachitano testified at the motion for new trial hearing that during a discussion in chambers the new trial judge told Sachitano that he would not have to try the case, but he would have to pick a jury that day. The trial judge also said he would work with the attorneys on scheduling.

A jury was selected and instructed to return Wednesday, February 26 at 1:30 p.m. After the jury was dismissed, Sachitano stated he would have the Harris County court coordinator keep in contact with the trial court. The trial judge instructed his staff "to tell the jurors to make sure that we have their correct home and work phone numbers in case anything changes . . . in case we have to start the case earlier or later. To be on stand by."

In the two days after jury selection and on the morning of February 26, the trial court's office received numerous calls from the Harris County judge and court coordinator where Harrison was in trial. Sachitano and his secretary also called and advised the trial judge's office that the Harris County suit would not be concluded before Wednesday afternoon.

On Wednesday at 1:30 p.m., the trial court called the case for trial. Neither Harrison nor Sachitano were present. The trial judge told the jury that he had received calls informing him Harrison was still in trial in Harris County, but that he expected Harrison himself to call, and that the "court [did] not take too kindly to their mannerism and the respect for the court system down here in south Texas." The judge discharged the jury, proceeded with a bench trial, and entered judgment against Dollar General.

The next day, the judge in the Harris County case faxed the trial judge a letter stating he had been having "difficulty making contact with [the trial judge]" and advising that Harrison was still in trial in Harris County. The letter provided, in part:

> When I first learned there might be conflicting trial settings, I asked my coordinator to contact you and see if we could work on an agreement. She left several messages with your staff, and actually talked with you briefly on Monday. Since then, my staff has attempted to reach you by telephone on numerous occasions and left messages asking you to call me back. For some reason, we are having difficulty making contact with you. Realizing the seriousness of the situation, that justice and fairness were at stake, and out of desperation, I had my staff contact [the regional presiding judge] for advice. It is my understanding that his office has also had difficulty reaching you.

Citing *Craddock*, Dollar General filed a motion for new trial. In it, Dollar General asserted that Harrison's failure to appear was not intentional nor the result of conscious indifference and the default judgment should be set aside. After conducting an evidentiary hearing, the trial court denied the motion. The court of appeals affirmed. 241 S.W.3d 584.

Dollar General now petitions this Court for review. It asserts (1) its motion for a new trial satisfied the *Craddock* test and the trial court abused its discretion by denying the motion; and (2) there is legally insufficient evidence to support the judgment. Lerma counters that *Craddock* is

inapplicable because this was a trial on the merits rather than a default judgment and because Dollar General waived its right to equitable relief by not filing a motion for continuance. Even if *Craddoc*k applies, Lerma asserts Dollar General has not met the *Craddock* elements. Lerma also asserts there is legally sufficient evidence to support the judgment.

Initially, we disagree with Lerma's assertion that because Dollar General participated in jury selection, this is an appeal from a trial on the merits rather than a default judgment. A post-answer default judgment occurs when a defendant who has answered fails to appear for trial. *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979). Even though Dollar General participated in jury selection, there is no evidence it intended to later abandon the proceedings. Its failure to attend trial when the case was called on Wednesday afternoon cannot realistically be classified as anything other than a failure to appear. The judgment against Dollar General is a default judgment.

In *Craddock*, we held that a default judgment should be set aside and a new trial granted when the defaulting party establishes that (1) the failure to appear was not intentional or the result of conscious indifference, but was the result of an accident or mistake, (2) the motion for new trial sets up a meritorious defense, and (3) granting the motion will occasion no delay or otherwise injure the plaintiff. 133 S.W.2d at 126. In *Ivy v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966), we extended *Craddock* to post-answer default judgments.

We review a trial court's refusal to grant a motion for new trial for abuse of discretion. *Cliff v. Huggins*, 724 S.W.2d 778, 778 (Tex. 1987). When a defaulting party moving for new trial meets all three elements of the *Craddock* test, then a trial court abuses its discretion if it fails to grant a new trial. *Old Republic Ins. Co. v. Scott*, 873 S.W.2d 381, 382 (Tex. 1994).

Dollar General references *Smith v. Babcock & Wilcox Construction, Co.*, 913 S.W.2d 467 (Tex. 1995), to support its position that its failure to appear was not intentional or the result of conscious indifference. There, the Smiths' attorney sought continuance of a trial setting because he was set for trial in another county. *Id.* at 467. After the court denied the motion, the attorney stated in a letter to the court that he understood the court would reconsider his motion for continuance on the date of trial if the other case actually went to trial at the same time. *Id.* The court, however, did not share this understanding and dismissed the case for lack of prosecution when the attorney failed to appear on the trial date. *Id.* at 468. The trial court later denied the Smiths' motion to reinstate the case. *Id.* Applying the *Craddock* standard, we held that

> failure to appear is not intentional or due to conscious indifference within the meaning of the rule merely because it is deliberate; it must also be without adequate justification. Proof of such justification—accident, mistake or other reasonable explanation—negates the intent or conscious indifference for which reinstatement can be denied.

Id. Accordingly, we held the attorney's failure to appear was not intentional or due to conscious indifference because "[h]e was actually in trial in another county and believed, based upon his credible explanation, that the court would grant a continuance for that reason." *Id.*

We distinguished the facts in *Smith* from those in *Smock v. Fischel*, 207 S.W.2d 891, 892 (Tex. 1948). In *Smock*, we held that a trial court did not abuse its discretion by proceeding to trial when defendant's counsel was in trial in another county because, among other things, the attorney had made no effort to resolve the conflicting trial settings and had failed to contact the judge on the day of trial to tell him of the attorney's whereabouts. *Id.* In contrast, the Smiths' attorney attempted

to resolve the conflict before trial and provided a credible explanation for why he believed a continuance would be granted. *Smith*, 913 S.W.2d at 468.

In the present case, Harrison was actually in trial in Harris County when he failed to appear in Cameron County for the Dollar General suit. At the motion for new trial hearing, Harrison testified that when he realized he had a conflicting preferential trial setting, he sent his associate, Sachitano, to announce the conflict at docket call for the Dollar General suit. In addition, while he was in trial in Harris County, he asked the Harris County judge and trial coordinator to call and notify the Cameron County trial court that he was still in trial. He also instructed his associate and secretary to call and apprise the Cameron County court of his status. The court coordinator for the Cameron County trial court submitted an affidavit confirming the fact that she received calls from the Harris County judge and trial coordinator as well as Sachitano and his secretary, each of whom confirmed that Harrison would be in trial in Harris County beyond his scheduled trial date for the Dollar General suit. Dollar General provided affidavits from Sachitano, his secretary, and the Harris County coordinator verifying the communications.

Lerma, relying on *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682 (Tex. 2002), asserts that by failing to file a verified motion for continuance, Dollar General waived its right to equitable relief. In *Carpenter*, Cimarron received notice of Carpenter's summary judgment motion and scheduled hearing on the motion but failed to file a timely response. *Id.* at 684. Two days before the scheduled summary judgment hearing, Cimarron realized the mistake and, on the day of the hearing, filed a motion for leave to file an untimely response and motion for continuance. *Id.* at 684-85. The trial court denied Cimarron's motions and granted Carpenter summary judgment. *Id.*

at 685. Cimarron filed a motion for new trial, claiming that the summary judgment should be set aside on the equitable grounds articulated in *Craddock*. *Id.* We held that *Craddock* does not apply to a motion for new trial filed after summary judgment is granted when the nonmovant failed to respond after having notice and an opportunity to obtain leave to file a late response. *Id.* at 686. We reasoned that in that situation, the rules relating to summary judgment afford the defaulting party an opportunity to obtain additional time to file a response, either by moving for leave to file a late response or by requesting a continuance of the summary judgment hearing. *Id.* at 685; *see* TEX. R. CIV. P. 166a(c), 251. We concluded *Craddock* should not apply because "[o]ur purpose in adopting the *Craddock* standard was to alleviate unduly harsh and unjust results at a point in time when the defaulting party has no other remedy available." *Carpenter*, 98 S.W.3d at 686.

Lerma asserts that under *Carpenter*, *Craddock* does not apply in this case because Dollar General had notice of the trial and an opportunity to seek a continuance under the rules of civil procedure. *See* TEX. R. CIV. P. 251. We disagree that *Carpenter* applies here. In *Carpenter*, the defaulting party knew of its failure to file a response in time for it to move for leave to file a late response, and it did so. 98 S.W.3d at 684-85. We stressed that *Craddock* did not apply because the defaulting party realized its mistake before judgment was entered and at a point in time when the rules of procedure provided other remedies. *Id.* at 685. But in this case, Dollar General was not actually aware that trial would begin on February 26. At the hearing on the motion for new trial, Harrison testified: "I reasonably believe[d] based on everything I knew that I was not to be called to trial [in Cameron County] while I was in trial in Harris County, that the court would work with the schedule." Harrison testified he based this belief on the fact that the court indicated it would

work with his schedule and was aware that he was still in trial in Harris County. He also based his belief on the fact that the court had collected the jurors' phone numbers so that they could be contacted in the event the case needed to start later.

We conclude that Harrison's failure to appear was not intentional or the result of conscious indifference. He attempted to resolve the conflict before trial, apprised the court of his whereabouts the day of trial, and provided a credible explanation for why he believed the court would delay trial. *See Smith*, 913 S.W.2d at 468. Dollar General satisfied the first prong of the *Craddock* test.

The second prong of the *Craddock* test requires Dollar General to "set up" a meritorious defense in its motion for new trial.[1] 133 S.W.2d at 126. Setting up a meritorious defense does not require proof "in the accepted sense." *Ivy*, 407 S.W.2d at 214. Rather, the motion sets up a meritorious defense if it alleges facts which in law would constitute a defense to the plaintiff's cause of action and is supported by affidavits or other evidence providing prima facie proof that the defendant has such a defense. *Id.* (testimony given at the motion for new trial hearing used to determine whether defendant provided prima facie evidence of a meritorious defense); *see Guar. Bank v. Thompson*, 632 S.W.2d 338, 339 (Tex. 2006). Once such requirements are met, controverting evidence offered by the nonmovant should not be considered. *Ivy*, 407 S.W.2d at 214.

Dollar General's motion for new trial stated, in part:

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[1] Dollar General does not assert we should dispense with any of the remaining *Craddock* factors, and we do not address the issue. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988) (holding that requiring proof of meritorious defense, in absence of valid service and notice of the judgment, violates due process rights); *Mathis v. Lockwood*, 166 S.W.3d 743, 744 (Tex. 2005) (dispensing with second *Craddock* element when post-answer default judgment was rendered without notice to defaulting party).

> Plaintiffs' Second Amended Petition alleged that Dolgencorp was negligent in "the lack of a complete fire wall and fire protection devices such as a sprinkler system." Additionally, plaintiffs had indicated in deposition questions that it may be alleged that Dolgencorp was negligent since, several hours before the fire, several Dollar General employees and customers indicated that they had smelled something burning and that there had been problems with a light fixture . . . . Dolgencorp was prepared to present evidence that the Brownsville Fire Marshal as well as another fire investigator had investigated the fire, and specifically whether the fire was electrical in origin, and had ruled out the probability that the fire was caused by the light fixture or that the fire was electrical in origin. In fact, according to the fire marshal's report, the fire was still open for investigation as it was possible that it was "incendiary" in origin. With respect to plaintiffs' allegations involving the fire wall and sprinkler system, evidence was developed during discovery, and would have been presented at trial, that there was no defect whatsoever in the fire wall . . . [and] there was no requirement in the plans, applicable ordinances or fire codes for any sprinkler system, and that the Dollar General Store had passed the applicable city inspections . . . .

At the hearing on the motion for new trial, Dollar General called a certified fire investigator hired by the shopping center's insurer to testify. *See id.* The investigator testified that he had conducted an investigation and could not identify the specific cause of the fire. In addition, the Brownsville Fire Department's fire investigation report provided: "The fire originally was thought to have come from a ballast from one of [Dollar General's] lights . . . however, it was later determined that the electrical system was not the cause of this fire even though several deficiencies were found in the electrical system. After systematically ruling out all other accidental causes it was determined that this fire is of a suspicious nature and remains open for investigation." Dollar General also called the manager of the Palm Village Shopping Center who testified that the City had inspected before the fire and determined that Dollar General's store, including the fire wall, complied with relevant regulations and ordinances.

The facts alleged in Dollar General's motion, if true, would constitute a defense to Lerma's cause of action. Further, the evidence and affidavits Dollar General submitted provided prima facie support for the defense. Dollar General satisfied the second prong of the *Craddock* test.

As to the third *Craddock* prong, Dollar General asserted that setting aside the default judgment would not harm or injure Lerma. Dollar General stated it was prepared to defend the case, and offered to pay any reasonable expenses incurred by Lerma in obtaining the default judgment. Once Dollar General alleged that granting a new trial would not injure Lerma, the burden of proof shifted to Lerma to prove injury. *See Mathis*, 166 S.W.3d at 744; *Dir., State Employees' Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 270 (Tex. 1994); *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 393 (Tex. 1993).

At the motion for new trial hearing, Lerma's attorney alleged that granting a new trial would harm the plaintiffs because Dollar General would "now know what we were going to be alleging . . . and what we're going to be arguing in front of a jury." The purpose of the third element of the *Craddock* test, however, is to protect a plaintiff against the sort of undue delay or injury that would result in a disadvantage when presenting the merits of the case at a new trial, "such as a loss of witnesses or other valuable evidence." *Evans*, 889 S.W.2d at 270. Lerma asserted a "harm" common to all parties facing a motion for new trial after obtaining a post-answer default judgment. But Lerma did not allege a specific injury, such as the loss of witnesses or valuable evidence, that would negate Dollar General's showing of no undue delay or injury. If Lerma's "harm" were sufficient to establish injury under *Craddock*, there would be no new trials granted. We hold that Lerma did not prove that

the granting of a new trial would cause such harm or injury as would preclude the granting of a new trial. Thus, Dollar General satisfied the third prong of the *Craddock* test.

Because Dollar General's motion for new trial satisfied all three elements of the *Craddock* test, the trial court abused its discretion by denying the motion, and Dollar General is entitled to a new trial. Dollar General, however, further asserts the Court should reverse and render judgment against Lerma because there is legally insufficient evidence from the bench trial to support the judgment.

Generally, if an appellate court holds there is legally insufficient evidence to support a judgment after a trial on the merits, the proper disposition is to reverse and render judgment. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 86 (Tex. 1992); *Mobil Oil Corp. v. Frederick*, 621 S.W.2d 595, 596 (Tex. 1981); *see* TEX. R. CIV. P. 43.3, 60.2. But in *Holt Atherton*, we held that when a plaintiff fails to present legally sufficient evidence at an uncontested hearing on unliquidated damages following a *no-answer* default judgment, the proper disposition is to remand for a new trial on the issue of damages. 835 S.W.2d at 86. We reasoned that the plaintiff should be afforded a second opportunity to present evidence in support of its claims because "as a practical matter, in an uncontested hearing, evidence of unliquidated damages is often not fully developed." *Id.*

Courts of appeals have reached differing results as to the proper disposition of a case when there is legally insufficient evidence to support a *post-answer* default judgment. *Compare Renteria v. Trevino*, 79 S.W.3d 240, 243 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (rendering judgment without discussion), *and Wallace v. Ramon*, 82 S.W.3d 501, 506 (Tex. App.—San Antonio 2002, no pet.) (same), *and Sutton v. Hisaw & Assocs. Gen. Contractors, Inc.*, 65 S.W.3d 281, 286 (Tex. App.—Dallas 2001, pet. denied) (same), *with In re Estate of Wilson*, 252 S.W.3d 708, 715 & n.8

(Tex. App.—Texarkana 2008, no pet.) (noting authorities allowing a case reversed on no evidence grounds to be remanded when the facts have not been fully developed, such as in a post-answer default judgment), *and Armstrong v. Benavides*, 180 S.W.3d 359, 364 (Tex. App.—Dallas 2005, no pet.) (remanding under *Holt Atherton* because facts had not been fully developed), *and Raines v. Gomez*, 143 S.W.3d 867, 869 (Tex. App.—Texarkana 2004, no pet.) (remanding without discussion), *and Thorp v. Adair & Myers*, 809 S.W.2d 306, 308-09 (Tex. App.—Houston [14th Dist.] 1991, no writ) (remanding for further factual development in the interest of justice).

No-answer and post-answer default judgments differ in the issues a plaintiff is required to prove. In cases of no-answer default, such as *Holt Atherton*, a defaulting defendant admits all facts properly pled in the plaintiff's petition except for the amount of unliquidated damages. *Holt Atherton*, 835 S.W.2d at 83. Thus, the plaintiff is only required to prove its claim for unliquidated damages. *Id.*; *see* TEX. R. CIV. P. 243. But if the defendant files an answer, as in this case, a trial court may not render judgment on the pleadings and the plaintiff is required to offer evidence and prove all aspects of its claim. *Bradley Motors, Inc. v. Mackey*, 878 S.W.2d 140, 141 (Tex. 1994); *Stoner*, 578 S.W.2d at 682. We, however, see no reason why this difference should result in judgment being rendered rather than remanded in cases of post-answer default.

In both types of default judgment, a plaintiff must present evidence, but the uncontested proceedings are often abbreviated and perfunctory. In the absence of opposing counsel, an uncontested trial, like an uncontested damages hearing, is less likely to result in a fully-developed factual record. *See Holt Atherton*, 835 S.W.2d at 86; *see also U.S. Fire Ins. Co. v. Carter*, 473 S.W.2d 2, 3 (Tex. 1971) (noting an appellate court may remand when the case has not been fully

developed). That is reflected in this case. Although Lerma had the burden to prove all elements of its claim, the trial court opined "[t]his will be only an issue of damages, not negligence, [so] prove it up the way you want to prove it up."

We conclude that the better rule is the one expressed in *Holt Atherton* and by the courts of appeals that have remanded for a new trial after a post-answer default judgment rather than rendering judgment. Under the rule we adopt, Dollar General's legal sufficiency challenge will not result in greater relief than the new trial afforded by our resolution of its motion for new trial argument; thus, we need not and do not address it.

Finally, this record compels us to note that judges and lawyers should, and in most instances do, extend common and professional courtesies to other judges and lawyers. *See* TEX. CODE JUD. CONDUCT, Preamble (noting, in part, that judges must strive to enhance and maintain confidence in our legal system and should be governed in their judicial conduct by general ethical standards); TEX. LAWYER'S CREED-A MANDATE FOR PROFESSIONALISM, III(11) ("I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed."). Here, despite attempts by other judges to contact the trial judge and both Lerma's counsel and the trial judge being aware that Dollar General's counsel was in trial elsewhere, judgment was entered against a party that by neither word nor deed exhibited intention to abandon or frustrate the proceedings. It is a credit to the trial bench and bar that this type of record rarely ends up before appellate courts.

We reverse the judgment of the court of appeals. The case is remanded to the trial court for a new trial.

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0043

TIMPTE INDUSTRIES, INC. AND TIMPTE INC., PETITIONERS,

v.

ROBERT GISH AND PINNACOL ASSURANCE, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

Argued March 11, 2009

JUSTICE MEDINA delivered the opinion of the Court.

Robert Gish was seriously injured when he fell from the top of a trailer into which he was attempting to load fertilizer. He sued Timpte Industries, the manufacturer of the trailer, alleging, among other things, that several features of the trailer were defectively designed, rendering the trailer unreasonably dangerous. The trial court granted a no-evidence summary judgment in Timpte's favor, but the court of appeals reversed. 2007 Tex. App. LEXIS 9411, 2007 WL 4224411 (mem. op.). Finding no defect, we reverse the court of appeals' judgment and render judgment reinstating the trial court's summary judgment.

I

On the morning of June 19, 2002, Robert Gish, a long haul trucker for Scott Hinde Trucking, arrived at the Martin Resources plant in Plainview, Texas, to pick up a load of ammonium sulfate

fertilizer. Gish was familiar with the plant, as he had picked up fertilizer there once or twice a week for approximately the past year. That morning Gish checked his trailer, weighed it, and waited for another customer to finish loading.

Gish's Peterbilt truck was hauling a forty-eight-foot Super Hopper trailer manufactured by Timpte Inc., a subsidiary of Timpte Industries.[1] The Super Hopper trailer is a standard open-top, twin hopper trailer, which is loaded from above through use of a downspout or other device and is emptied through two openings on its bottom. Once the trailer is loaded, a tarp is rolled over the top to protect its contents.[2] A ladder and an observation platform are attached to the front and rear of the trailer to allow the operator to view its contents.

After the truck ahead of him finished loading, Gish backed his trailer under the downspout attached to the fertilizer plant and yelled to a Martin employee to begin loading. In a typical delivery, an employee inside the Martin plant uses a front-end loader to drop fertilizer into a hopper. The fertilizer is then dropped onto a conveyer system that moves it to the downspout outside the plant and into the waiting trailer.

To prevent the granulated fertilizer from being blown away during the loading process, Gish attempted to lower the downspout by using a rope attached to it. The rope was attached to the downspout for that purpose, but Gish could not get it to work. He had previously complained to

[1] Because the interests of Timpte Inc. and Timpte Industries are the same throughout these proceedings, we refer to them collectively as "Timpte."

[2] The tarp assembly consists of two end caps–one on the front and one on the rear of the trailer–a latch plate that runs the length of the driver's side of the trailer, and seven curved metal bars that cross the trailer at approximately even intervals. These bars curve up towards the middle of the trailer, such that they form a peak down the trailer's center line. Two other metal bars run the length of the trailer on either side of this peak. This assembly supports the tarp when it is rolled over the trailer, and the latch plate allows the operator to tighten the tarp taut over the trailer.

Martin employees about problems lowering the downspout, but he did not do so again that morning. Instead, using the ladder attached to the front of the trailer, Gish climbed atop the trailer (as he had on several other occasions when the downspout would not lower) and attempted to lower the downspout by hand while standing on the trailer's top rail. This top rail is also the top of the trailer's side wall. It is made of extruded aluminum, is between 5 and 5.66 inches wide, and is nine-and-a-half feet above the ground.

While Gish was standing on the top rail working with the downspout, a gust of wind hit him from the back, causing him to fall. This fall fractured his legs, broke his ankles, and ruptured an Achilles tendon. Gish was in a wheelchair for six months, and he still has difficulty walking and standing.

Gish sued Martin and Timpte, asserting a cause of action for premises liability against Martin and causes of action for marketing, manufacturing, and design defects, misrepresentation, and breach of warranty against Timpte.[3] Specifically, Gish asserted that the warning labels on the Super Hopper trailer were insufficient to warn him of the danger of climbing on top of the trailer, and that the trailer contained two design defects:

- The top two rungs of the ladders attached to the front and rear of the trailer allow a person to climb atop the trailer; and
- The top rail of the trailer is too narrow and slippery and contains too many tripping hazards for a person to walk safely along it.

[3] Pinnacol Assurance, the workers' compensation insurance carrier for Gish's employer, Scott Hinde Trucking, intervened in the suit and asserted its rights to subrogation for the more than $150,000 it has paid in benefits as a result of Gish's accident. Because Pinnacol's interests are aligned with Gish's, we refer to them collectively as "Gish."

The two ladders on the trailer are made of rectangular tubing with rungs spaced twelve inches apart. The front ladder that Gish used to climb atop the trailer has five rungs–two below the observation platform (which is 38½ inches below the top of the front wall of the trailer), one approximately level with the platform, and two above the platform. The top rung of the ladder is thirteen inches below the top of the front wall of the trailer, and the rung second from the top is twelve inches below that. A metal bar approximately the length of the platform is mounted above the platform and near the top of the trailer to serve as a handhold while the operator stands on the platform.

Just below the middle rung of the ladder, Timpte has placed a rectangular warning label,[4] which reads:

> WARNING
> 1. EXERCISE EXTREME CAUTION WHILE CLIMBING ON ACCESS SYSTEM.
> 2. ALWAYS MAINTAIN 3-POINT CONTACT.
> (2 HANDS & 1 FOOT OR 2 FEET & 1 HAND)
> 3. DO NOT WEAR RINGS OR ANYTHING THAT CAN CATCH ON LADDER.
> 4. USE LADDER SIDE RAIL FOR HAND HOLD, NEVER USE THE RUNG.
> 5. NEVER CLIMB OVER THE TOP OF THE TRAILER AND ENTER THE INSIDE COMPARTMENTS FOR ANY REASON.
>
> FAILURE TO FOLLOW THESE WARNINGS COULD RESULT IN SERIOUS INJURY OR DEATH.

As previously noted, the top rail of the trailer is made of extruded aluminum, which is extremely slippery. The seven bars that support the tarp also intersect with the top rail, presenting the alleged tripping hazards.

[4] There were several other warning labels on the front of the trailer, but none are relevant to Gish's claims.

To remedy these alleged design defects, Dr. Gary Nelson, Gish's expert witness, proposed three design changes:

- Remove the top two rungs of the ladders attached to the trailer to make it impossible for a person to climb atop the trailer;
- Provide an adequate foothold and handhold at the top of the trailer so that a user on top of the trailer can maintain three-point contact with the trailer at all times; and
- If an adequate handhold cannot be provided, then widen the side rail to at least 12 inches to provide an adequate foothold.

Timpte moved for a no-evidence summary judgment, which the trial court granted. The trial court then severed Gish's claims against Timpte from the remainder of the case, making the summary judgment final for purposes of appeal. The court of appeals affirmed the trial court's judgment as to all of Gish's claims except his claim for design defect, concluding that there was "some evidence upon which reasonable factfinders could disagree as to whether the trailer's design was both unreasonably dangerous and a cause of Gish's fall." 2007 Tex. App. LEXIS 9411, at *11-12, 2007 WL 4224411, at *4.

II

A no-evidence summary judgment motion under Rule 166a(i) is essentially a motion for a pretrial directed verdict; it requires the nonmoving party to present evidence raising a genuine issue of material fact supporting each element contested in the motion. TEX. R. CIV. P. 166a(i); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581-82 (Tex. 2006). When reviewing a no-evidence summary judgment, we "review the evidence presented by the motion and response in the light most

favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Mack Trucks*, 206 S.W.3d at 582 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 208 (Tex. 2002)).

We begin with the grounds for Timpte's no-evidence summary judgment motion. Gish contends that Timpte's motion challenged only Gish's allegation that a design defect in the Super Hopper was the producing cause of his injury, not that there was a defect rendering the product unreasonably dangerous. Because the motion did not raise this issue, Gish concludes that the trial court erred in rendering its no-evidence summary judgment in favor of Timpte.

It is well settled that a trial court cannot grant a summary judgment motion on grounds not presented in the motion. *Brewer & Pritchard, P.C.*, 73 S.W.3d at 204; *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997). Our no-evidence summary judgment rule similarly requires that the moving party identify the grounds for the motion:

> After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

TEX. R. CIV. P. 166a(i). We have further explained that "[t]he motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not

authorize conclusory motions or general no-evidence challenges to an opponent's case." *Id.* at Comment–1997.

The underlying purpose of this requirement "is to provide the opposing party with adequate information for opposing the motion, and to define the issues for the purpose of summary judgment." *Westchester Fire Ins. Co. v. Alvarez*, 576 S.W.2d 771, 772 (Tex. 1978). We have analogized this purpose to that of the "fair notice" pleading requirements of Rules 45(b) and 47(a). *Id.* at 772-73; *see also* TEX. R. CIV. P. 45(b) (requiring a party's pleadings to give "fair notice" to the opponent); TEX. R. CIV. P. 47(a) (requiring a plaintiff's pleadings to give "fair notice of the claim involved").

After setting forth the elements of a design defect claim, Timpte's motion stated that "[p]laintiff has presented no evidence of a design defect which was a producing cause of his personal injury." In a subsequent paragraph labeled "Conclusion" Timpte restated: "There is no evidence of the product being defective or unreasonably dangerous, and there is no evidence the trailer was the proximate or producing cause of the Plaintiff's injuries." The motion thus unambiguously set out the elements of Gish's design defect claim and Timpte's belief that there was no evidence that its trailer was either unreasonably dangerous or the producing cause of Gish's injury. Although such a motion may be insufficient to give fair notice in a case involving a complex product or raising complicated issues of design defect, here the complaint was simple and straightforward; the record reveals no confusion of Gish's claim or Timpte's assertions of no evidence. Gish responded thoroughly as to both elements, indicating his understanding of Timpte's motion.

We conclude that Timpte's motion gave fair notice to Gish that it was challenging both whether the alleged defect rendered the trailer unreasonably dangerous and whether the defect was

the producing cause of Gish's injury. Timpte's motion was not the type of "conclusory motion[] or general no-evidence challenge[] to an opponent's case" barred by Rule 166a(i). The issues of design defect and producing cause were clearly raised in Timpte's motion and joined in Gish's response.

III

To recover for a products liability claim alleging a design defect, a plaintiff must prove that (1) the product was defectively designed so as to render it unreasonably dangerous; (2) a safer alternative design existed; and (3) the defect was a producing cause of the injury for which the plaintiff seeks recovery. *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 256-57 (Tex. 1999); TEX. CIV. PRAC. & REM. CODE § 82.005(a); *see also McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967) (adopting RESTATEMENT (SECOND) OF TORTS § 402A (1965)). To determine whether a product was defectively designed so as to render it unreasonably dangerous, Texas courts have long applied a risk-utility analysis that requires consideration of the following factors:

> (1) the utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use; (2) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive; (3) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs; (4) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and (5) the expectations of the ordinary consumer.

American Tobacco Co. v. Grinnell, 951 S.W.2d 420, 432 (Tex. 1997); *see also Hernandez*, 2 S.W.3d at 256 (citing *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 847 (Tex. 1979)).

The risk-utility analysis does not operate in a vacuum, but rather in the context of the product's intended use and its intended users. *Hernandez*, 2 S.W.3d at 259-60 (risk-utility analysis

of a cigarette lighter must be conducted in light of its intended adult users); *Caterpillar Inc. v. Shears*, 911 S.W.2d 379, 383-84 (Tex. 1995) (risk-utility analysis of a front-end loader with a removable canopy conducted in light of its specialized use in low-clearance areas). Although whether a product is defective is generally a question of fact, in the appropriate case, it may be determined as a matter of law. *Hernandez*, 2 S.W.3d at 260-61 ("[T]he issue of whether the product is unreasonably dangerous as designed may nevertheless be a legal one if reasonable minds cannot differ on the risk-utility analysis considerations."); *Grinnell*, 951 S.W.2d at 432.

In this regard, we have also rejected the contention that Texas should follow the "open and obvious danger rule":

> A number of courts are of the view that obvious risks are not design defects which must be remedied. *See, e.g.*, *Gray* [*v. Manitowoc Co.*], 771 F.2d [866,] 870 [(5th Cir. 1985)] (applying Mississippi law); *Delvaux v. Ford Motor Co.*, 764 F.2d 469, 474 (7th Cir. 1985) (applying Wisconsin law); *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671, 680 (1978). However, our Court has held that liability for a design defect may attach even if the defect is apparent. *Turner*, 584 S.W.2d at 850.

Shears, 911 S.W.2d at 383; *see also Hernandez*, 2 S.W.3d at 258 ("[I]n general, the obviousness of danger in and of itself is not an absolute bar . . . to liability for a defective design.").[5] We have noted, however, that the obviousness of the claimed defect is "an important consideration in determining whether the product is unreasonably dangerous . . . [and] may even be decisive in a particular case." *Hernandez*, 2 S.W.3d at 258.

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[5] This is also the rule adopted by the Restatement. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998) ("Subsection (b) does not recognize the obviousness of a design-related risk as precluding a finding of defectiveness. The fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessarily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to the plaintiff.").

Gish alleges that the Super Hopper trailer was defectively designed in two ways: (1) the top rail of the trailer was too narrow and presented tripping hazards; and (2) the top two rungs of the ladders mounted on the trailer were unnecessary and allowed the operator to climb to the top of the trailer. Essentially, Gish complains that the trailer's design failed to prevent him from climbing atop the trailer and then, once he was up there, failed to protect him from the risk of falling.

There is no evidence, however, that the top rail of the trailer is unreasonably dangerous in light of its use and purpose. As already noted, the top rail from which Gish fell is only 5 to 5.66 inches wide and made of extruded aluminum, an extremely slippery surface. Timpte's executive vice president of manufacturing and engineering, Jeffrey Thompson, testified that the top rail was designed this way for two reasons: (1) the width of the top rail is only as wide as necessary to support the front end of the trailer; and (2) the top rail is made of extruded aluminum and slants slightly towards the inside of the trailer so that any commodity that spills onto the top rail will slide into the trailer. Thompson testified that, were the top rail to be widened, it would add to the total weight of the trailer thereby reducing the weight of the commodity that the trailer would be permitted to carry. The utility of this design–maximizing the amount of commodity that the trailer can haul while keeping the structure of the trailer sound–is undeniably very high.

The corresponding risk of someone being injured the way Gish was is extremely low. The risk of falling while trying to balance on a 5 inch wide strip of extruded aluminum nearly ten feet above the ground is an obvious risk that is certainly "within the ordinary knowledge common to the community." *See Caterpillar Inc. v. Shears*, 911 S.W.2d 379, 382 (Tex. 1995) (internal quotation marks omitted). Whether the risk of injury is common knowledge is a question of law, not fact. *Id.*

at 383.[6] In *Shears*, we determined that the proper inquiry is whether an average user of the product would recognize the risks entailed by the use of the product as-is. *Id.*; *see also Sauder Custom Fabrication Inc. v. Boyd*, 967 S.W.2d 349, 350-51 (Tex. 1998) (per curiam) ("The consumer's perspective is that of an ordinary user of the product, not necessarily the same as that of an ordinary person unfamiliar with the product."). Applying that principle, we held as a matter of law that the risks presented by the open cab of a front-end loader were obvious to the average user, such that no warning was required. *Shears*, 911 S.W.2d at 383. The risk of falling from the top of the trailer while trying to balance on a five-inch strip of extruded aluminum is equally obvious to an average user of the Super Hopper trailer.

As noted, though, the fact that the alleged defect is open and obvious, although an important consideration, is generally not determinative in Texas. *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 258 (Tex. 1999). Timpte, however, asks that we revisit this rule, arguing that, in other contexts, the open and obvious nature of a danger is decisive. *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211 (Tex. 2008) (premises owner owes no duty to warn an independent contractor's employees of an open and obvious danger); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 183-84 (Tex. 2004) (product seller owes no duty to warn of commonly known risks of the product's use). But we have long recognized that, in the context of an obvious risk, the duty to warn of defects is distinct from the duty to design safe products. *Compare Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 850 (Tex. 1979) (recognizing design defect claim even if defect is apparent), *with Joseph E. Seagram & Sons,*

[6] We again recognize that in some situations, however, "there could be a fact question about whether consumers have common knowledge of risks associated with a product." *Shears*, 911 S.W.3d at 383. This is not such a situation.

Inc. v. McGuire, 814 S.W.2d 385, 387-88 (Tex. 1991) (no duty to warn of risks associated with prolonged and excessive alcohol consumption because such risks are common knowledge). As the Restatement notes:

> Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety. Furthermore, warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about non-obvious, not-generally-known risks. Thus, requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j (1998). The focus of a design defect claim, however, is whether there was a reasonable alternative design that, at a reasonable cost, would have reduced a foreseeable risk of harm. *Id.* § 2 cmt. d. Thus, if it is reasonable for a product's designer to incorporate a design that eliminates an open and obvious risk, the product reaches a more optimum level of safety by incorporating the safer design than by keeping the current design with the open and obvious risk. *See id.* § 2 cmt. a. We see no reason to discard the risk-utility analysis that Texas courts have long-applied to encourage manufacturers to reach an optimum level of safety in designing their products.

Nevertheless, the risk-utility factors here confirm that the design of the Super Hopper trailer was not defective as a matter of law. Timpte warned users to always maintain three-point contact with the trailer, which is impossible for a user standing on the top rail. Had Gish adhered to this warning, his accident would not have happened. Additionally, widening the side walls of the trailer so as to convert the top rail into a safe walkway, as Gish's expert proposed, would have increased

the cost and weight of the trailer while decreasing its utility.[7] The Federal Highway Administration generally limits the gross vehicle weight of a commercial motor vehicle to 80,000 pounds; therefore, any increase in the unloaded weight of the trailer results in a decrease of the amount of commodity the trailer can haul, thus reducing its overall utility to users. 23 C.F.R. § 658.17 (2008). The width of the top rail of the Super Hopper trailer is therefore not a design defect that renders the trailer unreasonably dangerous.

There is also no evidence that the top two rungs of the ladder are a design defect that renders the trailer unreasonably dangerous. Thompson testified that the top two rungs are necessary to maintain the structure and stability of the ladder when the side rails are under pressure; without them, the ladder could twist or bend. Additionally, even though Timpte warned users to use the side rails of the ladder as a handhold when climbing the ladder, were a user's hands to slip, the additional rungs provided additional handholds and an additional measure of safety. Thus, the utility of the ladder as constructed is high.

Conversely, the risk of injury from the use of the ladder is very slight. Gish's injury is only remotely related to the ladder's top two rungs: they allowed him to climb atop the trailer, where he was subsequently injured. Timpte warned users not to use the ladder to climb into the trailer itself, and the obvious nature of the risk of climbing onto the top rail negates the need for any additional warning. *See Caterpillar Inc. v. Shears*, 911 S.W.2d 379, 382-83 (Tex. 1995). Therefore, any risk

[7] Widening the side rail would also encourage other users of the Timpte trailer to use the side rail as a walkway, thus actually making it less safe.

from the ladder itself stems only from the risk that a user will ignore both Timpte's warnings and open and obvious dangers.

Additionally, as noted above, removal of the top two rungs, although it might have prevented Gish's injury,[8] might also increase the risk of injury to others who might need those rungs as a failsafe handhold. Removing the top two rungs could also cause the ladder to bend or become unstable under pressure, thereby increasing the risk of danger from its use. The inclusion of the top two rungs of the ladder is therefore not a design defect that renders the Super Hopper unreasonably dangerous.

* * * * *

Because there is no evidence that the design defects alleged by Gish rendered the trailer unreasonably dangerous, we reverse the court of appeals' judgment and render judgment reinstating the trial court's summary judgment.[9]

David M. Medina
Justice

OPINION DELIVERED: June 5, 2009

[8] As the observation platform is only 38½ inches below the top rail of the trailer, Gish could have climbed atop the trailer from this perch even if the top two rungs of the ladder had been removed.

[9] Before this appeal, Gish's premises liability claims against Martin Resources were severed from the claims against Timpte and left pending in the trial court.

IN THE SUPREME COURT OF TEXAS

NO. 08-0061

THE STATE OF TEXAS, PETITIONER

v.

CENTRAL EXPRESSWAY SIGN ASSOCIATES, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued January 13, 2009

JUSTICE O'NEILL delivered the opinion of the Court.

The Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." TEX. CONST. art. I, § 17. Adequate compensation does not include profits generated by a business located on condemned land. *Herndon v. Hous. Auth.*, 261 S.W.2d 221, 222–23 (Tex. Civ. App.—Dallas 1953, writ ref'd). In this case, the State condemned an easement that was leased to an advertising company for the purpose of erecting a billboard and selling advertising space. The trial court struck the condemnor's expert witness as unreliable for failing to include in his estimate of fair market value the income the billboard generated from advertising sales. Because the State's expert applied an accepted methodology for valuing the condemned property, we conclude the trial court reversibly erred in excluding his testimony.

I. Background

The State filed a petition to condemn a 3,950-square-foot parcel of land in Dallas that was needed to improve a highway interchange. Central Expressway Sign Associates (CESA) held an easement for the construction and operation of a billboard on an 1,801-square-foot parcel, most of which was contained in the parcel to be condemned. The easement was leased to Viacom Outdoor, Inc., for the greater of $11,000 per year or twenty-five percent of billboard advertising revenues after paying limited agency commissions, with the base rent rising to $11,500 after one year and $12,000 after two. Viacom sold advertising space on a billboard that had been constructed on the property. At the time of condemnation, the billboard generated $168,000 per year in advertising revenue. After court-appointed special commissioners determined that the fair market value of the property to all of the interest holders was $2,012,300,[1] the State objected and demanded a jury trial. The State reached a settlement agreement with the underlying fee owner and another leaseholder, and the State acquired title to the fee interest. The State also settled its condemnation suit against Viacom by agreeing to pay relocation benefits, and Viacom relocated its billboard to a new location. Thus, this case does not involve the acquisition of a billboard structure and Viacom was able to place its billboard elsewhere. Viacom remained a party to the State's suit against CESA, however, because of a dispute arising out of the settlement agreement over interest and attorneys' fees, which dispute

[1] The special commissioners' award was divided as follows:

CLBJ, Inc., fee owner	$280,000
Perry (Eller), a leaseholder	$784,500
CESA, easement holder	$100,000
Viacom, leaseholder	$847,800

proceeded separately from the trial on the merits between the State and CESA. As a result, the trial court's final judgment included acquisition of both CESA's and Viacom's interests in the property.

Before trial, the State challenged CESA's appraisal expert, claiming that he had improperly included in his appraisal business profits that Viacom's billboard generated and had mischaracterized the billboard structure as realty rather than personalty. The trial court struck CESA's expert for mischaracterizing the billboard structure, and neither Viacom nor CESA challenge that ruling here. The trial court also granted CESA's challenge to the State's expert appraiser, Grant Wall. Wall used the income approach to valuing property, which estimates future rental income generated by the property and applies a capitalization rate to arrive at a present value. Wall capitalized the income Viacom paid CESA in rent for the easement, and estimated the fair market value to be $359,817. Because Viacom was paying a market rent, Wall assigned no value to the leasehold interest. At a pretrial hearing, the trial court excluded Wall's testimony as unreliable because he did not include billboard advertising revenues in his appraisal. As a result, CESA's two principals, George Allen and Randolph Perry, offered the only estimates of the property's value. They both estimated the property was worth $2,500,000. The jury found the fair market value of the property to be $1,850,000, and the trial court entered a judgment for that amount. The court of appeals affirmed. ___ S.W.3d ___. We granted the State's petition for review to consider the reliability of its expert's methodology in estimating the fair market value of the condemned property.

II. Standard of Review

An expert's opinion, to be admissible, must be relevant and reliable. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 628 (Tex. 2002). To be relevant, the expert's opinion must be based on the facts; to be reliable, the opinion must be based on sound reasoning and methodology. *Id.* at 629; *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997). We review a trial court's determination that a witness's testimony is unreliable for an abuse of discretion. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001). A trial court abuses its discretion in excluding expert testimony if the testimony is relevant to the issues in the case and is based on a reliable foundation. *Zwahr*, 88 S.W.3d at 628; *Helena Chem. Co.*, 47 S.W.3d at 499.

For the exclusion of evidence to constitute reversible error, the complaining party must show that (1) the trial court committed error and (2) the error probably caused the rendition of an improper judgment. *McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992); *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989). We have recognized the impossibility of prescribing a specific test to determine whether a particular error is harmful, and entrust that determination to the sound discretion of the reviewing court. *McCraw*, 828 S.W.2d at 757–58; *Lorusso v. Members Mut. Ins. Co.*, 603 S.W.2d 818, 821 (Tex. 1980). In making this determination, the court must review the entire record. *Gee*, 765 S.W.2d at 396; *Lorusso*, 603 S.W.2d at 821. "[I]t is not necessary for the complaining party to prove that 'but for' the exclusion of evidence, a different judgment would necessarily have resulted." *McCraw*, 828 S.W.2d at 758. The complaining party must only show "that the exclusion of evidence probably resulted in the rendition of an improper judgment." *Id.* The role that excluded evidence plays in the context of the trial is also important. Thus, the exclusion or admission is likely harmless if the evidence was cumulative, or the rest of the evidence was so

one-sided that the error likely made no difference in the judgment. *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 873 (Tex. 2008). But if erroneously admitted or excluded evidence was crucial to a key issue, the error is likely harmful. *Id.*

III. Exclusion of Grant Wall's Testimony

The State argues that it is entitled to a new trial because the trial court erred in excluding expert appraiser Grant Wall's testimony. The trial court found that Wall's testimony was unreliable because he did not include billboard advertising revenues in his estimate of the easement's value. Texas recognizes three approaches to determining the market value of condemned property: the comparable sales method, the cost method, and the income method. *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001). The comparable sales method is the favored approach, but when comparable sales figures are not available, courts will accept testimony based on the other two methods. *Id.* at 182–83. The cost approach looks to the cost of replacing the condemned property minus depreciation. *Id.* at 183 (citing *Religious of the Sacred Heart v. City of Houston*, 836 S.W.2d 606, 615–16 (Tex. 1992)). The income approach is appropriate when the property would be priced according to the rental income it generates. *Sharboneau*, 48 S.W.3d at 183 (citing *Polk County v. Tenneco, Inc.*, 554 S.W.2d 918, 921 (Tex. 1977)). All three methods are designed to approximate the amount a willing buyer would pay a willing seller for the property. *Id.*

Texas law allows income from a business operated on the property to be considered in a condemnation proceeding in two situations: (1) when the taking, damaging, or destruction of property causes a material and substantial interference with access to one's property, *see City of Austin v. The Avenue Corp.*, 704 S.W.2d 11, 13 (Tex. 1986); and (2) when only a part of the land

has been taken, so that lost profits may demonstrate the effect on the market value of the remaining land and improvements, *see City of Dallas v. Priolo*, 242 S.W.2d 176, 179 (Tex. 1951). Absent one of these two situations, income from a business operated on the property is not recoverable and should not be included in a condemnation award. Courts have applied this rule for two reasons: first, because profits from a business are speculative and often depend more upon the capital invested, general market conditions, and the business skill of the person conducting it than it does on the business's location; and second, because only the real estate and not the business has been taken and the owner can presumably continue to operate the business at another location. *Herndon,* 261 S.W.2d at 223.

Texas courts have refused to consider business income in making condemnation awards even when there is evidence that the business's location is crucial to its success. *See, e.g.*, *State v. Rogers*, 772 S.W.2d 559, 561–62 (Tex. App.—Amarillo 1989, writ denied) (refusing consideration of "going concern" and "goodwill" values of auto parts store that caters to and depends upon nearby businesses); *City of Austin v. Casiraghi*, 656 S.W.2d 576, 579–80 (Tex. App.—Austin 1983, no writ) (refusing to consider business income of well-located restaurant); *State v. Villareal*, 319 S.W.2d 408, 410 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.) (upholding exclusion of evidence of income generated by grocery store); *Marshall v. City of Amarillo*, 302 S.W.2d 943, 945 (Tex. Civ. App.—Amarillo 1957, no writ) (refusing to consider income generated by pawn shop).

CESA and Viacom argue that billboard advertising revenue is derived from the intrinsic value of the land, and therefore that revenue should be treated like rental income for purposes of an income-method appraisal. In support of their position, they cite *Herndon*, in which the court of

appeals refused to consider income from a grocery business operated on condemned land, but noted that evidence of "rents and profits derived from the intrinsic nature of the real estate itself" would be admissible. 261 S.W.2d at 223. The *Herndon* court cited several examples from other states, including cases where income derived from a stone quarry, agricultural and livestock operations, and toll roads and bridges has been considered in placing a value on condemned land. *Id.*

Other states that have addressed this issue have come to varying conclusions. Some have held that the revenue from billboard advertising should not be considered in estimating the market value of condemned property. *See, e.g.*, *Comm'r of Transp. v. Rocky Mountain, LLC*, 894 A.2d 259, 283–85 (Conn. 2006); *City of Newport Mun. Hous. Comm'n v. Turner Adver., Inc.*, 334 S.W.2d 767, 770–71 (Ky. 1960); *State Dept. of Transp. & Dev. v. Chachere*, 574 So. 2d 1306, 1310–11 (La. Ct. App. 1991); *Wray. v. Stvartak*, 700 N.E.2d 347, 354 (Ohio Ct. App. 1997); *In Re Urban Redevelopment Auth.*, 272 A.2d 163, 165 (Pa. 1970); *Vivid, Inc. v. Fiedler*, 580 N.W.2d 644, 658–59 (Wisc. 1998). These courts reason that billboard advertising revenues are too speculative to use as an estimate of the fair market value of land, *see Turner*, 334 S.W.2d at 770, and that any portion of the revenues attributable to the sign's location should be reflected in the fair rental value of the premises, *see In Re Urban Redevelopment Authority of Pittsburgh*, 272 A.2d at 165. And although the court of appeals cited *Vivid, Inc. v. Fiedler* as supporting its opinion, in fact the majority of the justices opined that an appraisal based on billboard advertising income impermissibly compensates for business profits. 580 N.W.2d at 658. The Wisconsin Supreme Court emphasized that the billboard owner is a "comprehensive advertising enterprise" that "actively markets the availability of its billboards, employs an artist to create the advertising copy for its clients, and creates the actual

advertisement materials." *Id.* Accordingly, the trial court was directed to closely examine the offered appraisal to ensure that it did not include compensation for business income. *Id.* at 659.

Other states have decided that billboard advertising revenues may properly be considered in estimating the value of real property. *See State Dept. of Transp. v. Powell*, 721 So. 2d 795, 798 (Fla. Dist. Ct. App. 1998); *In re Acquisition of Billboard Leases & Easements*, 517 N.W.2d 872, 873 (Mich. Ct. App. 1994); *State v. 3M Nat'l Adver. Co.*, 653 A.2d 1092, 1094, 1096 (N.H. 1995); *Lamar Corp. v. Commonwealth Transp. Comm'r*, 552 S.E.2d 61, 66 (Va. 2001).

But Texas courts have not recognized the exception alluded to in *Herndon* for business profits "derived from the intrinsic nature of the real estate." 261 S.W.2d at 223. Profits from an existing farming business have been excluded as unreliable evidence of a property's value because they depend on weather, labor, market conditions, and other factors that may vary from year to year. *See Bridges v. Trinity River Auth.*, 570 S.W.2d 50, 53–54 (Tex. Civ. App.—Tyler 1978, writ ref'd. n.r.e.) (citing *Lower Nueces River Water Supply Dist. v. Sellers*, 323 S.W.2d 324 (Tex. Civ. App.—San Antonio 1959, writ ref'd. n.r.e.). Texas courts have also excluded evidence of profits from mining businesses operated on condemned land. *See Nelson v. Jefferson County*, No. 09-95-208CV, 1997 Tex. App. LEXIS 4411 (Tex. App.—Beaumont Aug. 14, 1997, pet. denied) (not designated for publication) (affirming trial court's exclusion of evidence that land was particularly suitable for future dirt pit operations); *Reilly v. State*, 382 S.W.2d 116, 120–21 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.) (affirming trial court's exclusion of evidence of income derived from selling topsoil and caliche gravel). In *Reilly*, evidence of the value of gravel or other material as it lies in its natural state in the ground was held admissible, but evidence to show the value of material

that had been taken from the ground and had become a commodity was excluded. 382 S.W.2d at 121; *see also State v. Angerman*, 664 S.W.2d 794, 796 (Tex. App.—Waco 1984, writ ref'd n.r.e.) (holding there was no error in instructing jury to consider gravel deposits only as "a part of the land" and not as having any market value separate from the land).

We are not inclined to create an exception for land on which a billboard is placed. Although CESA and Viacom consider billboards unique, there is nothing to indicate that a billboard's location is any more significant to their business than it would be to a retail establishment whose profitability depends upon visibility and easy access. Moreover, profits from a billboard advertising business depend upon more than just the land itself. The business involves securing permits for the operation of billboards, constructing, lighting, and maintaining the billboards, and employing personnel to sell advertising space and to place and remove the advertisements. If there were no business effort or skill involved in operating a billboard business beyond "renting" the space to advertisers, one would expect the rental rate of the easement to more closely approximate the advertising income Viacom received. Viacom and CESA cannot argue simultaneously that (1) the billboard generates $168,000 per year in advertising income while CESA only charges Viacom the greater of $12,000 per year or twenty-five percent of advertising revenue; and (2) Viacom does not employ any business skill beyond that of a "landlord" in order to profit from this arrangement. If, as CESA and Viacom argue, the operation of a billboard is much like renting real property, CESA would have no reason to charge so much less in rent than Viacom receives from its advertising sales.

If CESA were charging less in rent than the easement is truly worth, Wall's appraisal method still would not undervalue the property because it adds the lease's "bonus value" to the capitalized

rental income. The bonus value is the value of the leasehold's use and occupancy for the remainder of the tenant's term, plus the value of any renewal right, less the agreed rent. *Luby v. City of Dallas*, 396 S.W.2d 192, 198 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.). This value is calculated as part of the award when condemned property is subject to a lease. *Id.* Wall calculated this value as zero because Viacom was paying a rent that was comparable to what it would pay to rent similar properties.

Viacom and CESA argue that Wall's appraisal violates the "undivided-fee rule" and was properly excluded by the trial court on this basis alone. The undivided-fee rule states that when real property has been carved into different interests, the property is valued for condemnation purposes as if it were owned by a single party. *State v. Ware*, 86 S.W.3d 817, 822 (Tex. App.—Austin 2002, no pet.); *Aronoff v. City of Dallas*, 316 S.W.2d 302, 307–08 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.). Under the undivided-fee rule, the sum of the different interests cannot exceed the value of the property when viewed as a single estate. *Ware*, 86 S.W.3d at 824. The purpose of the rule is to award full compensation for the land itself, and not for the sum of the different parts. *Id.* at 824. Thus, while each interest-holder is entitled to a share of the compensation award, the award should be paid for the property itself, then apportioned between them. *Aronoff*, 316 S.W.2d at 307–08. When the property is subject to a lease, the fact-finder first determines the market value of the entire property as though it belonged to one person, then apportions that value between the lessee and the owner of the fee. *Urban Renewal Agency v. Trammel*, 407 S.W.2d 773, 774 (Tex. 1966) (citing *Aronoff*, 316 S.W.2d at 302).

According to CESA and Viacom, Wall failed to correctly apply the undivided-fee rule because he did not value the leasehold estate. This argument both misinterprets the undivided-fee rule and misunderstands Wall's appraisal. The rule merely ensures that the goal of an appraiser will always be to approximate what the entire property would sell for in a market transaction. It does not guarantee that any individual interest will be assigned a value greater than zero for purposes of calculating the value of the whole.

Contrary to what CESA and Viacom suggest, Wall did value the entire property, which in this case was the easement because the State had already acquired the underlying fee. The easement had been divided up into CESA's leased fee and Viacom's leasehold. Wall calculated the value of the whole by determining the value of each of these interests. He concluded that the leasehold had no value because the agreed rent was not less than the fair rental value of the easement. Moreover, Wall's appraisal did not overlook the value of the property as a billboard location because he valued the easement as put to its highest and best use. The rent Viacom paid CESA, which formed the basis of Wall's income-method appraisal, also accounted for the value of the location; a property better-suited to billboard advertising would presumably be able to command a higher rent.

Thus, we hold that Wall's testimony reflected an accepted and reliable method of appraising the condemned easement and it should not have been excluded. We believe the error was reversible because Wall's testimony was directly related to the central issue in the case, the value of the condemned property.

The State also argues that the trial court erred in admitting the testimony of CESA's principals because their estimates were based on billboard advertising revenues. CESA and Viacom

argue that the principals' testimony was based on their knowledge of the fair market value of the property as owners and as persons involved in the Dallas real estate market. It is not clear that the principals' testimony was based on advertising revenue, although they did mention it. Under Texas law, an owner of property is qualified to testify to the property's market value. *Porras v. Craig*, 675 S.W.2d 503, 504 (Tex. 1984). On remand, the trial court should not allow evidence of valuation based on advertising income. General estimates of what the property would sell for considering its possible use as a billboard site are acceptable.

IV. Conclusion

We conclude that the trial court abused its discretion in excluding Wall's testimony. We reverse the judgment of the court of appeals and remand for a new trial.

_____

Harriet O'Neill
Justice

OPINION DELIVERED: June 26, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0073

PROGRESSIVE COUNTY MUTUAL INSURANCE COMPANY, PETITIONER,

v.

REGAN KELLEY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

PER CURIAM

In this case, we consider whether two documents issued by an insurance company constitute two separate insurance policies or a single policy. We hold that this is a fact question and remand to the trial court.

Regan Kelley was struck by a car while riding her horse. Medical expenses for her injuries are alleged to have exceeded $1 million. After receiving $100,000 in benefits from the motorist's insurer, Kelley made a claim with Progressive County Mutual Insurance Company ("Progressive") for underinsured benefits under a policy issued to her parents, which also covered Kelley. At the time of the accident, Kelley was an adult living with her parents. Progressive paid the policy limit of $500,025. To cover the remaining damages, Kelley then made a claim under an alleged second policy with a limit of $500,025, also issued by Progressive. At the time of the accident, Progressive

insured five of the Kelleys' vehicles. Four vehicles were listed on a two-page document, and the fifth was listed on a separate two-page document. However, the documents had separate policy numbers. Nevertheless, Progressive denied there was a second policy and refused to make any additional payments.

Kelley sued Progressive for breach of contract and Insurance Code violations, while Progressive sought a declaratory judgment, requiring it to pay the maximum policy limit amount under only one policy. The suits were consolidated, and both parties filed motions for summary judgment, presenting two issues: (1) whether Progressive issued one or two policies, and (2) if two policies, whether Progressive's "Two or More Auto Policies" anti-stacking provision,[1] found within each policy, limited recovery to one policy's maximum limits. The trial court granted Progressive's motion and denied Kelley's motion, without specifying on which ground. The court of appeals reversed and rendered judgment in favor of Kelley, holding that (1) Kelley established as a matter of law that Progressive issued two separate policies, and (2) Progressive's "Two or More Auto Policies" provision violated public policy, as it had the same effect as an "other insurance" provision previously struck down by this Court in *American Liberty Insurance Company v. Ranzau*, 481 S.W.2d 793, 797 (Tex. 1972). ___ S.W.3d at ___. Thus, the court of appeals held that Kelley was

[1] This provision provides:

> **TWO OR MORE AUTO POLICIES**
> If this policy and any other auto insurance policy issued to you by us apply to the same accident, the maximum limit of our liability under all the policies shall not exceed the highest applicable limit of liability under one policy.

entitled to collect under the second policy to the extent of her actual damages. ___ S.W.3d at ___. Progressive appeals to this Court, arguing that the trial court's judgment should be reinstated.

"When both parties move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review the summary judgment evidence presented by both sides and determine all questions presented and render the judgment the trial court should have rendered." *Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex. 2004) (citations omitted). "When a trial court's order granting summary judgment does not specify the grounds relied upon, the reviewing court must affirm summary judgment if any of the summary judgment grounds are meritorious." *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000) (citations omitted).

Progressive argues it is entitled to judgment as a matter of law because it met its obligations under the single policy by paying its maximum limits, or alternatively, that the "Two or More Auto Policies" provision limits Kelley's recovery to a single policy. It argues that the documents clearly and unambiguously demonstrate Progressive only issued one policy to the Kelleys with a maximum coverage of $500,025. In support, Progressive directs the Court's attention to the multi-car discount reflected in the second document, and the affidavit of Debra Henry, Progressive's Litigation Underwriting Specialist, who explained that Progressive has specific procedures for "5+ Car" policies. According to Henry, "5+ Car" policies are split into two pages because Progressive's computer software only allows four vehicles per page, and that the two separate policy numbers generated are a product of Progressive's computer program, not an indication of two separate policies. Henry stated that had there been two policies, Progressive could have charged Kelley two

policy fees, rather than the one that it did charge. Also, Henry stated that the multi-car discount reflected on the second document was applicable only because the car listed was the fifth overall under the single policy, and that this discount would not have been available if the car was covered under its own distinct policy. Conversely, Kelley argues there is no fact question as to whether two policies were issued, and that refusing to stack the two policies in these circumstances is prohibited under Texas law. In support, Kelley points to the separate policy numbers and premiums on each document, as well as Progressive's own "Product & Underwriting Guide."

Although this question deals with the interaction of two documents, the rules of construction for insurance contracts apply.[2] The starting point of this analysis is the instrument itself. *See Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) ("If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law."). Here, the written instrument consists of two pages, and standing alone, contains the information necessary to be an insurance policy. It makes no reference to another related document or policy. In the top right corner, the document states "Page 1 of 2" and "Page 2 of 2," respectively, indicating that those are the only two pages related to that policy. These characteristics suggest the document is a single policy. However, Progressive urges the Court to consider its Product & Underwriting Guide and Henry's affidavit to explain the two documents. Extrinsic evidence is not admissible for the purpose of creating an ambiguity. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam) (citations

[2] The meaning of the first document/policy, which lists four cars, is not at issue because Progressive has already paid the limits on that policy. The question before the Court is whether the second document/policy is independent of the first.

omitted). But here, the document does reflect some ambiguity. The reference to the "multi-car discount" on the second document, which covers only one car, creates some ambiguity. *See Coker*, 650 S.W.2d at 394 ("A contract . . . is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning."). Also at issue here is latent ambiguity, which arises "when a contract which is unambiguous on its face is applied to the subject matter with which it deals and an ambiguity appears by reason of some collateral matter." *Nat'l Union Fire Ins*., 907 S.W.2d at 520. Here, the surrounding circumstances—the existence of the two documents—creates a latent ambiguity as to the intent of the parties. Thus, we will consider extrinsic evidence, including the content of the first document. A review of the two documents together shows that each has a different policy number, policy period, premium, and listed drivers. Also, the first document reflects that it was modified more recently than the second. However, the coverage amounts and deductibles are the same in each document.

Henry addressed these discrepancies, explaining that Progressive's computer program allows only four vehicles per page, so the fifth car must be listed on a separate page. While this explanation may indicate Progressive issued a single policy, the fact that a new policy number was generated for the second document does not. Also, Henry's affidavit and Progressive's own "Product & Underwriting Guide" conflict at times. Henry states that Kelley would have been required to pay an additional policy fee if there was a second policy, whereas the Guide states:

> ProRater can only accept four vehicles **per policy**. You will therefore need to **split policies** for five or more vehicles. When you generate a quote, ProRater will prompt you to indicate whether it is for the **second policy** of a "5 + car" policy. Answering "Yes" to this question will generate a multi-car discount, **and will prevent a policy fee and installment fee from**

> **being charged on the second policy**. Only answer "Yes" when quoting the second policy. The primary policy should be answered "No."

(emphasis added). As Progressive urges, this "second policy" could reasonably be read to refer to the second page or provision of the original policy, but it could also reasonably be read to refer to an additional independent policy. The Guide also refers repeatedly to a primary, secondary, and second policy, implying there is more than one policy involved here. Henry's affidavit, taken together with the Guide, does little to resolve the ambiguity as to whether the second document is a separate policy. That a discount was given for a fifth car could also reasonably be construed either way—Progressive may want to reward a continuing customer by offering discounts on new, additional policies in the same way it would want to offer discounts on additional coverage under the same policy. Further, while it may seem reasonable for a computer program to carry over policy information onto an additional page, the fact that each document contains a separate policy number suggests they are separate, independent policies. This evidence is sufficient to raise a fact issue as to whether Progressive issued two policies, but it falls short of establishing as a matter of law only one policy was issued. For these reasons, we hold that the documents are ambiguous as to whether one or two policies were issued.

Kelley argues that neither party claimed the contract was ambiguous. But whether a contract is ambiguous is a question of law to be decided by the Court. *J. M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003); *see also Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445 (Tex. 1993) (holding that a court can decide a contract is ambiguous on its own motion). We have said that in an insurance contract, where a provision is subject to two reasonable interpretations,

we will adopt the interpretation that favors the insured. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co., Inc.*, 811 S.W.2d 552, 555 (Tex. 1991) (citations omitted). Here, we are not interpreting a particular exclusion or provision within an insurance policy, *see, e.g.*, *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746 (Tex. 2006); rather, we are determining whether two documents amount to a single or separate policies. After reviewing the face of the documents and extrinsic evidence, we hold that the documents are ambiguous, and therefore, a fact finder should resolve the meaning. *See J. M. Davidson*, 128 S.W.3d at 230–31; *Coker*, 650 S.W.2d at 394 ("When a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue.").[3] Therefore, without hearing argument, we reverse the court of appeals judgment and remand to the trial court for further proceedings consistent with this opinion. TEX. R. APP. P. 59.1.[4]

OPINION DELIVERED: March 27, 2009

[3] The record reflects that Progressive requested a jury trial and that Kelly argued, during summary judgment, that the issue of whether there is two policies may be a fact issue.

[4] Because the validity of the anti-stacking provision is continent on a finding that Progressive issued two policies, we do not address it at this time.

IN THE SUPREME COURT OF TEXAS

NO. 08-0093

IN RE GAYLE E. COPPOCK

ON PETITION FOR WRIT OF HABEAS CORPUS

Argued December 10, 2008

JUSTICE O'NEILL delivered the opinion of the Court.

To be enforceable by contempt, a judgment must clearly order or command a party to perform the obligations imposed and the terms for compliance must be clear and unequivocal. Because the judgment challenged in this proceeding lacks the necessary clarity, we grant the petition for writ of habeas corpus and set aside the order of contempt as void.

Raymond Coppock and Gayle Magness, formerly Gayle Coppock, divorced in October 2003. The trial court's final decree of divorce incorporated a mediated settlement agreement between the parties which, among other things, permanently enjoined them from communicating with each other "in a coarse or offensive manner." Over the next two years, Gayle communicated numerous times with Raymond via telephone and e-mail in a manner that he considered violative of the decree. Raymond filed a motion to enforce the decree, which the trial court granted. Finding eighty-four separate violations of the decree for communicating with Raymond "in a coarse or offensive

manner," the trial court held Gayle in contempt and ordered that Gayle serve three consecutive sentences of 180 days imprisonment. However, the court suspended Gayle's commitment and placed her on community supervision for three years on the condition that she spend four nights in the county jail and pay $8,773.50 to Raymond's attorney. When Gayle failed to report for incarceration, the court issued a writ of capias for her arrest. The court of appeals — treating Gayle's petition for writ of habeas corpus as a petition for writ of mandamus — denied relief. We ordered Gayle released on bond pending our review of her habeas corpus petition.

In a habeas corpus action challenging confinement for contempt, the relator bears the burden of showing that the contempt order is void. *See In re Dupree*, 118 S.W.3d 911, 914 (Tex. App.—Dallas 2003, pet. denied). An order is void if it is beyond the power of the court to enter it, or if it deprives the relator of liberty without due process of law. *Ex parte Barnett*, 600 S.W.2d 252, 254 (Tex. 1980) (orig. proceeding). To be enforceable by contempt, an order must set out the terms of compliance in clear and unambiguous terms. *Ex parte Brister*, 801 S.W.2d 833, 834 (Tex. 1990) (orig. proceeding). Moreover, a person cannot be sentenced to confinement unless the order unequivocally commands that person to perform a duty or obligation. *Ex parte Padron*, 565 S.W.2d 921, 921 (Tex. 1978) (orig. proceeding).

Gayle contends the judgment providing that neither party may communicate with the other in a coarse or offensive manner is an unconstitutional prior restraint on speech, an unconstitutional content-based regulation of speech, and too vague a standard to be enforced by contempt. Raymond responds that Gayle waived her constitutional objections by failing to raise them in the trial court, and that by failing to object to the decree before judgment was rendered she waived objection to the

injunction's scope. Raymond further argues that individuals may waive constitutional rights, and contends Gayle did so by agreeing to the injunction in the mediated settlement agreement that was then incorporated into the judgment.

We agree with Gayle that the injunctive provision in issue is less than clear, as what constitutes "coarse or offensive" communication, especially between warring spouses, is largely in the eye of the beholder. However, because the judgment lacks a critical component necessary to invoke the court's contempt power, we do not reach Gayle's constitutional challenges. *See In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003) ("As a rule, we only decide constitutional questions when we cannot resolve issues on nonconstitutional grounds."); *Bradley v. State ex rel. White*, 990 S.W.2d 245, 247 (Tex. 1999) (same).[1]

"Civil contempt in Texas is the process by which a court exerts its judicial authority to compel obedience to some order of the court." *Ex parte Padron*, 565 S.W.2d at 924 (citing *Ex parte Werblud*, 536 S.W.2d 542, 545 (Tex. 1976) (orig. proceeding)). This Court has made clear that command language is essential to create an order enforceable by contempt. *See Ex parte Gorena*, 595 S.W.2d 841, 845 (Tex. 1979) (orig. proceeding); *Ex parte Padron*, 565 S.W.2d at 924; *see also Ex parte Duncan*, 62 S.W. 758, 760 (Tex. Crim. App. 1901) (orig. proceeding) (stating the order alleged to have been disobeyed "must be in the form of a command"). Merely incorporating an agreement into the recitals of a divorce decree, without a mandate from the court, is not sufficient.

[1] Neither do we reach Gayle's alternative contention that the *nunc pro tunc* divorce decree is void because it substantively changed the original decree, as both decrees contain the same language that formed the basis of the trial court's contempt order.

See, *e.g.*, *In re Dupree*, 118 S.W.3d at 916 (holding that a party cannot be held in contempt for failure to pay alimony when his agreement to pay was incorporated in the court's divorce decree without command language); *Ex parte Harris*, 649 S.W.2d 389, 391 (Tex. App.—Corpus Christi 1983, orig. proceeding) (holding that an agreement to pay child support that is incorporated in the parties' divorce decree is not enforceable by contempt because the decree did not order the parties to comply with the agreement). In *Ex parte Gorena*, we upheld a contempt order for failure to make agreed payments incorporated in a divorce decree. 595 S.W.2d at 843. There, the decree ordered that the payments be made. *Id.* ("'It is decreed that Respondent (Mr. Gorena) shall pay to Petitioner (Ms. Barber) . . . .'"). We distinguished *Ex parte Duncan*, 462 S.W.2d 336, 337 (Tex. Civ. App.—Houston [1st Dist.] 1970, orig. proceeding), in which there was "no language in [the decree] ordering the husband to make the installment payments." *Ex parte Gorena*, 595 S.W.2d at 845.

In this case, the divorce decree does not contain sufficient language to advise the parties that refraining from or engaging in the described conduct is mandatory. The judgment specifically provides:

> The Court finds that a permanent injunction of the parties should be granted . . . .
>
> The permanent injunction granted below shall be effective immediately and shall be binding on both parties . . . .
>
> > a. Communicating with the other party in person or in writing in vulgar, profane, obscene, or indecent language or in a coarse or offensive manner.

Although reciting that the injunction is "binding on both parties," the judgment does not order or mandate compliance. The order refers to a "permanent injunction granted below," and lists twenty-

one different behaviors, but there is no injunctive language commanding or ordering the parties not to engage in the described conduct. A later paragraph states clearly that "GAYLE E. COPPOCK is permanently enjoined from [other described activity]," but the portion of the order concerning "coarse and offensive" communication has no similar language.

Moreover, the judgment itself states that the parties' agreement, as recited therein, is "enforceable as a contract." Without decretal language making clear that a party is under order, agreements incorporated into divorce decrees are enforced only as contractual obligations. *McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882 (Tex. 1984); *Ex parte Jones*, 358 S.W.2d 370, 375 (Tex. 1962) (orig. proceeding). Obligations that are merely contractual cannot be enforced by contempt. *See* TEX. CONST. art. I, § 18 ("No person shall ever be imprisoned for debt."); *In re Green*, 221 S.W.3d 645, 648–49 (Tex. 2007) (orig. proceeding).

Because the underlying judgment in this case lacks decretal language necessary for enforcement by contempt, we grant the petition for writ of habeas corpus and set aside the order of contempt.

_____
Harriet O'Neill
Justice

OPINION DELIVERED: February 13, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0094

DALLAS COUNTY, PETITIONER,

v.

KIM POSEY, ET AL., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

PER CURIAM

In this governmental immunity case, we decide whether a prisoner's use of a telephone cord to commit suicide in a county holding cell constitutes a "condition or use" of tangible personal property for which the Tort Claims Act waives governmental immunity. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(2). We hold that immunity was not waived; accordingly, we vacate the court of appeals' judgment and dismiss the case.

Bryan Posey was arrested for assaulting his mother. During the intake procedure, he denied ever having attempted suicide or having suicidal thoughts or tendencies. The standard intake procedure included completion of a Mental Disability/Suicide Screening Form, but the intake officer left blank a question that inquired whether the officer believed Posey to be a medical, mental health, or suicide risk. Posey was then seen by a nurse for a cut on his hand, and the nurse referred him to

a psychiatrist for an anger management evaluation. Posey was placed in a holding cell with a cordless telephone. He made repeated, harassing calls to his mother, who requested that he be stopped from calling her. The officers moved Posey to a holding cell with an inoperative telephone. This telephone, however, had a cord. Shortly thereafter, the officers discovered Posey had committed suicide by hanging himself with the telephone cord.

Posey's parents sued the county, claiming it was negligent in failing to assess Posey's suicide risk and in placing him in a cell with a defective corded telephone. They presented evidence to the trial court that the county had ordered the replacement of all corded telephones with cordless telephones, indicating the county's awareness that telephone cords posed a significant suicide risk. The county filed a plea to the jurisdiction, claiming that its immunity was not waived. *See id*. The trial court denied the county's plea to jurisdiction, and the court of appeals affirmed. 239 S.W.3d 336 (Tex. App.—Dallas 2007).

A governmental unit waives immunity for "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE § 101.021(2). Immunity is not waived when the governmental unit merely "allow[s] someone else to use the property and nothing more." *San Antonio State Hosp. v. Cowan,* 128 S.W.3d 244, 246 (Tex. 2004). In *Cowan*, we held that the government did not waive immunity by providing suspenders and a walker to a patient who later used them to hang himself because it was the patient—not the government—who used the property. *Id*. In terms of the county's use of the property, this case is factually indistinguishable from *Cowan.* Here, the county did no more than

place Posey in a cell with a corded telephone, which he used to commit suicide. Therefore, we agree with the court of appeals that "the incident in this case did not arise from the [c]ounty's *use* of property." 239 S.W.3d at 342 (emphasis in original).

Posey's parents also argue that the county's failure to replace the telephone in the holding cell with a cordless telephone equates to negligent use because the county was aware of previous suicides using telephone cords. But failing to replace corded telephones with cordless ones is, at best, a misuse or a non-use, neither of which waives immunity under the Act. *See, e.g., Cowan*, 128 S.W.3d at 245–46 (rejecting contention that hospital misused a walker and suspenders by allowing patient to have them); *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996) (holding that hospital's "failure to administer an injectionable drug [instead of an oral drug] is non-use of tangible personal property and therefore does not fall under the waiver provisions of the Act").

Posey's parents further argue that the condition of the telephone proximately caused Posey's death—an issue we did not address in *Cowan*. To find proximate cause, there must be a nexus between the condition of the property and the injury. *See Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 342–43 (Tex. 1998). This nexus requires more than mere involvement of property; rather, the condition must actually have caused the injury. *Id*. at 343. Posey's parents claim that the condition of the corded telephone was defective because, not only was it inoperable, but wires were exposed on the handset. The incident memorandum prepared after the suicide stated that Posey "placed the receiver between the exposed [] wires of the telephone cord" in order to create the ligature he used to commit suicide. The court of appeals found proximate cause, reasoning that "without the corded telephone being in the cell, Bryan Posey would not have

died by hanging himself with the telephone's cord." 239 S.W.3d at 342 (citing *Sw. Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 274 (Tex. 2002)). However, there was no causal nexus between the condition of the exposed wires and the injury. For a defective condition to be the basis for complaint, the defect must pose a hazard in the intended and ordinary use of the property. For example, the exposed wires in this case might have posed an electrical hazard to an ordinary user of the telephone. But the exposed wires here did not cause the injury; they instead constituted no more than a condition of the property that was then used by Posey to form a ligature for suicide. The requisite nexus between the condition complained of and the harm was thus not established. Therefore, the county's immunity is not waived under the Act.

Finally, Posey's parents argue that the county failed to properly assess Posey as a suicide risk, pointing to Posey's incomplete suicide prevention screening form as evidence that the county's immunity is waived under the Act. However, the quality of Posey's assessment has no bearing on the county's immunity. In *Cowan*, we held that immunity was not waived even though the patient was committed for having suicidal tendencies. 128 S.W.3d at 247. So even if Posey had apparent suicidal tendencies, the county would still be immune under *Cowan* because it did no more than place Posey in a cell with a corded telephone which he, himself, used to commit suicide.

Bryan Posey's suicide was tragic, but the circumstances under which governmental immunity is waived under the Act are very narrow and are not present here. Accordingly, we grant the

county's petition for review and, without hearing oral argument, vacate the court of appeals' judgment and dismiss the case.[1]

OPINION DELIVERED: May 22, 2009

[1] While the court of appeals held that the county received proper notice as required by section 101.101(a) of the Civil Practices and Remedies Code, we need not decide this issue because we hold that the county's immunity is not waived.

IN THE SUPREME COURT OF TEXAS

NO. 08-0125

IN RE SHONDRA BUSTER, PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES BREWER, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

Lavene Brewer filed this suit against Oak Manor Nursing Home,[1] alleging it failed to prevent her husband from falling down a flight of stairs. Within 120 days of filing, she served an expert report as required by statute. TEX. CIV. PRAC. & REM. CODE § 74.351(a). Oak Manor moved to dismiss on the ground that the report was signed by a nurse, while the statute requires a physician's report on causation. *Id.* § 74.351(r)(5)(c). Before the hearing on the motion, Brewer served a supplemental report by a physician and moved for a 30-day extension to allow the supplement to cure the deficiency. *See id.* § 74.351(c).

The trial court granted the extension and denied Oak Manor's motion to dismiss. Oak Manor sought mandamus relief in the court of appeals, which held that the trial court did not err in

[1] Upon Laverne Brewer's death, Relator Shondra Buster succeeded as personal representative of James Brewer's estate. Real Party in Interest is Nexion Health at Oak Manor, Inc., d/b/a Oak Manor Nursing Home.

granting the 30-day extension, but did err by allowing a new report from a different expert. 243 S.W.3d 848, 853–54. Brewer then sought mandamus relief in this Court.

We agree the trial court did not err in granting the extension. To constitute a good-faith effort, a report must disclose the defendant's treatment that is challenged, and provide a basis for concluding the claims have merit. *Am. Transitional Care Ctrs. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001). A report by an unqualified expert will sometimes (though not always) reflect a good-faith effort sufficient to justify a 30-day extension. TEX. CIV. PRAC. & REM. CODE § 74.351(*l*); *see, e.g.*, *Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008) (remanding to trial court to determine whether expert report by anesthesiologist about cardiologist's care constituted good-faith effort).

But we disagree that the trial court erred in allowing the supplemental report from a physician. As we recently held in *Lewis v. Funderburk*, the statute provides that "*any requirement* of this section" can be fulfilled "by serving reports of separate experts." 253 S.W.3d 204, 208 (Tex. 2008) (quoting TEX. CIV. PRAC. & REM. CODE § 74.351(*i*)). Because a claimant may cure a deficiency by serving a report from a new expert, the court of appeals erred in concluding otherwise.

Finally, the court of appeals also ordered the trial court to dismiss Brewer's case within ten days. 243 S.W.3d at 854. When the trial court complied, the appellate court dismissed the original proceeding before it as moot. But when a petition was filed in this Court a month later, the parties filed an agreed order reinstating the case in the trial court to preserve the case and the trial court's jurisdiction. Thus, these proceedings are not moot.

Accordingly, without hearing oral argument, *see* TEX. R. APP. P. 52.8(c), we conditionally grant the writ of mandamus and direct the court of appeals to vacate its original judgment and its

order dismissing these proceedings as moot, and to deny Oak Manor's petition for writ of mandamus. We are confident the court will comply and our writ will issue only if it does not.

OPINION DELIVERED: November 14, 2008

IN THE SUPREME COURT OF TEXAS

NO. 08-0136

JOHN KAPPUS, PETITIONER,

v.

SANDRA L. KAPPUS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TWELFTH DISTRICT OF TEXAS

Argued December 10, 2008

JUSTICE WILLETT delivered the opinion of the Court.

This appeal concerns whether an independent executor's alleged conflict of interest—here, a good-faith dispute over the executor's percentage ownership of estate assets—requires his removal as a matter of law. Probate Code section 149C lists several grounds for removing an executor, but "conflict of interest" (either actual or potential) is not among them, and we refuse to engraft such a test onto the statute. Accordingly, as none of the conditions for removal under section 149C were met in this case, we reverse the court of appeals' judgment and reinstate the trial court's order denying the motion to remove.

I. Background

In the 1980s, James Kappus, his brother John, and their father Walter formed a partnership called Kappus Farms, which purchased 49.482 acres of land in Anderson County. In 1991, James married Sandra, and they had two children. Walter Kappus died in 2001, which led to the unofficial dissolving of the Kappus Farms partnership. After Walter's will was probated, James and John owned the Anderson County land 50/50 as co-tenants. Throughout the time they owned the land, several improvements were added to the property: some by James alone, some by James and Sandra, and some by John alone.

In 2004, James and Sandra divorced. As part of the divorce proceedings, Sandra was given an equitable lien on the real estate for her half of the community improvements made to the land. After the divorce was final, James executed a new will that named John as independent executor (an appointment that nobody challenged) and Sandra's brother as alternative independent executor. The will also set up a testamentary trust with James's children as beneficiaries and John as trustee.

James died in 2005 after a long illness. John initiated probate proceedings, qualified as independent executor, and was issued letters testamentary. As part of the administration of the estate, John intended to pay off James's debts by selling the Anderson County property with the improvements and splitting the proceeds 50/50 between the estate and himself. A buyer offered $110,000 in cash and also agreed to assume a $7,000 debt on a double-wide mobile home, which was one of the improvements on the property.

Sandra, on behalf of her children, opposed the proposed distribution from the property sale, contending the estate was owed more than 50% of the proceeds due to several improvements James

had made to the property, and she obtained an injunction preventing the sale from closing. Sandra also sought to remove John as independent executor and trustee of the testamentary trust, alleging that he had a conflict of interest, wasted estate assets, refused to allow the children access to the Anderson County land, and incurred significant expenses in probating the will. After a hearing, the trial court issued an order and accompanying findings of fact and conclusions of law that refused to remove John and found that the Anderson County property should be divided 58.59% for the estate and 41.41% for John.

On appeal, Sandra claimed that the evidence was both legally and factually insufficient to support the trial court's property division and that the estate was owed at least 63.45% of the proceeds. Sandra also claimed the trial court erred as a matter of law in not removing John as both independent executor and trustee. The court of appeals affirmed the trial court's division of the property, but reversed the trial court's decision on removal.[1] Citing Probate Code section 149C(5), the court held that John's shared ownership of the property created a conflict of interest.[2] "Under these circumstances," the court of appeals concluded, "the trial court had no alternative but to remove John as" executor.[3] John appealed his removal to this Court, and we now reverse.

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[1] 242 S.W.3d 182, 191-92.

[2] *Id*. at 190.

[3] *Id*.

II. Removal As Independent Executor

Since as early as 1848, a Texas testator has been able to opt for the independent administration of his estate,[4] including the right to pick his own independent executor. While this power is "well fixed in the Texas law,"[5] the testator's chosen executor can be removed under Probate Code section 149C(a), which states, "The county court . . . may remove an independent executor when . . ." and then lists six specific grounds for removal.[6] The party seeking removal has the burden of establishing a violation of Section 149C in the trial court. Once a violation of one of the

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[4] *Roy v. Whitaker*, 48 S.W. 892, 894 (Tex. 1898).

[5] *Boyles v. Gresham*, 309 S.W.2d 50, 53 (Tex. 1958).

[6] The grounds for removal are:

> (1) the independent executor fails to return within ninety days after qualification, unless such time is extended by order of the court, an inventory of the property of the estate and list of claims that have come to the independent executor's knowledge;
>
> (2) sufficient grounds appear to support belief that the independent executor has misapplied or embezzled, or that the independent executor is about to misapply or embezzle, all or any part of the property committed to the independent executor's care;
>
> (3) the independent executor fails to make an accounting which is required by law to be made;
>
> (4) the independent executor fails to timely file the affidavit or certificate required by Section 128A of this code;
>
> (5) the independent executor is proved to have been guilty of gross misconduct or gross mismanagement in the performance of the independent executor's duties; or
>
> (6) the independent executor becomes an incapacitated person, or is sentenced to the penitentiary, or from any other cause becomes legally incapacitated from properly performing the independent executor's fiduciary duties.

TEX. PROB. CODE § 149C(a)(1)-(6).

six grounds has been proven, the trial court has discretion to decide whether the violation warrants removal.

To begin, the grounds to *remove* an independent executor *post*-appointment are different from those to *disqualify* an executor *pre*-appointment. Probate Code section 78 sets out five different bases for disqualification of a would-be executor, including "[a] person whom the court finds unsuitable."[7] In contrast to this catch-all standard that confers broad trial-court discretion, section 149C lists six specific grounds for removal, none quite as expansive as unsuitability.[8] Sandra claims that by being a co-owner of an estate asset, John had a conflict of interest. And when John attempted to sell the land and split the proceeds evenly, despite the estate being owed more than half the proceeds, that potential conflict became an actual conflict and harmed the estate. While no subsection specifically covers "conflict of interest" in those express terms, Sandra argues that such a conflict can justify removal under subsections (2), (5), and (6) of section 149C. We consider each of these subsections in turn.

A. Subsection (2) — "Misapplied or Embezzled"

Sandra's first allegation is that John misapplied or embezzled part of the property committed to his care. She claims that when John attempted to split the proceeds from the potential sale of the Anderson County land 50/50, he improperly tried to divert part of the proceeds to himself since it was ultimately decided that the estate was owed 58.59% of the proceeds.

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[7] *Id*. § 78(e).

[8] *Id*. § 149C(a)(1)-(6).

We presume the Legislature chose its words carefully and intentionally.[9] Probate Code section 149C(a)(2) associates misapplication[10] with embezzlement;[11] accordingly, we give these terms a related meaning[12] and interpret them to authorize removal if the trial court believes the executor was engaged in subterfuge or wrongful misuse.[13] The evidence here shows that this dispute was, at bottom, a good-faith disagreement between John and Sandra as to how to split the value of the improvements between John and the estate. The record contains no evidence of dishonesty or misappropriation on John's part, much less enough evidence to conclude that Sandra proved misapplication or embezzlement as a matter of law. Accordingly, the trial court did not abuse its discretion in failing to remove John as independent executor on this basis.

B. Subsection (5) — "Gross Misconduct or Gross Mismanagement"

Sandra's second allegation is that John committed gross misconduct or gross mismanagement vis-a-vis his actual conflict of interest. In looking at the subsection, it is instructive that the Legislature did not use "misconduct or mismanagement" but rather "gross misconduct or gross mismanagement."[14] The use of the adjective "gross" indicates that something beyond ordinary

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[9] *See Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

[10] Misapplication is defined as: "[t]he *improper or illegal* use of funds or property lawfully held." BLACK'S LAW DICTIONARY 1019 (8th ed. 2004) (emphasis added).

[11] Embezzlement is defined as: "[t]he *fraudulent* taking of personal property with which one has been entrusted, esp. as a fiduciary." *Id*. 561 (emphasis added).

[12] *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174 n.2 (Tex. 1980).

[13] *In re Estate of Casida*, 13 S.W.3d 519, 524-25 (Tex. App.–Beaumont 2000, no pet.).

[14] TEX. PROB. CODE § 149C(a)(5).

misconduct and ordinary mismanagement is required to remove an independent executor. Gross is defined as "[g]laringly obvious; flagrant."[15] The question then we face today is whether a potential conflict of interest constitutes gross misconduct or gross mismanagement.

A half-century ago we addressed an independent executor's conflict of interest in a different setting. In *Boyles v. Gresham*, Boyles was named independent executor in Gresham's will.[16] But when Boyles applied for letters testamentary, Gresham's son contested the appointment because Boyles thought part of the money in the will should go to him and his sons.[17] In considering whether Boyles was unsuitable under Probate Code section 78, we acknowledged that "it was firmly established in Texas that a testator had wide latitude in the appointment of his independent executor."[18] Further, nothing in the Probate Code changed that principle.[19] In fact, in examining the Probate Code, we found the opposite was true. In particular, we looked at section 77, which listed the order of preference for those entitled to letters of administration.[20] Among those listed were creditors. As we noted, "[t]he creditor's interest is necessarily antagonistic to the distributees, to the

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[15] AM. HERITAGE COLLEGE DICTIONARY 600 (3rd ed. 2000).

[16] 309 S.W.2d 50, 51 (Tex. 1958).

[17] *Id*. at 51.

[18] *Id*. at 53.

[19] *Id*.

[20] *Id*.

estate."[21] It would be anomalous to say the Legislature specifically included someone entitled to letters of administration in one section only to deem them unsuitable in another.[22]

Boyles does not control our decision today. First, that case dealt with pre-appointment unsuitability and not post-appointment removal. Second, *Boyles* expressly left open the question of disqualification where "a named executor claims adversely, as his own, property which is owned . . . by the estate."[23] However, while *Boyles* is not controlling, the same policy reasons that undergird *Boyles* inform our decision today. The Legislature has provided that creditors of the deceased can be granted letters of administration.[24] Such creditors, by their very nature, have a conflict of interest by virtue of a claim against estate assets. Similarly, it is common for testators in Texas to name spouses (or business partners) as independent executors. If we judicially amended section 149C by declaring a per se removal rule for "conflict of interest" whenever spouse-executors have a shared interest in community property, and issues arise over the separate or community character of estate assets, the surviving spouse could be ousted. While Sandra contends removal would only be justified when the executor has actually asserted a claim adverse to the estate, it seems under her theory that once a beneficiary objects to an executor's proposed valuation and distribution of property, the executor's defense would constitute a conflict of interest that mandates removal. Such a rule, besides having no statutory anchor in the text of section 149C, would undermine the ability

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[21] *Id*.

[22] *Id*.

[23] *Id*. at 54.

[24] *See* TEX. PROB. CODE § 77(f).

of Texas testators to name their own independent executor and also weaken the ability of an executor "free of judicial supervision, to effect the distribution of an estate with a minimum of cost and delay."[25] And it would impose this extra-statutory restriction even if the testator was fully aware of the potential conflict when the executor was chosen.

A good-faith disagreement over the executor's ownership share in the estate is not enough, standing alone, to require removal under section 149C. The statute speaks of affirmative malfeasance, and an executor's mere assertion of a claim to estate property, or difference of opinion over the value of such property, does not warrant removal.[26] A potential conflict does not equal actual misconduct. The court of appeals here did not list any instances of John's misconduct or mismanagement, let alone any that could be labeled "gross," a modifier that implies serious and willful wrongdoing.

We recognize there may be scenarios where an executor's conflict of interest is so absolute as to constitute what the statute terms "gross misconduct or gross mismanagement." In deciding whether an executor's conflict amounts to "gross misconduct or gross mismanagement," trial courts should take into consideration several factors, including the size of the estate,[27] the degree of actual

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[25] *Corpus Christi Bank & Trust v. Alice Nat'l Bank*, 444 S.W.2d 632, 634 (Tex. 1969).

[26] STANLEY M. JOHANSON, JOHANSON'S TEX. PROB. CODE ANN. § 149C cmt. at 225 (West 2008).

[27] *See Street v. Skipper*, 887 S.W.2d 78, 83 (Tex. App.–Fort Worth 1994, writ denied) (upholding the removal of an independent executor for a conflict of interest when, under the executor's division, the estate would receive nearly $1 million less than what it should).

harm to the estate,[28] the executor's good faith in asserting a claim for estate property,[29] the testator's knowledge of the conflict,[30] and the executor's disclosure of the conflict.[31]

In this case, these factors cut squarely in John's favor: the estate was small; there was no actual harm to the estate since the trial court resolved the percentage-of-ownership issue; John asserted his claim in good faith; and James knew that his brother's co-ownership of estate property might later pose allocation/valuation issues when he named John independent executor.[32] As such, we cannot say that the trial court abused its discretion in failing to remove John as independent executor for gross misconduct or gross mismanagement.

C. Subsection (6) — "Legally Incapacitated"

Sandra's third allegation is that John is legally incapacitated from performing as independent executor. This subsection, as we construe it, is inapplicable to an alleged conflict of interest. An incapacitated person is "[a] person who is impaired by an intoxicant, by mental illness or deficiency,

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[28] *See Geeslin v. McElhenney*, 788 S.W.2d 683, 685 (Tex. App.–Austin 1990, no writ) ("the statutory criteria of 'gross mismanagement' and 'gross misconduct' . . . include at minimum . . . any breach of fiduciary duty that results in actual harm to a beneficiary's interest") (emphasis omitted).

[29] *See In re Estate of Casida*, 13 S.W.3d 519, 524 (Tex. App.–Beaumont 2000, no pet.) (The grounds of removal alleged showed no bad faith, but rather a disagreement over the value of the property.).

[30] *See In re Roy*, 249 S.W.3d 592, 596-97 (Tex. App.–Waco 2008, pet. denied) (holding that while a conflict of interest might not be enough to remove an independent executor, the failure to disclose that conflict was grounds for removal).

[31] *Id*.

[32] The trial court's findings of fact made this clear:

> When he executed the 2004 Will, Decedent James Kappus knew the issues involving allocation and valuation of the improvements to the 49.482 acre tract because he had himself litigated those issues with Applicant Sandra L. Kappus in the divorce just three months before he made the Will, and with that knowledge named his brother John Kappus independent executor.

or by physical illness or disability to the extent that personal decision-making is impossible."[33] A conflict of interest does not make it impossible for someone to make decisions. Nor was John under any other legal incapacity that prevented him from carrying out his duties. Accordingly, the trial court did not abuse its discretion in failing to remove John as independent executor on this basis.

III. Removal as Trustee

The second issue is whether the trial court erred in failing to remove John as trustee of the testamentary trust. The removal of a trustee is governed by Trust Code section 113.082. This section gives the trial court more leeway on removal than does the Probate Code, as its four grounds are not as narrow. In fact, in one subsection, the statute allows that "a court may, in its discretion, remove a trustee . . . if . . . the court finds other cause for removal."[34] While the statute for removal of an independent executor is different from the statute for removal of a trustee, the fiduciary duties owed by both are similar.[35] Given the similarities in the type of duties owed and the level of discretion given a trial court by the statute, we cannot say the trial court abused its discretion in not removing John as trustee when, viewing the same conduct, it was not error to keep him as independent executor.

IV. Conclusion

A good-faith disagreement between an executor and the estate over the percentage division and valuation of estate assets is not grounds for removal as a matter of law. Such a development

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[33] BLACK'S LAW DICTIONARY 775 (8th ed. 2004).

[34] TEX. PROP. CODE § 113.082(a)(4).

[35] *Humane Soc'y of Austin & Travis County. v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975).

would (1) depart from the specific grounds for removal listed in the statute, (2) frustrate the testator's choice of executor (particularly the common practice of appointing spouse-executors), and (3) impede the broader goal of supporting the independent administration of estates with minimal costs and court supervision. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's order denying the motion to remove John Kappus as independent executor and trustee.

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Don R. Willett
Justice

OPINION DELIVERED: May 15, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0157

IN THE INTEREST OF E.A. AND D.A., CHILDREN

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE JOHNSON.

JUSTICE BRISTER filed a concurring opinion, in which JUSTICE WAINRIGHT and JUSTICE WILLETT joined.

In *Weaver v. Hartford Accident and Indemnity Co.*, 570 S.W.2d 367, 370 (Tex. 1978), we held that "a new citation is necessary for a party who has not appeared when the plaintiff, by amended petition, seeks a more onerous judgment than prayed for in the original pleading." In 1990, however, Texas Rule of Civil Procedure 21a was amended to provide for a variety of methods of service, including certified or registered mail, for all pleadings and court papers except the original petition. We must decide whether, in light of Rule 21a, service of new citation is required for a default judgment based on a more onerous amended petition, or whether service under Rule 21a will suffice. We conclude that service under Rule 21a is sufficient. Accordingly, we reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion.

I
Background

Emilio and Norma Avitia were married and had two children, E.A. and D.A. The Avitias later divorced, and the final decree appointed them joint managing conservators of the children. Norma was given the exclusive right to designate the children's primary residence, and Emilio was granted visitation. Five months later, Emilio filed this petition to modify the parent-child relationship, seeking the exclusive right to designate the children's primary residence. If a suit seeking such a modification is filed within one year of the prior order, the petitioner must attach an affidavit that contains, along with supporting facts, one of several allegations. TEX. FAM. CODE § 156.102(a),(b). Emilio's petition had no such affidavit attached. Norma was served with citation but did not file an answer or otherwise appear.

Approximately three months later, Emilio filed an amended petition alleging that Norma had a pattern or history of drug use and requesting that he be appointed sole managing conservator and given a credit on his child support arrearage for a period during which he had intermittent physical custody of the children. Emilio attached a supporting affidavit making an appropriate allegation under Family Code section 156.102(b). Although the amended petition did not contain a certificate of service, Emilio alleges he sent Norma the amended petition via certified mail. The amended petition, transmittal letter, return receipt, and court order modifying the parent-child relationship all included the same street address in Wichita Falls but reflected three different zip codes. The post office attempted delivery of the amended petition three times before it was returned to Emilio's counsel as unclaimed.

The trial court rendered a default judgment granting Emilio the exclusive right to designate the children's primary residence. The court ordered no visitation for Norma and required her to pay child support to Emilio. Norma moved to set aside the default judgment and for new trial, arguing that default judgment was improper because Norma was not served with the amended petition. The trial court denied both motions. The court of appeals affirmed, __S.W.3d__, holding that Texas Rule of Civil Procedure 21a eliminated the requirement of an additional citation for service of an amended petition seeking a more onerous judgment on a nonanswering party. The court of appeals further held that Norma had constructive notice of the amended petition, and that this satisfied due process. Because we conclude that a new citation is not required for service of a more onerous amended petition on a nonanswering party, but that Norma was not properly served with the amended petition and did not have constructive notice of it, we reverse the court of appeals' judgment and remand to the trial court for further proceedings.

II
Weaver and Rule 21a

If a defendant is properly served with process, in order to have a default judgment set aside, she must prove the three elements set out in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). But if the defendant never received the suit papers, she is generally entitled to a new trial without any further showing. *Fidelity and Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 574 (Tex. 2006) (per curiam) (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80,

84 (1988)). Here there is no dispute that Norma was properly served with Emilio's original petition.[1] The parties dispute only whether Norma was properly served with the amended petition.

The parties agree that a nonanswering party is entitled to some form of notice of a more onerous amended petition, but they dispute the manner in which such a petition must be served. Norma argues that service of new citation is required, while Emilio contends that service under Texas Rule of Civil Procedure Rule 21a is sufficient. In *Weaver v. Hartford Accident and Indemnity Co.*, 570 S.W.2d 367, 370 (Tex. 1978), we held that "new citation is necessary for a party who has not appeared when the plaintiff, by amended petition, seeks a more onerous judgment than prayed for in the original pleading." However, in 1990, we amended Rule 21a to provide that several methods of delivery, including certified or registered mail, are appropriate for "[e]very notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules." TEX. R. CIV. P. 21a. The court of appeals held that Rule 21a "eliminated the requirement of an additional citation" set out in *Weaver*. __S.W.3d at __.

We have never addressed this issue directly. Although we recently cited *Weaver* in *Fidelity and Guaranty Insurance Co. v. Drewery Construction Co.*, 186 S.W.3d 571, 574 (Tex. 2006) (per curiam), we did not reach the issue of whether the type of service required has changed in light of

[1] In the court of appeals, Norma argued that under Texas Rule of Civil Procedure 107, the certified receipt must be on file for ten days before the final hearing, as opposed to ten days before the final judgment is rendered. The court of appeals rejected this argument, and Norma does not raise the Rule 107 issue in this Court.

Rule 21a because we concluded that the amended petition in *Fidelity* was not more onerous than the original petition. *Id*.

The majority of courts of appeals that have cited *Weaver* since the 1990 amendment to Rule 21a do not address Rule 21a. *See, e.g., Bennett v. Wood County*, 200 S.W.3d 239, 241 (Tex. App.—Tyler 2006, no pet.); *Scott v. Tanner*, No. 01-02-00668-CV, 2003 WL 22862806, at *3 (Tex. App.—Houston [1st Dist.] Dec. 4, 2003, no pet.) (mem. op.); *Seeley v. KCI USA, Inc.*, 100 S.W.3d 276, 278 (Tex. App.—San Antonio 2002, no pet.); *Atwood v. B & R Supply & Equip. Co.*, 52 S.W.3d 265, 267 (Tex. App.—Corpus Christi 2001, no pet.); *Cohen v. Cohen*, No. 05-93-00192-CV, 1994 WL 121118, at *2 (Tex. App.—Dallas Apr. 6, 1994, no writ) (not designated for publication); *Lim v. Botello*, No. A14-90-00481-CV, 1991 WL 36980, at *1 (Tex. App.—Houston [14th Dist.] Mar. 21, 1991, writ denied) (not designated for publication). Aside from the court of appeals in this case, only two courts of appeals have squarely addressed whether *Weaver*'s service of new citation requirement applies in light of Rule 21a, and both concluded that it does not. *See Sw. Constr. Receivables, Ltd. v. Regions Bank*, 162 S.W.3d 859, 865 (Tex. App.—Texarkana 2005, pet. denied); *In re R.D.C.*, 912 S.W.2d 854, 855-56 (Tex. App.—Eastland 1995, no writ); *see also* WILLIAM V. DORSANEO, III, 7 TEX. LITIGATION GUIDE § 111.02[11] (2008) (noting that cases that still follow *Weaver*–and *Weaver* itself–"arguably conflict with Civil Procedure Rule 21a, as amended in 1990"); 1 JUDGE JOHN D. MONTGOMERY ET AL., TEXAS FAMILY LAW: PRACTICE & PROCEDURE § 4.02[1] (2009) (providing that "a plaintiff who amends his or her petition may serve the defendant by complying with the filing and serving requirements of Texas Rules of Civil Procedure 21 and 21a

without regard to whether the amendment seeks a more onerous judgment or adds a new cause of action") (citing *In re R.D.C.*, 912 S.W.2d at 855-57).

Rule 21a applies to all pleadings required to be served under Rule 21 other than the original petition and except as provided in the rules. Nothing in the rules requires a plaintiff to serve a nonanswering defendant with new citation for a more onerous amended petition. While a nonanswering defendant must be served with a more onerous amended petition in order for a default judgment to stand, we agree with the court of appeals that Rule 21a service satisfies that requirement. This interpretation "eliminates the uncertainty and confusion that is found in the cases regarding what constitutes a 'more onerous judgment' or a new 'cause of action.'" *In re R.D.C.*, 912 S.W.2d at 856 (noting that Rule 21a now governs over "ambiguous rules that have evolved as to when a new citation must be served") (citing 2 ROY W. MCDONALD, TEXAS CIVIL PRACTICE §§ 10:15-16 (1992)). To the extent *Weaver* conflicts with Rule 21a, the rule prevails.

III
Service

We must then determine, however, whether Emilio served the amended petition in compliance with Rule 21a. Under that rule, court papers served by certified mail must be sent "by certified or registered mail, to the party's last known address." TEX. R. CIV. P. 21a. Service by mail is "complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository . . . ." *Id.*

Even assuming that the amended petition was properly addressed, a point that Norma disputes, any presumption of service arising from Emilio's mailing of the amended petition was

negated by the amended petition's return as unclaimed. __S.W.3d at __. The presumption of service under Rule 21a "is not 'evidence' and it vanishes when opposing evidence is introduced that [a document] was not received." *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987).

Rule 21a further provides that the party or attorney of record shall certify compliance with the rule "in writing over signature and on the filed instrument." TEX. R. CIV. P. 21a. A certificate of service is prima facie evidence of the fact of service, but nothing in the rule "preclude[s] any party from offering proof that the notice or instrument was not received, or, if service by mail, that it was not received within three days . . . ." *Id.* Because the amended petition does not include a certificate of service, Emilio has not made a prima facie case of the fact of service on this basis.

Nonetheless, the court of appeals concluded that Norma received constructive notice of the amended petition and that this satisfied due process. __S.W.3d at __. The court of appeals relied on the post office's repeated attempts to deliver the petition, one of the children's testimony that Norma knew about the lawsuit,[2] and Emilio's attorney's statement that she sent Norma a copy of the amended petition via regular mail and it was not returned. *Id*. The court of appeals also noted that despite the fact that the later modification order, like the amended petition, was returned unclaimed, Norma timely moved to set the order aside. *Id*. The court of appeals held that even when a party does not receive actual notice, if the serving party has complied with Rule 21a, constructive notice may be established "'if the serving party presents evidence that the intended recipient engaged in instances of selective acceptance or refusal of certified mail relating to the case or that the intended

[2] At the hearing on Emilio's motion to modify, E.A. was asked whether Norma knew about the lawsuit. He responded: "[s]he – I mean, letters – she got letters, like, go to her house. She should be informed."

recipient refused all deliveries of certified mail.'" *Id*. (quoting *Etheredge v. Hidden Valley Airpark Ass'n, Inc.*, 169 S.W.3d 378, 381-82 (Tex. App.—Fort Worth 2005, pet. denied)).

We have never decided whether constructive notice of a more onerous amended petition satisfies due process. Assuming, without deciding, that it does, the record in this case is insufficient to establish constructive notice. Emilio presented no evidence that Norma avoided or refused delivery of the amended petition, nor that she received the certified mail notices. The mere fact that the certified mail was returned unclaimed is not sufficient to show avoidance or refusal where, as here, the relevant documents reflect three different zip codes for Norma's address, and the pertinent pleading lacks a certificate of service. The child's testimony regarding Norma's knowledge of the lawsuit was vague and did not address Norma's knowledge of the amended petition. Moreover, that Norma learned of the modification order does not mean she received notice of the amended petition. Emilio's attorney asserted that she sent Norma a copy of the amended petition via regular mail and that copy was not returned. However, standing alone, this is insufficient to establish that Norma had constructive notice of the amended petition.

IV
Conclusion

In order for a default judgment to stand, a nonanswering party must be served with a more onerous amended petition under Rule 21a. Service of new citation is no longer required. There is no evidence, however, that Norma was served with the amended petition under Rule 21a or that she had constructive notice of the amended petition. Accordingly, without hearing oral argument, we

reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion. TEX. R. APP. P. 59.1.

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 5, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0157

IN THE INTEREST OF E.A. AND D.A., CHILDREN

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

JUSTICE BRISTER, joined by JUSTICE WAINWRIGHT and JUSTICE WILLETT, concurring.

I concur in the Court's judgment setting aside the default judgment against Norma Avitia. But I dissent to the Court's abrogation of one of the oldest procedural rules in Texas.

For 150 years, the rule has been that a default judgment cannot be based on an amended petition seeking more onerous relief unless the amendment was served with citation. As we said in *Weaver v. Hartford Accident & Indemnity Co.*, "new citation is necessary for a party who has not appeared when the plaintiff, by amended petition, seeks a more onerous judgment than prayed for in the original pleading."[1] This Court, for example, applied that rule three times shortly before the Civil War.[2] By 1887, we called the rule "well established":

> The rule is well established in our state that a defendant who has been cited, but has not answer[ed], must be notified of every amendment which sets up a new cause of action, or requires a more onerous judgment against him; but, if he has pleaded to the action, the only notice to which he is entitled is the order of court granting leave to file the amendment.[3]

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[1] 570 S.W.2d 367, 370 (Tex. 1978).

[2] *See, e.g.*, *De Walt v. Snow*, 25 Tex. 320, 321 (1860); *Morrison v. Walker*, 22 Tex. 18, 20 (1858); *Hutchinson v. Owen*, 20 Tex. 287, 289 (1857).

[3] *Rabb v. Rogers*, 3 S.W. 303, 305 (Tex. 1887).

There are good reasons for this rule. A citation is an official notice from a court officer,[4] is accompanied by the petition,[5] and warns recipients that they must answer by a stated deadline or "judgment by default may be rendered *for the relief demanded in the petition*."[6] A person served with citation can be under no misconceptions about the effect of ignoring that petition.

By contrast, a petition received in the mail is not an official notice from a court but an adversary's list of complaints. It is not even directed to the recipient, but like all other pleadings is directed to the court. It states no deadlines, no actions necessary to avoid default, not even a hint that default might occur. Reasonable laymen receiving such a document in the mail might simply ignore it, and under Texas law have long been entitled to do precisely that.[7]

But what about those who receive one petition with citation and a second one in the mail? The first has come with an official court notice; the second has not. The first says an answer is required; the second does not. The first says the court may grant the relief demanded in the petition if it is ignored; the second does not. Perhaps modern litigants are more sophisticated than those of the past 150 years, but many will still be surprised to learn the second petition is the one they should worry about.

In addition to unsophisticated litigants, we must also be concerned about their opposite — very sophisticated litigants who would bend the rules to their advantage. A plaintiff usually cannot know in advance whether a defendant will fail to answer, but they will always know once default

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[4] TEX. R. CIV. P. 99(a).

[5] TEX. R. CIV. P. 99(d).

[6] TEX. R. CIV. P. 99(b) (emphasis added).

[7] *Ross v. Nat'l Ctr. for the Employment of the Disabled*, 197 S.W.3d 795, 798 (Tex. 2006) (stating that parties "not properly served have no duty to act"); *Harrell v. Mex. Cattle Co.*, 11 S.W. 863, 865 (Tex. 1889) ("A defendant . . . is not bound to take action until he has been duly served with process.").

occurs. It would be easy in such cases to take advantage of a defaulting defendant by simply mailing an amended petition that raises the stakes.

The amendments to Rule 21a in 1990 did not abrogate this traditional rule. Since its adoption in 1947, Rule 21a has always stated that it does not apply to "citation to be served upon the filing of a cause of action."[8] The Court misstates this exception by limiting it to the *original* petition;[9] that is nowhere in the rule. None of the rules regarding citation are limited to the original petition, nor do they define which petitions need citation. So while it is true that "nothing in the rules" requires citation for more onerous amendments,[10] nothing in the rules dispenses with it either. The law regarding which petitions require citation has always been in our cases, which until today had never changed.

The Court seems to think the 1990 amendment to Rule 21a was a new creation "to provide for a variety of methods of service, including certified or registered mail, for all pleadings and court papers except the original petition."[11] But litigants have been able to serve amended pleadings by mail since our first rules of procedure were adopted in 1940.[12] The 1990 amendment merely consolidated three separate service rules (rule 21a for notices, rule 60 for interventions, and rule 72

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[8] TEX. R. CIV. P. 21a (1947, amended 1990).

[9] *See* ___ S.W.3d at ___ ("In 1990, however, Texas Rule of Civil Procedure 21a was amended to provide for a variety of methods of service, including certified or registered mail, for all pleadings and court papers except the *original petition*.") (emphasis added).

[10] ___ S.W.3d ___, ___.

[11] ___ S.W.3d at ___.

[12] *See* Tex. R. Civ. P. 72 (1940, repealed 1990)("Whenever any party files, or asks leave to file any pleading, plea, or motion of any character which is not by law or by these rules required to be served upon the adverse party, he shall at the same time either deliver or mail to the adverse party or attorney(s) of record a copy of such pleading, plea, or motion.").

for pleadings).[13] Consolidating all three into rule 21a could not change the rule in *Weaver* because by its own terms rule 21a *does not apply* when citation is required.

Indeed, if the 1990 amendment changed such an old and well-established rule, it is odd that no one noticed at the time. Nothing in the Advisory Committee's records suggest such a change was intended, and the only comment appended to the change was that it added service by fax "[t]o allow for service by current delivery means and technologies."[14] Law review articles addressing the 1990 amendments did not notice the change at the time,[15] and most guides for practitioners have not noticed it since.[16]

Nor has this Court. We stated the *Weaver* rule as law as recently as 2006.[17] And in *Baker v. Monsanto Co.* in 2003, we interpreted the 1990 addition of interventions to Rule 21a to mean that mailing was sufficient service as to parties that appeared, but service with citation was necessary for those that did not.[18] If Rule 21a means all amendments after the original petition can be served by

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[13] TEX. R. CIV. P. 21a.

[14] TEX. R. CIV. P. 21a, cmt. to 1990 change.

[15] *See, e.g.*, Ernest E. Figari, Jr., A. Erin Dwyer, & Donald Colleluori, *Civil Procedure*, 45 Sw. L.J. 73, 83 (1991) (stating only that the rule "was amended to keep pace with advancing technology").

[16] *See, e.g.*, 2 MCDONALD & CARLSON TEX. CIV. PRAC. § 10:16 (2d. ed. 1998) ("When there has been no appearance by the defendant, . . . [a] new citation is necessary when (but only when) the plaintiff . . . seeks a more onerous judgment than prayed for in the original pleading."); 16 COUCH ON INSURANCE 3d § 231:4 (1995) ("Where an amendment to a complaint states a new and distinct cause of action from that presented in the original pleading, however, the general rule requires a new service of process after the amendment for a party who has not theretofore appeared in the proceedings."); Julia F. Pendery, Shawn M. McCaskill, & Hilaree A. Casada, *Dealing with Default Judgments*, 35 ST. MARY'S L.J. 1, 37 (2003) ("If the plaintiff decides to file an amended petition pleading additional causes of action or damages, or both, thereby seeking a more onerous judgment, the defendant must be served with the amended petition by service of citation in order for a default judgment to be based on the amended petition."); MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES * CIVIL TRIALS 2002, *Commentaries* § 3.2 at 444 (2004) ("When, after service of the original petition, the plaintiff amends to ask for a more onerous judgment by adding claims or increasing damages, the plaintiff must serve the defendant with a new citation and the amended petition before taking a default judgment."); *cf.* 7 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 111 at 111–28 (2008) (noting that recent cases continuing to require service of citation "arguably conflict with Civil Procedure Rule 21a, as amended in 1990").

[17] *See Fid. & Guar. Ins. Co. v. Drewery Constr. Co., Inc.*, 186 S.W.3d 571, 574 (Tex. 2006).

[18] 111 S.W.3d 158, 160 (Tex. 2003).

mail, it is hard to see why we did not extend intervenors the same right under the same rule.

We must interpret the rules of civil procedure liberally,[19] but we should hesitate to interpret them in a way completely unforeseen by those who drafted them. Nor should we interpret them to make litigation unjust or unfair,[20] as will no doubt occur if more onerous amended petitions can simply be dropped in the mail on defaulting defendants. Accordingly, I would not discard a rule that has worked so long so well so casually.

Scott Brister,
Justice

OPINION DELIVERED: June 5, 2009

[19] TEX. R. CIV. P. 1.

[20] TEX. R. CIV. P. 1.

IN THE SUPREME COURT OF TEXAS

NO. 08-0163

EMMANUEL GINN, A&R TRANSPORT, INC., KEITH JACKSON, STEVE BRANTLEY, PETITIONERS,

v.

JEFF FORRESTER AND KIM FORRESTER, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

PER CURIAM

A restricted appeal requires error that is apparent on the face of the record; error that is merely inferred will not suffice. In this case, the clerk's supplemental record contains a notation that the clerk's office was unable to locate documents indicating notice was sent or a hearing was held on the trial court's dismissal for want of prosecution. Construing the notation as affirmative evidence that the trial court failed to provide notice, a divided court of appeals concluded the requirements for a restricted appeal were met. ___ S.W.3d ___. Because the clerk has no affirmative duty to record the giving of notice, however, a statement that the record reflects none cannot establish error on the face of the record. Accordingly, we reverse the court of appeals' judgment and render judgment dismissing the case.

Jeff and Kim Forrester filed suit against Emmanuel Ginn, A&R Transport, Inc., Keith Jackson, and Steve Brantley (collectively Ginn) on January 29, 2004, for damages arising out of a traffic accident. On May 18, 2005, the trial court notified all parties that unless either a judgment or scheduling order was signed or a verified motion to retain was filed by June 27, the case would be dismissed for want of prosecution. On June 17, Forrester filed a verified motion to retain the case, which the trial court granted after inserting the words "for 60 days" at the end of the paragraph ordering retention. The trial court subsequently granted Forrester's motion to substitute counsel, but the record reflects no further activity until December 2 when the trial court dismissed the case for want of prosecution. Six months later, Forrester filed a notice of restricted appeal.

The court of appeals initially denied Forrester's restricted appeal for failure to demonstrate error apparent on the face of the record, but suggested that this requirement might be satisfied by a notation from the trial court clerk indicating that no documents were available to show the notice allegedly not given or the record of the hearing allegedly not had. *Forrester v. Ginn*, No. 14-06-00549-CV, 2007 Tex. App. LEXIS 5826 at *14 (Tex. App.—Houston [14th Dist.] July 26, 2007), *reh'g granted, vacated by* _____ S.W.3d ____. Apparently relying on the court of appeals' suggestion, Forrester requested a supplemental clerk's record containing the following documents, or an indication in writing that the following documents were not contained in the clerk's file:

> 1. Notice of Dismissal for Want of Prosecution, Dated December 2, 2005;
>
> 2. Any notice of intent to dismiss dated after June 27, 2005 and before December 2, 2005;
>
> 3. Any notice of any hearing scheduled for December 2, 2005 regarding the court's intent to dismiss the case;

> 4. The record of any hearing regarding the court's intent to dismiss held on December 2, 2005 in this case;
>
> 5. Any trial court docket sheet entry for any notice of a hearing to be held on December 2, 2005;
>
> 6. Any trial court docket sheet entry regarding any hearing on the court's intent to dismiss held on December 2, 2005;
>
> 7. Any notice of the December 2, 2005 dismissal order sent to Plaintiffs[] or their counsel . . . .

In response to Forrester's request, the clerk provided a supplemental record that concluded with the statement "NOTE: Unable to locate other items requested." Concluding on rehearing that the clerk's notation affirmatively demonstrated the trial court's failure to notify Forrester of the impending and subsequent dismissal, the court of appeals reversed the trial court's judgment of dismissal and remanded the case for further proceedings. ___ S.W.3d ___, ___. Ginn filed this petition for review contending the court of appeals erred in holding that the requirements for a restricted appeal were met. We agree.

Before a trial court may properly dismiss a case for want of prosecution, "[n]otice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record." TEX. R. CIV. P. 165a(1). When a party claims in a restricted appeal that required notice was not given or a required hearing was never held, the error must appear on the face of the record. *See* TEX. R. APP. P. 30; *Gold v. Gold*, 145 S.W.3d 212, 213 (Tex. 2004); *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004); *Gen. Elec. Co. v. Falcon Ridge Apartments, Joint Venture*, 811 S.W.2d 942, 943 (Tex. 1991). When extrinsic evidence is necessary to challenge a judgment, the appropriate remedy is by motion for new trial or by bill of review filed in the trial

court so that the trial court has the opportunity to consider and weigh factual evidence. *See Falcon Ridge*, 811 S.W.2d at 944. Accordingly, we have held that affidavits filed for the first time in the appellate court from the district clerk and its counsel averring, respectively, that notice was neither given nor received constituted extrinsic evidence and did not support a restricted appeal. *Id.* at 943–44.

As to what does constitute error on the face of the record, we have clearly said that silence is not enough. The rules governing dismissals for want of prosecution direct the district clerk to mail notice containing the date and place of hearing at which the court intends to dismiss the case, TEX. R. CIV. P. 165a(1), and a similar notice of the signing of the dismissal order, see TEX. R. CIV. P. 306a(3). But the rules do not impose upon the clerk an affirmative duty to record the mailing of the required notices; accordingly, the absence of proof in the record that notice was provided does not establish error on the face of the record. *See Alexander*, 134 S.W.3d at 849 ("'The absence from the record of affirmative proof that notice of intent to dismiss or of the order of dismissal was provided does not establish error.'" (quoting *Falcon Ridge*, 811 S.W.2d at 944)).

Forrester contends, and the court of appeals held, that the clerk's notation in the trial record that the clerk's office was "[u]nable to locate other items requested" affirmatively reveals that the trial court failed to notify Forrester of its intent to dismiss the case. Because the clerk's notation is in writing and appears in the record, Forrester asserts, the record as to notice is not silent but rather demonstrates on its face that no notice was given. According to Forrester, the clerk's notation comports with the requirements we have articulated for a restricted appeal. We fail to see the distinction, however, between a record that is silent and a record that contains a written notation that

the record is silent; either way, proof of error is absent. *See Gold*, 145 S.W.3d at 213; *Alexander*, 134 S.W.3d at 849–50; *Falcon Ridge*, 811 S.W.2d at 943–44. The clerk's notation reflected nothing more than affirmation of a silent record, which is insufficient to establish reversible error in a restricted appeal.

We reverse the court of appeals' judgment and render judgment dismissing the case.

OPINION DELIVERED: March 27, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0192

IN RE NEXT FINANCIAL GROUP, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

The issue in this mandamus proceeding is whether a former securities broker must arbitrate a claim that his employer wrongfully discharged him for refusing to commit an illegal act. *See Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 734-35 (Tex. 1985). We hold that the employee's *Sabine Pilot* claim falls within the scope of his arbitration agreement and is not subject to an exception limited to statutory employment discrimination claims. Because the trial court erroneously denied the employer's motion to compel arbitration, we conditionally grant mandamus relief.

In September 2006, NEXT Financial Group, Inc., a securities brokerage firm, hired the real party in interest, Michael Clements, as a regional supervisor. Clements did not have a written employment agreement with NEXT, but registered representatives of broker-dealers must register with one or more of the self-regulatory organizations that regulate the securities industry. *See* 15 U.S.C. § 78o-3 (2006) (discussing self-regulatory organizations); 17 C.F.R. § 240.15b7-1 (registration requirement). As a condition of his employment, Clements was required to register with

the National Association of Securities Dealers (NASD)[1] by executing a Uniform Application for Securities Industry Registration or Transfer form (U-4). *See* 15 U.S.C. § 78o. The U-4 includes an agreement to "arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or bylaws of [the NASD] . . . as may be amended from time to time . . . ."

NEXT fired Clements on August 31, 2007, claiming that he failed to perform required duties in connection with an NASD audit. Shortly thereafter, Clements sued NEXT, alleging that he was actually fired for refusing to conceal a trader's fraudulent "churning" transactions.[2] *See Sabine Pilot*, 687 S.W.2d at 734-35 (holding that an at-will employee can recover damages from an employer who terminated his employment solely for refusing to perform an illegal act). NEXT moved to compel arbitration under the Federal Arbitration Act (FAA) based on the arbitration agreement in the U-4. At the time the dispute arose and Clements filed suit, the NASD Code of Arbitration Procedure mandated arbitration of all disputes "aris[ing] out of the business activities of a member or an associated person," with the exception of claims "alleging employment discrimination, including sexual harassment, in violation of a statute." NASD Code of Arbitration Procedure §§ 13200(a), 13201 (2007) (NASD Code).

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[1] The NASD, a self-regulatory organization overseeing securities transactions, absorbed the enforcement arm of the New York Stock Exchange (NYSE) and became the Financial Industry Regulation Authority (FINRA) on July 30, 2007. For purposes of this appeal, we will continue to refer to the agency as the NASD.

[2] "Churning" refers to the excessive buying and selling of securities without authorization, usually to increase a broker's commissions. *See, e.g.*, *Commodity Futures Trading Comm'n v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1324 (11th Cir. 2002) (referencing 17 C.F.R. 33.10(a)). Churning violates anti-fraud provisions of the federal securities laws and SEC regulations. *See, e.g.*, 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-1, .10b-3, .10b-5).

The trial court refused the arbitration request, and the court of appeals summarily denied mandamus relief. On petition for writ of mandamus to this Court, the disputed issues are (1) whether the FAA governs, (2) whether Clements's *Sabine Pilot* claim, which implicates alleged illegal activity, "arises out of [NEXT's] business activities," and (3) whether a *Sabine Pilot* claim is a statutory employment discrimination claim that triggers an exception to required arbitration. Neither the validity of the arbitration agreement nor the applicability of the 2007 NASD rules is in dispute. Although Clements signed the U-4 before the NASD arbitration rules were amended to their current form in 2007, Clements agreed to be bound by the NASD rules as they "may be amended from time to time."[3]

Mandamus relief is appropriate when a trial court erroneously denies a motion to compel arbitration pursuant to an agreement governed by the FAA. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005). The FAA applies to "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . ." 9 U.S.C. § 2 (2006). Courts have consistently held that the FAA applies to U-4 arbitration agreements because they regulate the securities industry and thus affect commerce, a point Clements does not contest. *See, e.g.*, *Seus*, 146 F.3d at 178-79; *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 659-60 (5th Cir. 1995). Clements contends, however, that his at-will employment relationship with NEXT precludes applicability of the FAA because his non-

[3] *See also Gardner v. Benefits Commc'ns Corp.*, 175 F.3d 155, 158 (D.C. Cir. 1999) ("[W]e must look to NASD's rules and by-laws in effect when [suit was filed] to determine whether [the] discrimination claims were subject to the arbitration clause."); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 187 (3d Cir. 1998) ("Most courts have found that the Form U-4 compliance clause obligates a registrant to comply with the NASD Arbitration Code as it existed at the time she filed suit."); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320–21 (9th Cir. 1996) (same).

contractual wrongful termination claim does not arise out of a contract evidencing a commercial transaction.

Under the FAA's plain language, an arbitrable dispute can arise out of *either* the contract containing the arbitration clause *or* a transaction evidenced by the contract. *See* 9 U.S.C. § 2. While Clements's wrongful termination claim may not arise out of a written employment contract, "the creation of an employment relationship . . . is a sufficient 'transaction' to fall within section 2 of the [Federal Arbitration] Act." *Dickstein v. du Pont*, 443 F.2d 783, 785 (1st Cir. 1971); *see also White-Weld & Co. v. Mosser*, 587 S.W.2d 485, 487 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (holding that the FAA governed an employee's suit for commissions owed by his employer because an employment relationship constitutes a transaction involving commerce). Moreover, this Court has held that tort claims and other extra-contractual claims can arise from a commercial transaction and thus may be subject to arbitration agreements made under the FAA. *See In re Dillard Dep't Stores, Inc.*, 186 S.W.3d 514, 516 (Tex. 2006). We therefore hold that the FAA applies to this dispute.

In addition, NEXT is a clearly intended third-party beneficiary of the U-4 and may compel arbitration in accordance with the terms of that agreement, even though NEXT is not a signatory to the U-4. *See In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 133 F.3d 225, 230 (3rd Cir. 1998) (holding that an employer was an intended third-party beneficiary of a U-4 and could compel arbitration); *cf. In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006) (holding that an intended third-party beneficiary of an arbitration agreement could compel arbitration).

We turn now to the principal dispute in this case, which is whether Clements's *Sabine Pilot* claim falls within the scope of the arbitration agreement and, if so, whether an exception removes his claims from mandatory arbitration. In resolving these issues, we are mindful that the scope of an arbitration agreement must be broadly interpreted in light of the federal policy favoring arbitration. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001); *see* 9 U.S.C. §§ 1–307 (the Federal Arbitration Act). Conversely, when exceptions to an arbitration agreement are at issue, we construe the exceptions narrowly in light of the federal policies favoring arbitration and disfavoring broad interpretations of exceptions, "lest they overwhelm the rule." *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 711 (4th Cir. 2001); *see* 9 U.S.C. §§ 1–307.

We first consider whether Clements's claim falls within the general class of "business activities" claims that are compelled to arbitration under the NASD Code. Clements argues that his claim does not arise from NEXT's business activities because the claim is based on NEXT's alleged illegal actions. The current version of the arbitration provision in the NASD Code was adopted in 2007 and states that arbitration is required if a claim "arises out of the business activities of [an NASD] member . . . ." NASD Code § 13200(a). NASD members are securities firms. *See* 17 C.F.R. § 240.15b7-1. Between 1993 and 2007 (and at the time Clements executed the arbitration agreement in 2006), the NASD Code explicitly provided for arbitration of claims "arising out of or in connection with the business of any member . . . or arising out of the employment or termination of employment." 58 Fed. Reg. 39070 (July 21, 1993) (emphasis omitted) (text of proposed rule); *see also* 58 Fed. Reg. 45932-33 (Aug. 31, 1993) (SEC order adopting the proposed rule change effective October 1, 1993). Clements argues that the 2007 change in the NASD Code's language

evinces an intent to narrow the scope of arbitrable claims to exclude employment-related disputes. We disagree.

In 2007, the NASD and the enforcement arm of the New York Stock Exchange (NYSE), which had maintained its own arbitration rules, were preparing to merge to form the Financial Industry Regulation Authority (FINRA). *See supra* note 1. At that time, NYSE's arbitration rules required arbitration of any claim "arising out of the employment or termination of employment of a registered representative . . . ." 72 Fed. Reg. 45078 (Aug. 10, 2007) (quoting NYSE R. 347(a) (2007)). NASD's rule was similar. However, shortly before the merger, NASD amended the NASD Code's language to its present form. Despite the modification in the NASD Code, the SEC's commentary on the merger explicitly indicated that, following the merger, employment and employment termination claims would "continue to be covered by NASD DR Rule 13200(a)." 72 Fed. Reg. 45078. Thus, the "business activities" language in the current version of NASD rule 13200(a) is inclusive of employment and employment termination claims, which is confirmed by the SEC's commentary.

In addition, effective January 1, 1999 and continuing to date, statutory employment discrimination and sexual harassment claims have been excluded from compelled arbitration under NASD rules. *See* NASD Code § 13201; 63 Fed. Reg. 35303 (June 29, 1998) (SEC order approving rule change). There would be no reason to have such an exception if employment-related disputes were excluded from mandatory arbitration.

Furthermore, cases interpreting similar language in the pre-1993 NASD Code, which required arbitration for "a[ny] dispute, claim, or controversy arising out of or in connection with the

business of any member . . .," held that claims arising from employment-related disputes were subject to arbitration under the NASD Code. *See, e.g.*, *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 799 (10th Cir. 1995) (following most other federal circuits in holding that employment disputes were compelled to arbitration by the pre-1993 NASD Code, largely due to "the requirement to construe arbitration clauses broadly where possible" (citing cases from other federal courts)); *Singer v. Jefferies & Co.*, 575 N.E.2d 98, 99, 101-04 (N.Y. 1991) (holding that the employee's claim for injury to reputation resulting from the employer's alleged use of him as "an unwitting pawn" in securities fraud was subject to arbitration because the employer's wrongful conduct involved "significant aspects" of the employer's business activities); *Skewes v. Shearson Lehman Bros.*, 829 P.2d 874, 882 (Kan. 1992) (holding that an employee's retaliatory discharge claim "arose out of or in connection with [the employer's] business" even though the employee claimed he was terminated in retaliation for filing a wage claim).

Although the language in the pre-1993 NASD Code differs from the language in the current version of the Code, the language in the current Code–"arising out of"–is not appreciably narrower than the language of the former Code–"arising out of or in connection with." The Fifth Circuit has stated that arbitration agreements that require arbitration for claims "arising out of the contract" are narrower than those that require arbitration for claims that are "connected with the contract." *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998). But in construing contracts generally, this Court has stated that "'arising out of' are words of . . . broad[] significance . . . ." *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004) (quoting *Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co.*, 189 F.2d 374, 378 (5th Cir.

1951)). We do not perceive such a significant difference in the breadth of these terms that one version would include employment-related disputes and the other would not.

At least one other court has concluded that a tort claim arising from a securities broker's illegal conduct "arose out of" the brokerage firm's business and was subject to arbitration based on the arbitration provision in the U-4 and the pre-1993 NASD rules. In *Singer v. Jefferies*, a securities-industry employee claimed that his employer's conduct made him appear complicit in the employer's securities-fraud crime. 575 N.E.2d at 100. The court opined, "To hold that such a dispute does not arise out of the firm's business is unrealistic and inconsistent with the Federal policy requiring liberal, indeed generous, interpretation of arbitration agreements." *Id.* at 102. In so holding, the court relied on the federal policy favoring arbitration and "the arising out of" language rather than the broad "in connection with" language in the NASD Code. *Id.* at 101-02. Similarly, although Clements's retaliatory discharge claim is premised on NEXT's allegedly illegal activities, the alleged conduct involves "significant aspects" of NEXT's legitimate business activities, bringing the dispute within the scope of the NASD arbitration clause.

Our inquiry does not end there, however, because Clements contends that his *Sabine Pilot* wrongful termination claim is excepted from compelled arbitration as a "claim alleging employment discrimination . . . in violation of a statute." NASD Code § 13201. Although Clements concedes that Rule 13201 generally does not except common law claims, he argues that his *Sabine Pilot* claim is inherently different because NEXT's act of terminating him for refusing to commit a criminal act constitutes a violation of the Texas Penal Code, which criminalizes threats made against a witness or prospective witness. TEX. PEN. CODE § 36.06(a). Relying on the doctrine of last antecedent,

Clements severs the "statutory discrimination exception" into two separate elements and offers the following analytical construct: To satisfy the "employment discrimination . . . in violation of a statute" exception, (1) the claim must allege employment discrimination, and (2) the conduct constituting discrimination must violate some statute, but not necessarily a statute intended to address employment discrimination in particular. Based on his construction of the exception, Clements concludes that a *Sabine Pilot* wrongful termination action is a "claim alleging employment discrimination" and such discrimination was "in violation of a statute," section 36.06 of the Texas Penal Code.

Clements's strained interpretation is contrary to the plain meaning and intent of the NASD Code, to which this Court must give effect. *See J.M. Davidson v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) ("In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument."); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (holding that states generally "should apply ordinary state-law principles" to determine whether the parties agreed to arbitrate a particular issue). The plain language of the NASD Code confirms that Rule 13201 does not except common law discrimination claims, which is substantiated by the SEC's commentary and conceded by Clements. 62 Fed. Reg. 66166-67 (Dec. 17, 1997) (stating that the statutory discrimination exception in the NASD Code "does not apply to causes of action created solely by judicial precedents"). The most natural reading of this rule is that it applies only to violations of statutes proscribing employment discrimination. Indeed, the rule is entitled "Statutory Employment Discrimination Claims." NASD Code § 13201. We do not view a *Sabine Pilot* claim as a "discrimination claim," but even if it were, it is not a

statutory discrimination claim, nor is it converted into one merely because the underlying conduct might actually constitute a violation of some other type of statute. *See* 62 Fed. Reg. 66167 n.28 ("Such judicially created causes of action might include, for example, claims alleging 'wrongful discharge' without any accompanying claim of discrimination on account of age, sex, race, or other status protected by a specific law.").

We therefore hold that Clements's *Sabine Pilot* claim is subject to arbitration under the NASD rules. Because the trial court abused its discretion in refusing to compel arbitration, we conditionally grant the writ of mandamus without hearing oral argument, *see* TEX. R. APP. P. 52.8(c). The trial court is directed to vacate its order denying NEXT's motion to compel arbitration and enter an order compelling arbitration of Clements's claims. We are confident that the trial court will comply, and this writ will issue only if it does not.

OPINION DELIVERED: November 14, 2008

IN THE SUPREME COURT OF TEXAS

NO. 08-0238

IN RE INTERNATIONAL PROFIT ASSOCIATES, INC.;
INTERNATIONAL TAX ADVISORS, INC.; AND
IPA ADVISORY AND INTERMEDIARY SERVICES, LLC, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this original proceeding, we consider whether the trial court abused its discretion by refusing to enforce forum-selection clauses. We conclude that it did and grant relief.

In March 2004, McAllen Tropicpak, Inc. entered into separate contracts with International Profit Associates, Inc., IPA Advisory and Intermediary Services, LLC, and International Tax Advisors, Inc. (collectively "IPA"), three related management and tax consulting firms. The contracts called for IPA to provide Tropicpak with (1) general business consulting services, (2) business operations and financial assessment services, and (3) tax consulting services. Each agreement is two pages in length and contains the following clause just above the signature line in one contract and a few lines above the signature line in the others: "It is agreed that exclusive jurisdiction and venue shall vest in the Nineteenth Judicial District of Lake County, Illinois, Illinois law applying."

After execution of the agreements, according to Tropicpak, IPA made business recommendations, including that Tropicpak hire David Salinas to help increase sales. Tropicpak hired Salinas, who allegedly embezzled large sums of money from the company. Tropicpak sued Salinas, IPA employee James Gibson, and IPA in Hidalgo County. The allegations as to IPA were that it negligently provided professional services, committed fraud and/or fraudulent inducement, made negligent misrepresentations, and breached its duty of good faith and fair dealing. IPA answered and on January 6, 2006 filed a motion to dismiss based upon the forum-selection clauses. A hearing was held on May 2, 2006, but the trial court failed to rule on the motion until after a second hearing in May 2007. The trial court denied IPA's motion, but the written order erroneously referred to IPA's motion as a "motion to compel" and was dated May 29, 2006, instead of May 29, 2007. After various attempts by IPA to obtain entry of a correct order through the summer and fall, the trial court signed a corrected order dated October 23, 2007. IPA obtained a copy of the corrected order by fax in December 2007.

IPA sought a writ of mandamus from the court of appeals, complaining that the trial court abused its discretion in denying the motion to dismiss. The court of appeals denied relief. ___ S.W.3d ___.

In this Court, IPA again argues that the trial court abused its discretion by not enforcing the forum-selection clauses. Tropicpak responds that IPA waived its right to mandamus relief because it delayed asserting its rights, and that even if IPA did not waive its right to seek mandamus relief, the trial court did not abuse its discretion in denying the motion because (1) the clauses are unenforceable as they are ambiguous in general, and in the alternative, the clauses are ambiguous

as to whether Tropicpak's tort claims are within the scope of the clauses; (2) IPA procured the clauses through overreaching or fraud; (3) the interest of Tropicpak's witnesses and the public favor litigating this case in Texas; and (4) enforcement of the clauses would effectively deprive Tropicpak of its day in court.

Forum-selection clauses are generally enforceable, and a party attempting to show that such a clause should not be enforced bears a heavy burden. *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 232 (Tex. 2008) (per curiam) (citing *In re AIU Ins. Co.*, 148 S.W.3d 109, 113 (Tex. 2004)). A trial court abuses its discretion if it refuses to enforce a forum-selection clause unless the party opposing enforcement clearly shows that (1) the clause is invalid for reasons of fraud or overreaching, (2) enforcement would be unreasonable or unjust, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. *Id.* at 231-32; *AIU*, 148 S.W.3d at 112; *see also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-17 (1972). Mandamus relief is available to enforce forum-selection agreements because there is no adequate remedy by appeal when a trial court abuses its discretion by refusing to enforce a valid forum-selection clause that covers the dispute. *Lyon*, 257 S.W.3d at 231; *see also AIU*, 148 S.W.3d at 115-20.

In asserting that IPA waived its right to seek mandamus by not diligently pursuing such relief, Tropicpak focuses on three time periods. The first is the time between January 9, 2006 when IPA filed its motion to dismiss and May 2, 2006 when the trial court first heard the motion. The second is the period of almost eight months between May 29, 2007 when the trial court signed the erroneous order on IPA's motion to dismiss, and January 22, 2008 when IPA filed its mandamus petition with

the court of appeals. The third is the period of thirty-eight days between the time the court of appeals denied relief and the filing of IPA's petition seeking relief from this Court.

Although mandamus is not an equitable remedy, its issuance is controlled largely by equitable principles. *In re Users Sys. Servs., Inc.*, 22 S.W.3d 331, 337 (Tex. 1999); *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993). One such principle is that "equity aids the diligent and not those who slumber on their rights." *Rivercenter*, 858 S.W.2d at 367 (quoting *Callahan v. Giles*, 155 S.W.2d 793, 795 (Tex. 1941)). Thus, delaying the filing of a petition for mandamus relief may waive the right to mandamus unless the relator can justify the delay. *Id.* at 367-68.

Tropicpak relies on *Rivercenter*, 858 S.W.2d at 367, where mandamus was denied to a party who delayed seeking mandamus relief for over four months, showed no diligent pursuit of its rights, and provided no justification for the delay. Here, Tropicpak claims that the gap of almost four months between the filing of IPA's motion to dismiss and its being heard bars equitable relief. However, Tropicpak does not reference any actions by IPA during the gap that indicate IPA lacked interest in or did not intend to press its motion to dismiss. IPA, on the other hand, references separate written requests for a hearing that it made in February and March. A hearing on the motion to dismiss was originally set for April 3, 2006 but was continued without objection to May 2, 2006, when the first hearing actually took place. The record shows that IPA timely pursued a hearing on its motion to dismiss and provided justification for the four-month delay. *See id.*

As to the second period of time Tropicpak references, on May 29, 2007, the trial court signed an order that erroneously referenced a motion to compel and was incorrectly dated May 29, 2006. Tropicpak furnished the incorrect order to the trial court. When IPA received the order, it contacted

Tropicpak, who indicated that it had no objection to presenting the trial court with a revised order. IPA faxed a proposed revised order to Tropicpak on July 30, 2007. IPA received no response from Tropicpak, and on October 1, 2007, IPA filed a motion to enter a corrected order. Tropicpak then agreed to the corrected order, and the trial court signed a revised order on October 23, 2007. IPA asserts, without contest by Tropicpak, that despite repeated requests by IPA and assurances from the trial court that IPA would receive the corrected copy in the mail, the trial court failed to provide IPA with a copy until it was faxed on December 5, 2007. IPA filed its petition with the court of appeals on January 22, 2008, and the court of appeals denied the petition on February 21, 2008. IPA then filed its petition for relief in this Court on March 31, 2008.

IPA's actions following entry of the May 29, 2007 order do not indicate the type of delay that forfeits a party's right to mandamus relief. IPA could have been more diligent in its efforts to have a corrected order entered, but Tropicpak does not claim that IPA took any actions inconsistent with pressing its motion to dismiss or seeking mandamus relief, and it was the errors and delays of the trial court and Tropicpak that hindered IPA's ability to initiate mandamus proceedings. Nor was delay in filing for mandamus relief from the court of appeals from December 5, 2007, when it received a copy of the corrected order, until January 22, 2008 unreasonable. Neither was the thirty-eight day time period between the court of appeals' denial of mandamus relief and IPA's filing in this Court such an unreasonable time under this record as to waive IPA's right to seek equitable relief. Based on the explanations provided by IPA and the record presented, we conclude that IPA did not "slumber on its rights" to the extent it waived its right to seek mandamus relief. *In re SCI Tex. Funeral Servs., Inc.*, 236 S.W.3d 759, 761 (Tex. 2007) (per curiam).

Moving to the merits of IPA's petition, we first address Tropicpak's arguments as to ambiguity. Tropicpak urges that the forum-selection clauses do not mention "litigation," do not mention what, if anything, is to be brought in the Nineteenth Judicial District Court of Lake County, Illinois, and are so vague and ambiguous on their face they should not be enforced. In the alternative, Tropicpak argues that the clauses are ambiguous as to the scope of claims they cover and do not clearly govern the various tort claims Tropicpak asserts. We disagree with both arguments.

A contract is ambiguous when it is susceptible to more than one reasonable interpretation. *Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005). The forum-selection clauses in this case are not susceptible to more than one reasonable interpretation. Each clause specifies that exclusive jurisdiction and venue shall vest in the Nineteenth Judicial District of Lake County, Illinois. The only reasonable interpretation is that the clauses fix jurisdiction and venue for judicial actions between the parties in a specific location and court in Illinois. Whether the clauses unambiguously select the Illinois court as the forum for all tort claims between the parties is a question we need not address because, as we note below, the claims asserted by Tropicpak arise from its contracts with IPA.

As to whether Tropicpak's claims sound more in contract or tort, we have drawn analogies between forum-selection clauses and arbitration clauses. *AIU*, 148 S.W.3d at 115 (recognizing an arbitration clause as a type of forum-selection clause); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 134-35 (Tex. 2004) (holding that determination of enforceability of forum-selection and arbitration clauses is the same when a party alleges fraudulent inducement); *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995) (observing that arbitration

provisions are a subset of forum-selection clauses). We held in *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131-32 (Tex. 2005), a case dealing with arbitration clauses, that whether claims seek a direct benefit from a contract turns on the substance of the claim, not artful pleading. We said that a claim is brought in contract if liability arises from the contract, while a claim is brought in tort if liability is derived from other general obligations imposed by law. *Id.* at 132. The principles explicated in *Weekley Homes* apply here. Additionally, we look to federal law for guidance in analyzing forum-selection clauses. *See AIU*, 148 S.W.3d at 111-14. The Court of Appeals for the Fifth Circuit recently reiterated that it has foresworn "slavish adherence to a contract/tort distinction; to hold to the contrary would allow a litigant to avoid a forum-selection clause with 'artful pleading.'" *Ginter ex. rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 444 (5th Cir. 2008). The court called for a common-sense examination of the claims and the forum-selection clause to determine if the clause covers the claims. *Id.* at 444-45. The Fifth Circuit's approach is instructive: determining whether a contract or some other general legal obligation establishes the duty at issue and dictates whether the claims are such as to be covered by the contractual forum-selection clause should be according to a common-sense examination of the substance of the claims made. *See Weekley Homes*, 180 S.W.3d at 131-32; *see also In re Kaplan Higher Educ. Corp.*, 235 S.W.3d 206, 209 (Tex. 2007) (per curiam).

Tropicpak contends that its claims are outside the scope of the contracts because none of the contracts called for IPA to make employment recommendations. But Tropicpak claims no relationship with IPA apart from the contracts, and the contracts express no limitation on the extent or form of IPA's consulting services. Tropicpak's pleadings allege that during the course of IPA's

engagement, IPA provided advice to Tropicpak and made a series of recommendations, one of which was to hire Salinas to help with sales. Each of Tropicpak's claims relate to its employment of Salinas. In the contract for business consulting services, the "scope of engagement" section provides

> [T]he Project Manager will prepare a Project Plan encompassing the objectives and scope of the engagement. Due to the fact that each Client's business is unique, Consulting Services' work is custom designed around each objective, giving consideration to the specific nature of Client's business and personnel.

The only limitation in the contract pertaining to IPA's work is that any proposal be presented to Tropicpak prior to implementation. The agreement does not draw a bright-line limit on the scope of work to be performed by IPA. Instead, it recognizes that IPA's work was to be custom designed around Tropicpak's business. The recommendation to hire a new employee to bolster Tropicpak's sales was a proposal that IPA made as an integral part of its consulting services, and Tropicpak alleges as much in its pleadings. No matter how Tropicpak characterizes or artfully pleads its claims, the claims and alleged damages arise from the contractual relationship between the parties, not from general obligations imposed by law. We conclude that Tropicpak's claims are within the scope of the forum-selection clauses. *See Weekley Homes*, 180 S.W.3d at 131-32.

We next consider whether IPA obtained Tropicpak's agreement to the forum-selection clauses through overreaching or fraud. Tropicpak claims that because an IPA representative initially contacted Rodriguez in her Texas office, accepted payment in her Texas office, and disclosed that the representative resided in Texas, IPA inferred that the contracts and resolution of any disputes related to them would be limited to Texas. Tropicpak urges that under the circumstances, IPA had

a duty to call the contents of the forum-selection clauses to Rodriguez's attention and that the failure to do so was "overreaching or fraud."

We analyze claims of "overreaching" in the context of whether the contract results in unfair surprise or oppression to the party alleging overreaching. *Lyon*, 257 S.W.3d at 233. A party asserting that it was fraudulently induced into entering an agreement must show that (1) the other party made a material representation, (2) the representation was false and was either known to be false when made or made without knowledge of its truth, (3) the representation was intended to be and was relied upon by the injured party, and (4) the injury complained of was caused by the reliance. *See Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997). Failing to disclose information is equivalent to a false representation only when particular circumstances impose a duty on a party to speak, and the party deliberately remains silent. *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001) (citing *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 353 (Tex. 1995)). Whether such a duty to speak exists is a question of law. *Id.*

Tropicpak does not argue that it was surprised by the presence of the forum-selection clauses in the contracts; it only contends that the clauses were not affirmatively disclosed by IPA's representative. Nor does Tropicpak argue that it is somehow oppressed by the clauses. As did the facts in *Lyon*, 257 S.W.3d at 230, these facts show that IPA offered to do business on a particular basis as set out in the two-page contracts, and Tropicpak accepted the offer.

Nor does the record establish that IPA fraudulently induced Tropicpak to accept the forum-selection clauses by not separately disclosing the clauses. It is presumed that Tropicpak understood and agreed to the contents of its contracts. *See In re Bank One, N.A.*, 216 S.W.3d 825, 826 (Tex.

2007) (per curiam). The parties were businesses dealing at arms length, and Rodriguez testified that she read each agreement and had the opportunity to discuss the contracts prior to signing. The clauses were parts of agreements that were each two pages in length, were located in close proximity to the signature elements, and were in the same font style and size as all other provisions. Under these circumstances, IPA did not have a duty to separately disclose each particular clause of the agreements—including the forum-selection clauses. The fact that the contracts were signed and payments were made in Tropicpak's offices and the IPA representative lived in Houston, without more, does not change this conclusion. Tropicpak presented no evidence that IPA fraudulently induced Tropicpak to enter the contracts. *See In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001) (holding that a home buyer's allegations that the seller (1) made no reference to an arbitration clause in its advertisements and pre-sale statements and (2) did not adequately explain the consequences of signing the agreement did not constitute fraud). Tropicpak has not met its burden of proving that enforcement of the forum-selection clauses should be barred on the basis of overreaching or fraud.

Next, we address Tropicpak's contention that the interests of its witnesses and the public justify the trial court's refusal to enforce the forum-selection clauses. Tropicpak argues that forcing its witnesses—all of whom it claims reside in Texas—to travel to Illinois for trial would be unfair. Further, Tropicpak asserts that the public interest mandates that trial be held in Texas because all events giving rise to this suit occurred within the state.

We have previously considered similar arguments regarding the location of witnesses. *See AIU*, 148 S.W.3d at 112. In *AIU*, a corporation with its principal place of business in Texas sued its

insurer in Texas despite a forum-selection clause in the insurance agreement that named New York as the forum for dispute resolution. *Id.* at 111. The insured argued that its witnesses would be seriously inconvenienced by having to travel to New York for trial. *Id.* at 112. We determined that because New York is not a "remote alien forum" and the insured could have foreseen having to litigate a claim in New York as a result of entering into the insurance agreement, the insured did not meet its burden of proving that the forum-selection clause should not be enforced. *Id.* at 113-14.

This case is similar to *AIU*. Tropicpak could have foreseen litigation in Illinois for claims arising out of its contracts with IPA, and Illinois is not a remote alien forum for purposes of forum-selection agreements. *Id*. Tropicpak has not demonstrated that the interests of witnesses residing in Texas should override the parties' choice of a sister state as the venue in which it would resolve disputes with IPA.

In regard to the public interest and forum-selection clauses, we have held that policy considerations weigh in favor of enforcing valid forum-selection clauses absent a statute that requires suit to be brought or maintained in Texas. *See In re AutoNation, Inc.*, 228 S.W.3d 663, 669 (Tex. 2007) (citing *AIU*, 148 S.W.3d at 114). Tropicpak does not assert that a statute precludes enforcement of these forum-selection clauses; thus, the public interest does not prevent enforcement of the clauses.

Tropicpak combines its arguments regarding convenience of litigation and deprivation of its day in court if the forum-selection clauses are enforced. It points out that Hidalgo County is where IPA solicited Tropicpak's business, the agreements were executed, its witnesses are located, payments were made to IPA, Tropicpak's president resides, and the companies used by Salinas to

convert money and products from Tropicpak are located. Tropicpak also points to the expense of pursuing litigation in Illinois and the fact that it would be forced to try two separate lawsuits since Salinas is not subject to jurisdiction in Illinois.

By agreeing to the forum-selection clauses, Tropicpak represented to IPA that the agreed forum would not be so inconvenient that enforcing the clause would deprive Tropicpak of its day in court. *See Lyon*, 257 S.W.3d at 234. To avoid enforcement of its agreements and the clauses, Tropicpak must have proved that special and unusual circumstances developed after the contracts were executed and that litigation in Illinois would now be so gravely difficult and inconvenient that Tropicpak would for all practical purposes be deprived of its day in court. *Id.*; *AIU*, 148 S.W.3d at 113. This record does not demonstrate such proof. First, it is not a special or unusual circumstance for many, or even most, of the fact witnesses in a lawsuit to reside somewhere other than in the area where the suit is brought. Next, assuming Tropicpak's argument that if the clauses are enforced, it will have to pursue two suits—one against IPA in Illinois and one against Salinas in Texas—is correct, that is not the type of unusual and special circumstances that show litigating in the contracted-for forum will be so gravely difficult and inconvenient Tropicpak will be deprived of its day in court. Litigation over contractual business obligations frequently involves more parties than the two principals to the contract. If all it takes to avoid a forum-selection clause is to join as defendants local residents who are not parties to the agreement, then forum-selection clauses will be of little value. Tropicpak cannot be faulted for wanting to sue parties who allegedly damaged it. But the fact there are several parties who may be sued in Texas because they have potential liability

to Tropicpak, even though Tropicpak agreed to sue IPA in Illinois, are not such special and unusual circumstances that they negate the forum-selection clauses. *See Lyon*, 257 S.W.3d at 234.

In conclusion, Tropicpak presented no evidence to overcome the presumption that the forum-selection clauses are valid. Neither did it prove that its claims do not fall within the scope of the clauses. The trial court clearly abused its discretion in denying IPA's motion to dismiss.

Without hearing oral argument, we conditionally grant mandamus relief and direct the trial court to vacate its order denying IPA's motion to dismiss and to grant the motion. *See* TEX. R. APP. P. 52.8(c). We are confident the trial court will comply with our directive, and the writ will issue only if the trial court fails to do so.

OPINION DELIVERED: January 9, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0240

WILFREDO AVILES, M.D., AND
WILFREDO AVILES, M.D., P.A., PETITIONERS,

v.

ALBERT AGUIRRE, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

PER CURIAM

Like the current statute,[1] former article 4590i required dismissal of a health-care claim if no timely expert report was served, and an award of attorney's fees and costs "incurred" by the defendant. Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 13.01, 1995 Tex. Gen. Laws 985, 986, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884 (hereinafter "article 4590i"). In this case, the trial court granted dismissal but denied attorney's fees because they had been incurred by the defendant's insurer rather than the defendant himself. A divided court of appeals affirmed. ___ S.W.3d ___. As this reflects a basic misunderstanding of both the statute and liability insurance, we reverse.

[1] *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b)(1) (requiring trial court to award attorney's fees and costs "incurred by the physician or health care provider" if expert report not filed).

More than 20 plaintiffs jointly sued Dr. Wilfredo Aviles, alleging he misrepresented to them that a physician's assistant he employed was a medical doctor. The plaintiffs never filed an expert report, claiming theirs was not a health-care claim. Dr. Aviles moved to dismiss in February 1999. After no less than six hearings over a seven-year period, the trial judge finally decided in August 2006 that the claim was indeed a health-care claim and dismissed it with prejudice. The plaintiffs have not appealed that ruling.

But the trial court denied Dr. Aviles's motion for reimbursement of attorney's fees (even though more than $85,000 had been expended) based on a stipulation by defense counsel that the fees "were paid by the insurance carrier on behalf of the doctor" and "not paid by the doctor personally." The court of appeals affirmed, defining "incur" as "to have liabilities cast upon one" based on an older edition of Black's Law Dictionary.[2] Believing the fees in this case had been "cast upon" the insurer rather than the physician, the court of appeals concluded that Dr. Aviles had incurred no fees. ___ S.W.3d at ___.

We disagree. The plaintiffs sued only Dr. Aviles; they could not sue his insurer under the Texas rules barring direct actions. *See* TEX. R. CIV. P. 38(c) (prohibiting direct actions in tort against insurer); TEX. R. CIV. P. 51(b) (same); *Angus Chem. Co. v. IMC Fertilizer, Inc*., 939 S.W.2d 138, 138 (Tex. 1997) (per curiam) ("In Texas, the general rule . . . is that an injured party cannot sue the tortfeasor's insurer directly until the tortfeasor's liability has been finally determined by agreement

[2] *See* BLACK'S LAW DICT. 768 (6th ed. 1990) ("To have liabilities cast upon one by act or operation of law, as distinguished from contract, where the party acts affirmatively. To become liable or subject to, to bring down upon oneself, as to incur debt, danger, displeasure and penalty, and to become through one's own action liable or subject to."). The current edition is simpler: "To suffer or bring on oneself (a liability or expense)." BLACK'S LAW DICT. 782 (8th ed. 2004).

or judgment."). Accordingly, Dr. Aviles was personally liable in the first instance for both defense costs and any potential judgment. That he had previously contracted with an insurer to pay some or all of both does not mean he incurred neither. *See Black v. Am. Bankers Ins. Co.*, 478 S.W.2d 434, 438 (Tex. 1972) (holding plaintiff "actually incurred" hospital expenses even though they were eventually paid by Medicare); *see also Allstate Indem. Co. v. Forth*, 204 S.W.3d 795, 796 (Tex. 2006) (holding insured had no claim against insurer because, even though she had incurred medical expenses, insurer had discharged them). When Dr. Aviles's insurer paid his attorney's fees on his behalf, the insurer was "stand[ing] in the shoes of its insured." *Sonat Exploration Co. v. Cudd Pressure Control, Inc.*, 271 S.W.3d 228, 236 (Tex. 2008).

No other construction complies with the Legislature's explicit purpose for the statute. *See* TEX. GOV'T CODE § 311.023. As its title suggests, the "Medical Liability and Insurance Improvement Act of Texas" was expressly intended to reduce costs of medical insurance. *See* art. 4590i, § 1.01. The reason for enactment was a "medical malpractice *insurance* crisis in the State of Texas." *Id.* § 1.02(a)(5) (emphasis added). Of the 13 legislative findings stating why Article 4590i was adopted, virtually every one is expressly related to the cost of malpractice insurance. *See id.* § 1.02(a). By refusing to award costs unless no insurance was involved, the court of appeals completely misunderstood the nature and frustrated the purpose of the statute.

Accordingly, without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the judgment of the court of appeals and remand to the trial court for further proceedings and an award of reasonable attorney's fees and costs of court incurred by Dr. Aviles.

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0268

CRAIG GARDNER AND THELMA GARDNER, PETITIONERS,

v.

U.S. IMAGING, INC. D/B/A SADI PAIN MANAGEMENT AND BERNEY KESZLER, M.D., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

PER CURIAM

Craig Gardner and Thelma Gardner brought this health care liability suit against Dr. Berney Keszler, who performed a lumbar epidural procedure on Craig, and U.S. Imaging, Inc. d/b/a SADI Pain Management ("SADI"), the owner and operator of the facility where the procedure was performed. The Gardners served an expert report on Dr. Keszler and SADI, who both contested the report as untimely and deficient. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a). The trial court denied the defendants' motion to dismiss the suit, but the court of appeals determined the report was deficient and ordered the case dismissed. ___ S.W.3d at ___. Although we do not disturb the court of appeals' determination that the report was deficient, in light of our decision in *Leland v. Brandal*, 257 S.W.3d 204 (Tex. 2008), we vacate the court of appeals' judgment and remand the case to the

trial court to consider granting the Gardners an extension to cure under section 74.351(c) of the Texas Civil Practice and Remedies Code.

On August 24, 2006, the Gardners filed this suit alleging that Dr. Keszler was negligent in choosing to perform a lumbar epidural procedure, that he did not conform to the standard of care while performing the procedure, and that he failed to obtain Craig Gardner's informed consent. The Gardners contend Dr. Keszler's actions led to Craig's contracting spinal meningitis, which caused his hearing loss. Dr. Keszler timely answered the suit, and pursuant to section 74.351(a), the Gardners served Dr. Keszler with an expert report from Dr. Edson O. Parker (the "Parker report") within 120 days of filing suit. TEX. CIV. PRAC. & REM. CODE § 74.351(a).

Unlike Dr. Keszler, SADI failed to timely answer the suit and, before the 120-day period for filing an expert report expired on December 22, 2006, the Gardners moved for default judgment against SADI. The trial court rendered a default judgment on December 14, 2006, and severed the suit against SADI. Upon learning of the default judgment, SADI filed an answer in the severed suit, along with a motion for new trial and a motion to set aside the default judgment. Pursuant to the parties' agreement, the court, on February 8, 2007, granted a new trial and set aside the default judgment. In accordance with the agreed order, the Gardners nonsuited the severed suit, SADI filed an answer in the original suit on February 12, and the Gardners filed an amended petition in the original suit on February 16. On March 20, the Gardners served SADI with the expert report they had served on Dr. Keszler.

Dr. Keszler and SADI objected to the report and moved for dismissal under section 74.351(b), which provides that a health care liability suit must be dismissed if a non-compliant report

is served, subject to the availability of one thirty-day extension to cure under section 74.351(c). TEX. CIV. PRAC. & REM. CODE § 74.351(b), (c); *see Lewis v. Funderburk*, 253 S.W.3d 204, 207 (Tex. 2008). The trial court, presumably finding that the report complied with the statute, denied the defendants' motions to dismiss. The court of appeals reversed, however, reasoning that the report was deficient because the discussion of causation was conclusory. ___ S.W.3d at ___. The court remanded the case to the trial court to award the defendants reasonable attorneys' fees and costs pursuant to section 74.351(b). *Id.* at ___. In their motion for rehearing before the court of appeals, the Gardners argued that, in light of our decision in *Leland*, 257 S.W.3d 204, the court of appeals should have also remanded the suit to the trial court to consider granting a thirty-day extension to cure.[1] We agree, and reject the defendants' contention that the Parker report is so deficient as to constitute no report at all. *See Ogletree v. Matthews*, 262 S.W.3d 316, 323 (Tex. 2007) (WILLETT, J., concurring); *Funderburk*, 253 S.W.3d at 211 (WILLETT, J., concurring).[2]

SADI asserts an additional challenge, contending it was not served with an expert report within the statutory deadline. Section 74.351(a) states that, within 120 days of filing an original petition, a claimant must "serve on each party or the party's attorney one or more expert reports."

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[1] Because the Gardners argued that the trial court's decision should have been affirmed, and remand constitutes lesser included relief, the Gardners need not have requested an extension earlier to preserve such relief. *See Martinez-Partido v. Methodist Specialty & Transplant Hosp.*, 267 S.W.3d 881 (Tex. 2008).

[2] The defendants additionally contend the report is deficient because Dr. Parker was not qualified to render an opinion. Because such a deficiency would be subject to cure on remand, we do not address the defendants' challenge to Dr. Parker's qualifications. *Funderburk*, 253 S.W.3d at 207.

TEX. CIV. PRAC. & REM. CODE § 74.351(a). Because SADI was named in the original petition as a party to this suit, the Gardners were required to serve it with a report before the statutory period expired on December 22, 2006, and it is undisputed they failed to do so. However, before the 120-day period expired, SADI defaulted and judgment was taken against it. The statute does not specify the effect of a default judgment on the 120-day period. But the effect of default on a plaintiff's claim for unliquidated damages is clear: once a default judgment is taken, all factual allegations contained in the petition, except the amount of damages, are deemed admitted. *See Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992). In light of the expert-report requirement's dual purpose to inform the served party of the conduct called into question and to provide a basis for the trial court to conclude that the plaintiff's claims have merit, it makes little sense to require service of an expert report on a party who by default has admitted the plaintiff's allegations. Moreover, our jurisprudence requires that, for a default judgment to be set aside, the plaintiff must be placed "in no worse position than he would have been had an answer been filed . . . ." *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 125 (Tex. 1939). Accordingly, when SADI failed to timely answer the Gardners' suit by the Monday following the expiration of twenty days after it was served, *see* TEX. R. CIV. P. 99(b), the statutory period for serving it with an expert report was tolled until such time as SADI made an appearance. Once the default judgment was set aside and SADI filed an answer, tolling ended and the Gardners had 100 days remaining in which to serve SADI with an expert report. SADI filed an answer in the original suit on February 12, and the Gardners served it with an expert report on March 20, well within the remaining statutory period.

SADI additionally contends it was not served with an expert report because the report that was served does not mention SADI or implicate its behavior. The Gardners respond that because SADI's alleged liability is purely vicarious in nature, the report as to Dr. Keszler was sufficient. To the extent the allegations against SADI are based upon respondeat superior, we agree with the Gardners. When a party's alleged health care liability is purely vicarious, a report that adequately implicates the actions of that party's agents or employees is sufficient. *See Univ. of Tex. Med. Branch v. Railsback*, 259 S.W.3d 860, 864 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Univ. of Tex. Sw. Med. Ctr. v. Dale*, 188 S.W.3d 877, 879 (Tex. App.—Dallas 2006, no pet.); *Casados v. Harris Methodist H-E-B*, No. 2-05-080-CV, 2006 Tex. App. LEXIS 6357, at *12–*13 (Tex. App.—Fort Worth July 20, 2006, no pet.) (not designated for publication). Thus, to the extent the Gardners allege that SADI is liable only vicariously for Dr. Keszler's actions, the expert report requirement is fulfilled as to SADI if the report is adequate as to Dr. Keszler.

We grant the petition and, without hearing oral argument, reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion. *See* TEX. R. APP. P. 59.1, 60.2(f).

OPINION DELIVERED: December 19, 2008

IN THE SUPREME COURT OF TEXAS

NO. 08-0272

DEALERS ELECTRICAL SUPPLY CO., PETITIONER,

v.

SCOGGINS CONSTRUCTION COMPANY, INC. AND BILL R. SCOGGINS, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued February 3, 2009

JUSTICE O'NEILL delivered the opinion of the Court.

Chapter 2253 of the Texas Government Code, historically called the McGregor Act, requires a prime contractor on a public-work contract to execute a payment bond to protect laborers and materialmen who work on or supply materials for the project. *See* TEX. GOV'T CODE § 2253.021(a)(2). In this case, an electrical subcontractor on a bonded public-work project walked off the job, leaving his supplier of electrical parts unpaid. The supplier missed the McGregor Act deadline to pursue a claim on the bond, and filed this suit against the prime contractor for violation of the Texas Construction Trust Fund Act, TEX. PROP. CODE §§ 162.001(a), 162.031(a), and breach of a separate Joint Check Agreement designed to ensure payment for materials supplied to the subcontractor. We must decide whether the McGregor Act provides the supplier's exclusive remedy. We hold that it does not. Accordingly, we reverse the court of appeals' judgment and remand the

case for the court to consider the remaining issues it did not address.

I. Background

Scoggins Construction Company, Inc. (SCC) entered into a $5,751,000.00 public-work contract with Mercedes Independent School District (MISD) in February 2001 for the construction of an elementary school in Mercedes, Texas.[1] Pursuant to section 2253.021(a)(2) of the McGregor Act, SCC executed a payment bond with Fidelity and Deposit Company of Maryland (Fidelity) and Colonial American Casualty and Surety Company (Colonial). SCC subcontracted with Art Bujanos d/b/a Diamond Industries (Diamond) to provide electrical labor and materials for $662,000.00.[2] In March 2001, SCC, Diamond, and Dealers Electrical Supply Co. (Dealers) entered into a Joint Check Agreement whereby, in an effort to "induce [Dealers] to extend or continue extending credit to [Diamond]," SCC agreed to "make all payments for all materials and/or services furnished by [Dealers] to the project by check made jointly payable to [Diamond] and [Dealers]." Based on this agreement, Dealers sold and delivered electrical materials to Diamond for the project between January 1, 2002, and May 2, 2002. In early May 2002, Diamond walked off the job, leaving Dealers unpaid for electrical supplies it had provided.

Dealers sued SCC and SCC's president, Bill Scoggins (collectively, Scoggins), and Diamond, jointly and severally, for violating Chapter 162 of the Texas Property Code, known as the Texas Construction Trust Fund Act, TEX. PROP. CODE § 162.001–.033, and for breaching the Joint Check Agreement. Dealers also sued Scoggins, Fidelity, and Colonial, jointly and severally, under the McGregor Act to recover on the payment bond, but later dropped that claim because it failed to

[1] For purposes of the McGregor Act, a "'[g]overnmental entity' means a governmental or quasi-governmental authority authorized by state law to make a public work contract, including . . . a school district." TEX. GOV'T CODE § 2253.001(1)(C). A "'[p]ublic work contract' means a contract for constructing . . . a public building." Therefore, the contract between SCC and MISD is a public-work contract.

[2] After two subsequent change orders, the total contract amount between SCC and Diamond was $665,789.00.

comply with the Act's mandatory notice requirements. *See* TEX. GOV'T CODE §§ 2253.041, 2253.073. After a bench trial, the court ruled that Scoggins violated the Trust Fund Act by receiving payment for electrical materials supplied to the project and failing to pay Dealers for them, and that SCC failed to guarantee payment as required by the Joint Check Agreement. The trial court rendered judgment against Diamond and Scoggins, jointly and severally, for $78,123.59, together with pre-judgment interest, attorneys' fees, and costs. The trial court issued findings of fact and conclusions of law, *inter alia*, that (1) the materials for which Dealers was not paid were incorporated into the project; (2) MISD paid SCC for the materials Dealers provided; (3) by failing to pay Dealers for the materials, Scoggins violated the Trust Fund Act; and (4) under the Joint Check Agreement, SCC guaranteed payment to Dealers for those materials and is therefore liable to Dealers for them.

Scoggins appealed, contending the McGregor Act was Dealers' exclusive remedy. In the alternative, Scoggins challenged the evidence to support a judgment for violation of the Joint Check Agreement or the Trust Fund Act, and the evidence to hold Bill Scoggins personally liable for the debt. Finally, Scoggins claimed that Dealers failed to refute affirmative defenses that Scoggins proved under the Trust Fund Act. The court of appeals agreed that the McGregor Act was Dealers' sole remedy and reversed the trial court's judgment, rendering a take-nothing judgment against Dealers on its alternative claims. ___ S.W.3d ___. We granted Dealers' petition for review to consider whether the McGregor Act precludes Dealers' other statutory and common-law claims. 52 Tex. S. Ct. J. 237, 238 (Tex. Jan. 12, 2009).

II. Discussion

A. The McGregor Act's Purpose

The McGregor Act was enacted to protect public-work laborers and materialmen, since a lien cannot generally be asserted against a public improvement. *See Mosher Mfg. Co. v. Equitable Surety*

Co., 229 S.W. 318, 319–20 (Tex. Comm'n App. 1921, judgm't adopted; *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 886 n.6 (Tex. App.—San Antonio 1996, writ denied); *Baxter Constr. Co. v. Hou–Tex Prods., Inc.*, 718 S.W.2d 355, 357 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Barfield v. Henderson*, 471 S.W.2d 633, 637 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.). . For prime contracts exceeding $25,000, the Act requires the prime contractor to "execute to the governmental entity . . . a payment bond" before beginning work. TEX. GOV'T CODE § 2253.021(a)(2). The payment bond must be for the amount of the prime contract and "is solely for the protection and use of payment bond beneficiaries," such as subcontractors, laborers, and materialmen.[3] Id. § 2253.021(c). If the Act's stringent notice requirements are followed, a payment-bond beneficiary who has not been paid "may sue the principal or surety, jointly or severally, on the payment bond." *Id.* § 2253.073(a).

The McGregor Act is intended to be a simple and direct method for claimants who supply labor and materials for public-work projects to give notice and perfect their claims under the Act. *Capitol Indem. Corp. v. Kirby Rest. Equip. & Chem. Supply Co.*, 170 S.W.3d 144, 147 (Tex. App.—San Antonio 2005, pet. denied) (citing *City of LaPorte v. Taylor*, 836 S.W.2d 829, 831–32 (Tex. App.—Houston [1st Dist.] 1992, no writ)). It is well-recognized that the McGregor Act is remedial in nature, and should be liberally construed to achieve its purposes. *Id.* at 148; *Featherlite Bldg. Prods. Corp. v. Constructors Unlimited, Inc.*, 714 S.W.2d 68, 69 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

B. Does the McGregor Act Preclude a Remedy under the Texas Construction Trust Fund Act?

Scoggins contends the remedy available to an unpaid public-work laborer or materialman

[3] "'Payment bond beneficiary' means a person for whose protection and use [the Act] requires a payment bond." TEX. GOV'T CODE § 2253.001(2). It is undisputed that Dealers is a payment bond beneficiary under the Act.

under the McGregor Act is exclusive. First, Scoggins points to *Commercial Union Insurance Co. v. Spaw-Glass Corp.*, 877 S.W.2d 538 (Tex. App.—Austin 1994, writ denied), and *Bunch Electric Co. v. Tex-Craft Builders, Inc.*, 480 S.W.2d 42 (Tex. Civ. App.—Tyler 1972, no writ), which discussed the McGregor Act's exclusivity. Next, Scoggins argues that, despite legislative changes to the Texas Construction Trust Fund Act in 1987, the Trust Fund Act does not apply when, as in most public-work construction projects, a prime contractor has executed a payment bond. And finally, Scoggins contends that allowing public-work laborers and materialmen to assert claims under the Trust Fund Act might subject prime contractors to double liability. The court of appeals agreed with Scoggins on all three contentions. We address each in turn.

1. *Commercial Union* and *Bunch*

The court of appeals relied on *Commercial Union*, 877 S.W.2d at 540, and *Bunch*, 480 S.W.2d at 45, for the blanket proposition that the McGregor Act is exclusive. However, a close reading of those cases, in conjunction with the history of the McGregor Act, only supports a conclusion that the McGregor Act provides an unpaid laborer or materialman an exclusive remedy *against a payment bond*.

In *Commercial Union*, a prime contractor agreed to build a school for Judson Independent School District. 877 S.W.2d at 539. Commercial Union Insurance Co. was the surety for Kleck Plumbing, HVAC, a subcontractor that agreed to provide plumbing work on the project. *Id.* After the prime contractor fully paid Kleck for its services, Commercial Union was notified that Kleck had unpaid obligations to certain suppliers. *Id.* The suppliers, however, had failed to notify the prime contractor of Kleck's unpaid obligations as the McGregor Act required. *Id.* at 540. Commercial Union nonetheless paid the suppliers, expecting to recover those expenditures from the prime

contractor. *Id.* at 539. When the prime contractor refused, Commercial Union sued. *Id.*

The court of appeals denied Commercial Union's claim, reasoning that because the suppliers failed to comply with the McGregor Act's notice requirements, the suppliers would not have been entitled to recover from Commercial Union or the prime contractor on the bond. *Id.* at 540. Thus, Commercial Union should not be allowed to stand in the suppliers' shoes. *Id.* Recognizing that Commercial Union's suit was not a McGregor Act claim, the court noted that the Act's notice requirements "must be strictly complied with if there is to be recovery from a payment bond," and that allowing Commercial Union to assert a claim the suppliers failed to perfect would eviscerate the notice requirements' purpose. *Id.* Additionally, the court stated that "the Act provides the exclusive remedy for laborers and suppliers on a public project." *Id.* (citing *Bunch*, 480 S.W.2d at 45). But *Commercial Union* was not a McGregor Act case and did not discuss whether the unpaid suppliers could have pursued alternate remedies against the prime contractor; accordingly, its application here is off point.

In *Bunch*, Tex-Craft Builders, Inc. contracted with the Housing Authority of the City of Crockett, Texas, to construct a public-housing project. 480 S.W.2d at 43. Continental Casualty Company of Illinois was Tex-Craft's surety on the project. *Id.* Tex-Craft subcontracted the electrical work to Bunch Electric Company. *Id.* When Tex-Craft failed to pay Bunch for work performed, Bunch sued Tex-Craft, the Housing Authority, and Continental, jointly and severally, under the McGregor Act. *Id.* at 43–44. Finding that Bunch failed to properly notify Continental as the Act required, the trial court rendered judgment only against Tex-Craft. *Id.* Bunch appealed, arguing that it had complied with the notice requirements as to both Tex-Craft and Continental. The court of appeals, in holding that Bunch had failed to follow the requisite procedures for notifying Continental of its claim, noted that "the [McGregor Act] provides the procedure and remedy for

presenting a claim *against the bond*." *Id.* at 45 (emphasis added). "It has been held," the court continued, "that the statute is mandatory as well as exclusive; that it must be complied with in all respects or a cause of action under it is not maintainable." *Id.* (citing *Fed. & Deposit Co. v. Big Three Welding Equip. Co.*, 249 S.W.2d 183 (Tex. 1952); *Employers' Liab. Assur. Corp. v. Young County Lumber Co.*, 64 S.W.2d 339 (Tex. 1933); *Indem. Ins. Co. of N. Am. v. S. Tex. Lumber Co.*, 29 S.W.2d 1009 (Tex. Comm'n App. 1930, judgm't adopted)).

While there is some language in *Commercial Union* and *Bunch* that might appear to support Scoggins' position, neither case turned on the McGregor Act's exclusivity. The history of the McGregor Act, as well as the case long cited for the Act's exclusivity — *South Texas Lumber*, 29 S.W.2d 1009 — clarify that the McGregor Act was intended to be a public-work laborer or materialman's exclusive claim only as against the payment bond itself, but not necessarily against contractors on a public-work project.

At the time *South Texas Lumber* was decided, the McGregor Act required that a contractor on a public-work project obtain "the usual penal bond, with the additional obligation that such contractor shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for." Act of Mar. 19, 1929, 41st Leg., R.S., ch. 226, § 1, 1929 Tex. Gen. Laws 481, 481. Any laborer or materialman seeking payment for work or supplies had the "right to intervene and be made a party to any action instituted by the [governmental entity] on the bond . . . subject, however, to the priority of the claims and judgment of the [governmental entity]." *Id.* However, if the governmental entity failed to bring suit "within six months from the completion and final settlement of [the] contract," the governmental entity would lose priority, and any laborer or materialman could prosecute a suit on the bond. Act of Mar. 20, 1913, 33rd Leg., R.S., ch. 99, § 2, 1913 Tex. Gen. Laws 185, 185–86 Any claim by a laborer or

materialman against the bond, though, was required to be brought within one year from the completion and final settlement of the public-work project. *Id.* at § 3, 1913 Tex. Gen. Laws at 186. It was in this statutory context that *South Texas Lumber* was decided, and the Act's exclusivity was first discussed. 29 S.W.2d 1009.

In *South Texas Lumber*, A. E. Quay contracted with the City of Houston for the construction of certain public improvements. The Indemnity Insurance Company of North America was Quay's surety. *South Texas Lumber*, 29 S.W.2d at 1009. South Texas Lumber Company furnished material to Quay for the project. When Quay failed to pay for the material, South Texas Lumber sued Quay and Indemnity Insurance on the bond. *Id.* Although South Texas failed to file suit within the Act's one-year limitations period, the trial court rendered judgment for South Texas Lumber, and the court of appeals affirmed. *See Indem. Ins. Co. of N. Am. v. S. Tex. Lumber Co.*, 19 S.W.2d 913, 915 (Tex. Civ. App.—Galveston 1929), *rev'd*, 29 S.W.2d 1009 (Tex. Comm'n App. 1930, judgm't adopted). In an attempt to avoid the Act's limitations provision, South Texas Lumber argued that the bond itself contained protections in addition to those required by statute; according to South Texas Lumber, it could still assert common-law causes of action against the bond based on those additional protections, which should be governed by a general four-year statute of limitations. *Id.* The court of appeals agreed, but the Texas Commission of Appeals did not. After examining the statutory scheme, the Commission reasoned that, although the statutorily required bond was for the dual protection of the governmental entity and laborers and materialmen, the governmental entity clearly had the dominant claim against the bond. *South Texas Lumber*, 29 S.W.2d at 1011. Were a laborer or materialman allowed to assert a non-statutory cause of action against the bond, the statutory priority given governmental bodies could be circumvented. *Id.* Because such circumvention would be clearly repugnant to the statutory priority scheme, the Commission held that a McGregor Act

claim was the exclusive cause of action that could be asserted *against the bond*. *Id.* Importantly, nothing in *South Texas Lumber* suggests that a laborer or materialman should be precluded from asserting alternative claims not based on the bond against the prime contractor itself. Reliance on *South Texas Lumber* for such a proposition is, therefore, misplaced.[4]

2. The Trust Fund Act's Language

Beyond focusing on the exclusivity language found in *Commercial Union* and *Bunch*, the court of appeals cited two decisions interpreting earlier versions of the Trust Fund Act. *See Truckers, Inc. v. S. Tex. Constr. Co.*, 561 S.W.2d 855, 859 (Tex. Civ. App.—Corpus Christi 1977, no writ); *Econ. Forms Corp. v. Williams Bros. Constr. Co.*, 754 S.W.2d 451, 457 (Tex. App.—Houston [14th Dist.] 1988, no writ). Those decisions held that the Trust Fund Act did not apply when a construction contract was covered by a corporate surety bond.[5] Despite significant changes to the statutory language, the court of appeals relied on those decisions in interpreting the current Trust Fund Act. We disagree with that interpretation.

Under the Trust Fund Act, payments made to a contractor or subcontractor under a construction contract for the improvement of real property are considered to be trust funds. TEX. PROP. CODE § 162.001(a). Subcontractors or suppliers who furnish labor or material for the

[4] In 1959, the Legislature took direct action to eradicate several problems created by the statutory scheme. First, the McGregor Act was amended to provide that "[a]ny bond furnished by any prime contractor in attempted compliance with [the Act] shall be treated and construed in conformity with the requirements of [the Act] as to rights created, limitations thereon, and remedies provided." Act of April 13, 1959, 56th Leg., R.S., ch. 93, § 1, 1959 Tex. Gen. Laws 155, 155. In doing so, it seems the Legislature meant to clarify the precise issue presented in *South Texas Lumber*, effectively eliminating any argument that a laborer or materialman could assert a common law action against a McGregor Act bond. Additionally, the Legislature implemented the requirement that — with regard to public-work contracts of a certain minimum amount — the prime contractor obtain two bonds: (1) a performance bond to protect the governmental body; and (2) a payment bond to protect "all claimants supplying labor and material." *Id.* By requiring separate bonds, the Legislature appears to have eliminated the need for governmental-entity priority in a suit against a single bond.

[5] The court of appeals indicated that the Trust Fund Act does not protect unpaid laborers or materialmen in the private construction context. ___ S.W.3d at ___. Although this issue is not before us, we do not endorse the court of appeals' reasoning on this issue.

construction project are considered beneficiaries of any trust funds paid or received in connection with the improvement. *Id.* § 162.003. A trustee misapplies trust funds if it "intentionally or knowingly or with intent to defraud, directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust fund." *Id.* § 162.031(a). A party who misapplies trust funds under the Trust Fund Act is subject to civil liability to trust-fund beneficiaries whom the Act was designed to protect. *See C & G Inc. v. Jones*, 165 S.W.3d 450, 453 (Tex. App.—Dallas 2005, pet. denied).

Until 1987, the Trust Fund Act, by its terms, did not apply to "*receipts* under a construction contract if the full contract amount [was] covered by a corporate surety bond." Act of May 27, 1983, 68th Leg., R.S., ch. 576, § 1, 1983 Tex. Gen. Laws 3475, 3721 (amended 1987) (current version at TEX. PROP. CODE § 162.004) (emphasis added). Thus, until 1987, Dealers would not have been entitled to assert a trust-fund claim against Scoggins, as the prime contract in this case was covered by a corporate surety bond. However, in 1987 the Act was amended, eliminating the language that excluded receipts under a bonded project. Act of May 25, 1987, 70th Leg., R.S., ch. 578, § 2, 1987 Tex. Gen. Laws 2283, 2283. As amended, the Trust Fund Act instead exempts from liability "a *corporate surety* who issues a payment bond covering the contract for the construction or repair of the improvement." TEX. PROP. CODE § 162.004(a)(3) (emphasis added). By narrowing the statutory exemption in this manner, the Legislature unequivocally expanded the Trust Fund Act's purview. *See Fleming Foods of Tex. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999). Accordingly, when, as in this case, the full amount of the prime contract is covered by a corporate surety bond, the surety itself is not a trustee of construction funds and cannot be sued under the Trust Fund Act. But even when a public construction project is bonded, the plain language of the amended Act protects laborers and materialmen by providing them with a remedy against a nonsurety trustee's improper diversion of

trust funds. *See id*.

The court of appeals, however, determined that the change in the Trust Fund Act's language was non-substantive, and relied on cases interpreting the Act prior to the 1987 amendment. ___ S.W.3d at ___ (citing *Trucker's, Inc.*, 561 S.W.2d at 859; *Econ. Forms Corp.*, 754 S.W.2d at 457). The court compared the pre-amended statute[6] to the current version and found the two statutes to be similar. *Id.* at ___. The court then pointed to an acknowledgment by the 1983 Legislature that codified the former statute "that the property code was intended to be a 'topic-by-topic' revision of the state's general and permanent statute law *without substantive change*." *Id.* at ___ (citing TEX. PROP. CODE § 1.001(a)) (emphasis added by court of appeals). While the court acknowledged that the 1983 codification was amended in 1987, it refused to give any weight to that amendment. *Id.* In doing so, the court erred.

First, courts may not look back to the former text of a statute that has been nonsubstantively re-codified if the current text is direct and unambiguous. *Fleming Foods*, 6 S.W.3d at 286; *see also Arias v. Brookstone, L.P.*, 265 S.W.3d 459, 465 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). The court of appeals erroneously imputed the apparent intent of the 1983 Legislature to the 1987 Legislature and ignored the unequivocal change in statutory language that the latter effected.

Additionally, since neither the McGregor Act nor the current version of the Trust Fund Act are expressly exclusive of the other, they can only be exclusive by implication. *See Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189, 192 (Tex. App.—Fort Worth 1995, writ denied). Conflicting statutory provisions must, however, be construed "so that effect is given to both," if possible. TEX. GOV. CODE § 311.026(a). In deciding whether dual remedies may be given effect,

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[6] *See* Act of May 27, 1967, 60th Leg., R.S., ch. 323, §§ 1–7, 1967 Tex. Gen. Laws 770, 770–71, *repealed by* Act of May 27, 1983, 68th Leg., R.S., ch. 576, § 6, 1983 Tex. Gen. Laws 3475, 3729-30 (current version at TEX. PROP. CODE §§ 162.001–.004, §§ 162.031–.033).

we look to whether "'the Legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed.'" *City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008) (quoting *In re Sw. Bell Tel. Co.*, 235 S.W.3d 619, 624–25 (Tex. 2007)). The McGregor Act reflects no such intent.

As noted earlier, the purpose of the McGregor Act is to provide unpaid public-work laborers and materialmen with an additional remedy and a simple and direct method to perfect their claims to that remedy. *See Capitol Indem. Corp.*, 170 S.W.3d at 147. Similarly, the Trust Fund Act was enacted for the protection of laborers and materialmen, and is a remedial statute that should be given a broad construction. *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985); *C & G Inc.*, 165 S.W.3d at 454. Interpreting the McGregor Act to provide an exclusive remedy for unpaid claims would contravene, rather than further, the purpose of both the McGregor Act and the Trust Fund Act. To hold that one impliedly abrogates the other absent the Legislature's expression would undermine both Acts' clear purpose.

3. Double-Liability and Public-Policy Considerations

Scoggins raises an additional concern, contending that the McGregor Act's notice requirement is irreconcilable with the Trust Fund Act's four-year limitations period.[7] *See* TEX. GOV'T CODE § 2253.041. According to Scoggins, if a public-work laborer or materialman provides

[7] The McGregor Act requires notice to be mailed on or before the fifteenth day of the third month after labor or materials was supplied. TEX. GOV'T CODE § 2253.041(b). The Trust Fund Act does not provide a statute of limitations. When a statute of limitations is not provided, a four-year limitations period applies. TEX. CIV. PRAC. & REM. CODE § 16.051.

timely notice under the McGregor Act, the prime contractor will withhold payment from the subcontractor and promptly pay the McGregor Act claimant; thereafter, the prime contractor will deduct that amount from what it pays the subcontractor. Scoggins claims this statutory scheme allows the prime contractor to pay all subcontractors once the notice period has passed, safe in the assumption that no more claims may be asserted. If trust-fund claims may be brought beyond the notice period, Scoggins contends, prime contractors will be reluctant to pay their subcontractors until four years after the laborer or materialman's work is completed, causing subcontractors to institute litigation with resultant costs and delays that will hinder public-work projects. Scoggins also argues that a prime contractor may be subject to double liability when the prime contractor has already paid a subcontractor for the labor or material supplied, but the subcontractor fails to pay the laborer or materialman. Once again, we believe Scoggins' concerns are unfounded.

First, the argument presupposes that the McGregor Act was intended to benefit contractors by shielding them from all non-McGregor Act liability after the ninety-day notice deadline passes. The Act, however, was enacted to protect unpaid laborers and materialmen by providing them an additional funding source — a payment bond — in the event the prime contractor fails to meet its obligations. Foreclosing laborers' and materialmens' alternative remedies if the McGregor Act's strict notice requirements are not met would undermine its overarching purpose, particularly considering that many laborers and suppliers might have difficulty complying with the Act's notice requirements without the assistance of legal counsel.

Second, since the Trust Fund Act was amended in 1987, bond and trust-fund claims appear to have co-existed harmoniously in the private-construction context even though such bond claims, too, generally come with stringent notice requirements. *See Perry & Perry Builders, Inc. v. Galvan*, No. 03-02-0091-CV, 2003 WL 21705248, at *4–5 (Tex. App.—Austin July 24, 2003, no pet.)

(allowing material supplier to sue on payment bond and under the Trust Fund Act); *U.S. Fire Ins. Co. v. Rey-Bach, Inc.*, No. 3:02-CV-2133K, 2004 WL 1836314, at *3 (N.D. Tex. Aug. 16, 2004) (allowing bond surety the right to subrogation to sue prime contractor for trust-fund violations where the surety paid unpaid laborers and materialmen on a payment bond).

Third, the Trust Fund Act provides an affirmative defense when the trust funds not paid to a laborer or materialman were used to pay the trustee's "actual expenses directly related to the construction or repair of the improvement." TEX. PROP. CODE § 162.031(b). Such expenses include payments to subcontractors for costs actually and directly tied to the improvement. *See Taylor Pipeline Constr., Inc. v. Directional Road Boring, Inc.*, 438 F.Supp.2d 696, 716 (E.D. Tex. 2006) (citing *Holladay v. CW&A, Inc.*, 60 S.W.3d 243, 248 (Tex. App.—Corpus Christi 2001, pet. denied); Op. Tex. Att'y Gen. No. JM-945 (1988)). Thus, as long as a prime contractor pays its subcontractor for the labor or materials supplied, and does not otherwise misapply trust funds, the prime contractor is — to the extent funds were paid to the subcontractor — protected under the Trust Fund Act from a later claim by the subcontractor's laborers or materialmen for unpaid labor or supplies. Accordingly, the risk of double liability for a prime contractor who pays subcontractors once the McGregor Act notice period has expired is significantly diminished.

Finally, Scoggins' concern that the availability of non-McGregor Act claims will hinder the timely payment of laborers and materialmen on public-work contracts raises a policy concern that is within the Legislature's realm to decide; that the Legislature has not chosen to make the McGregor Act remedy exclusive, despite its obvious ability to do so, is the best indication of its policy. *See, e.g.*, *Tex. Dep't of Transp. v. Jones Bros. Dirt & Paving Contractors*, 92 S.W.3d 477, 484 (Tex. 2002) (citing TEX. TRANSP. CODE § 201.112 (providing exclusive remedy for contract claims against the Texas Department of Transportation)).

C. The Joint Check Agreement

Although the parties disagree as to the effect of the Joint Check Agreement, one fact is uncontested: the Joint Check Agreement was a binding contract between SCC, Diamond, and Dealers. If the McGregor Act was meant to be exclusive, Dealers' common-law breach of contract claim would be preempted. But abrogation of common-law rights is disfavored, and absent clear legislative intent we have declined to construe statutes to deprive citizens of common-law rights. *See Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000). Nothing in the McGregor Act indicates that the Legislature intended to preclude public-work laborers or materialmen from enforcing their contractual rights under the common law. To the contrary, allowing unpaid laborers and materialmen to vindicate their contractual rights furthers the legislative goal of protecting public-work laborers and materialmen whose valid claims cannot be enforced by procuring a lien upon the property. *City of Laporte*, 836 S.W.2d at 831–32. Because allowing Dealers to recover for SCC's breach of the Joint Check Agreement furthers, rather than frustrates, the McGregor Act's purpose, we hold that the Act does not preempt Dealers' contractual rights.

According to Dealers, the Joint Check Agreement was an unconditional guarantee by SCC to pay for any materials Dealers provided to Diamond. We disagree. In relevant part, the agreement provides that "[SCC] agrees to make all payments for all materials . . . furnished by [Dealers] . . . by check made jointly payable to [Diamond] and [Dealers]." The agreement's unambiguous language guarantees only that SCC will make payment by joint check. Thus, SCC complied with the agreement to the extent checks were made jointly payable to Diamond and Dealers, and the trial court erred by expanding the agreement's scope. SCC has challenged the sufficiency of Dealers' evidence to support a breach of the joint-payment provision, and we remand the issue to the court of appeals for consideration along with the remaining points.

III. Conclusion

While Texas cases and the statute itself support a conclusion that the McGregor Act provides a laborer or materialman's mandatory and exclusive remedy against a surety and obligor on a public-work payment bond, that exclusivity does not extend beyond suit against the bond itself. Accordingly, we reverse the court of appeals' judgment and remand the case to the court of appeals to consider the parties' remaining arguments that were not addressed.

_____

Harriet O'Neill
Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0363

STATE OFFICE OF RISK MANAGEMENT, PETITIONER,

v.

MARY LAWTON, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

Argued March 11, 2009

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

In an effort to streamline workers' compensation claim processing, the Legislature established time limits applicable to compensability disputes. *See* Act of Dec. 11, 1989, 71st Leg., 2nd C.S., ch. 1, § 5.21(a), 1989 Tex. Gen. Laws 1, 51. These limits furthered "the legislative goal of providing employees with either prompt payment or notice of denial of benefits." *Cont'l Cas. Co. v. Downs*, 81 S.W.3d 803, 806 (Tex. 2002), *overruled on other grounds by Sw. Bell Tel. Co. v. Mitchell*, 276 S.W.3d 443, 448 (Tex. 2008). Today we must decide whether the sixty-day period for challenging compensability of an injury also applies to a dispute over the extent of injury, if the basis for that dispute could have been discovered by a reasonable investigation within the waiver period. We hold it does not and therefore reverse the court of appeals' judgment.

I
Factual and Procedural Background

On July 5, 2005, Mary Lawton, a Texas Department of Criminal Justice employee, hit her left knee on a steel monitor while at work. A physician diagnosed her with a left knee contusion and strain. The State Office of Risk Management (SORM), which is responsible for administering the state employees workers' compensation insurance program,[1] received written notice of the injury the next day and commenced paying benefits. On July 25, 2005, Lawton underwent an MRI, and the reviewing physician diagnosed severe chondromalacia, an irritation of the cartilage on the undersurface of the patella. In October, Lawton saw an orthopedic surgeon, who recommended surgery. SORM ordered a peer review of this recommendation. On November 29, 2005, the peer review physician reported that the medical conditions for which surgery was sought "[were] related to [Lawton's] known degenerative changes of the knee and [were] not the result of the contusion she realized from her reported compensable injury." He concluded that "[the] proposed surgery would not be reasonable or necessary as related to the left knee contusion." Eight days later, SORM disputed the extent of Lawton's compensable injury and refused to pay benefits for any pre-existing degenerative joint disease.

Following a contested case hearing, the hearing officer concluded that SORM waived the right to contest responsibility for the degenerative joint disease because SORM waited too long after it received notice of Lawton's knee contusion to dispute the extent of injury. The officer found that

[1] SORM administers "insurance services obtained by state agencies, including the government employees workers' compensation insurance program . . .." TEX. LAB. CODE § 412.011(a). SORM is treated as an "insurer" for purposes of applying chapter 409 of the Labor Code. *Id*. § 501.002(c).

SORM could have discovered the extent of Lawton's claimed injury if it had conducted a reasonable investigation within the sixty-day time period established by Texas Labor Code section 409.021(c), and SORM's failure to dispute the claim within that deadline waived its right to do so. An appeals panel affirmed the officer's decision, and SORM sought judicial review. On competing motions for summary judgment, the trial court affirmed the decision and awarded Lawton attorney's fees. *See* TEX. LAB. CODE § 408.221(c). A divided court of appeals affirmed. 256 S.W.3d 436, 441. We granted SORM's petition for review, 52 Tex. Sup. Ct. J. 333 (Feb. 13, 2009), and now reverse.

II
Discussion

This appeal concerns the interpretation of both a statutory provision and an administrative rule. Texas Labor Code subsection 409.021(c) provides, in pertinent part:

> If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability.

TEX. LAB. CODE § 409.021(c).

The administrative rule states:

> Texas Labor Code, § 409.021 and subsection (a) of this section do not apply to disputes of extent of injury. If a carrier receives a medical bill that involves treatment(s) or service(s) that the carrier believes is not related to the compensable injury, the carrier shall file a notice of dispute of extent of injury (notice of dispute). The notice of dispute shall be filed . . . not later than the earlier of:
>
> (1) the date the carrier denied the medical bill; or
>
> (2) the due date for the carrier to pay or deny the medical bill as provided in Chapter 133 of this title (relating to General Medical Provisions).

28 TEX. ADMIN. CODE § 124.3(e) ("Rule 124.3(e)").

The court of appeals reviewed both of these provisions and determined that SORM's contest did not pertain to compensability: "SORM's dispute is not a denial of Lawton's entitlement to benefits in general or a dispute as to the overall injury, . . . [rather the] complaint falls within the scope of an extent of injury dispute." 256 S.W.3d at 440. We agree.

The court then examined a Texas Workers' Compensation Commission[2] appeals panel decision that stated:

> [T]he injury that becomes compensable by virtue of waiver is not necessarily limited by the information listed on the first written notice of injury. Rather the nature of the injury will be defined by that information that could have been reasonably discovered in the carrier's investigation prior to the expiration of the waiver period.

Appeals Panel No. 041738-s, 2004 WL 2347601, at *2 (Tex. Workers' Comp. Comm'n Sept. 8, 2004), *cited in* 256 S.W.3d at 440-41. The court noted that SORM received the MRI report within the initial sixty-day period, and the "report put SORM on notice that Lawton was seeking benefits for something more than a contusion and placed SORM in a position to dispute the extent of Lawton's injury." 256 S.W.3d at 441. Accordingly, the court concluded that SORM waived its right to contest the extent of Lawton's injury because SORM's first challenge to extent was presented outside the initial sixty-day period. *Id.* SORM argues that this holding "is unsupported by the text of Section 409.021, and conflicts with Rule 124.3(e) and the [Division]'s intent in adopting the rule." We agree.

Section 409.021(c)'s sixty-day deadline applies only to compensability. Rule 124.3(e), which has the force and effect of a statute and must be construed accordingly,[3] provides that section 409.021

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[2] The Commission is now known as the Division of Workers' Compensation, a division of the Texas Department of Insurance. *See* Act of May 29, 2005, 79th Leg., R.S., ch. 265, § 1.003, 2005 Tex. Gen. Laws 469, 470.

[3] *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999).

does not apply to disputes regarding extent of injury, and the rule sets deadlines for disputing those types of claims. 28 TEX. ADMIN. CODE § 124.3(e). This is consistent with the Division's "reasoned justification" for the Rule as reflected in the Texas Register. *See Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999) (noting that "our primary objective is to give effect to the [Division's] intent," and "[o]ur best source of the [Division's] intent is the Texas Register"). In relation to Rule 124.3, the Texas Register provides:

> Texas Labor Code, § 409.021, is intended to apply to the compensability of the injury itself or the carrier's liability for the claim as a whole, not individual aspects of the claim. When a carrier disputes the extent of an injury, it is not denying the compensability of the claim as a whole, it is disputing an aspect of the claim. . . . [A] dispute involving extent of injury is a dispute over the amount or type of benefits, specifically, medical benefits, to which the employee is entitled (i.e. what body areas/systems, injuries, conditions, or symptoms for which the employee is entitled to treatment); it is not a denial of the employee's entitlement to benefits in general.

25 Tex. Reg. 2096, 2097 (2000) (noting that, as required by statute, "the [Division]'s reasoned justification for this rule is set out in this order"). The Texas Register also notes that "[t]he timeframes for a denial of a claim in its entirety such as those addressed in subsection (a) are statutorily driven by Texas Labor Code, § 409.021 and are tied to notice of the injury. Extent of injury disputes are not so governed." *Id.* at 2100. Nowhere in the text of the rule, the statute, or the Texas Register is there a suggestion that a carrier waives the right to challenge the extent of an injury if the extent of that claim was reasonably discoverable within the period for determining compensability.

Moreover, implying such a requirement would eliminate the distinction between compensability and extent: a dispute about any injury reasonably discoverable within sixty days of

the initial notice would be governed by the deadlines for compensability, while information obtained outside that time frame would fall under the deadlines for disputing extent. Not only does this contravene the statute and the rule, it would create an unworkable situation. A carrier who received medical information within the sixty-day period—even on the fifty-ninth day—would have to determine immediately whether to contest the injury's extent (or its discoverability)[4] or waive its right to do so. This would lead to an investigation of all conditions that may be "reasonably discoverable," resulting in increased costs and premature or unnecessary disputes (as a worker may never seek benefits for those conditions). Although the sixty-day period governs only compensability, not extent, the Legislature and the Division have ensured that workers enjoy certain protections during extent-related disputes including, in certain cases, expedited proceedings, benefits during appeal, interlocutory orders requiring medical and income benefits, and examinations by designated doctors. *See* TEX. LAB. CODE §§ 408.0041(a)(3), 410.025(d), 410.169, 413.055(a); 28 TEX. ADMIN. CODE §§ 126.7(a), (c)(3), 133.306(b).

Here, SORM agreed that Lawton's injury was compensable. When it later disputed the extent of that injury, it was governed by the deadline applicable to such disputes, not the sixty-day deadline governing compensability. A carrier has up to forty-five days from the date it receives a complete medical bill to dispute whether that treatment was necessary. *See* 28 TEX. ADMIN. CODE §§ 124.3(e); 133.240(a). That is the time frame applicable here. "[T]he [Division] could have easily formulated

[4] Amicus curiae Office of Injured Employee Counsel cites two appeals panel decisions holding that injuries not diagnosed until the fifty-eighth and fifty-seventh days, respectively, of the sixty-day period were not discoverable by reasonable investigation during that period. *See* Appeals Panel No. 070181, 2007 WL 1034970, at *2 (Tex. Workers' Comp. Comm'n Mar. 19, 2007); Appeals Panel No. 062601-s, 2007 WL 747440, at *3-*4 (Tex. Workers' Comp. Comm'n Feb. 21, 2007);.

exceptions in the language of a general rule." *Rodriguez*, 997 S.W.2d at 255. Because the Division has not done so, the court of appeals' reliance on an appeals panel decision to the contrary was improper. *Id.* at 254-55 (holding that, while courts "defer to the [Division's] interpretation of its own regulation," they cannot do so if that interpretation is "'plainly erroneous or inconsistent with the regulation'" (quoting *Public Util. Comm'n of Tex. v. Gulf States Util. Co.*, 809 S.W.2d 201, 207 (Tex. 1991))). To the extent some cases have held differently, we disapprove of them. *See, e.g., Fed. Ins. Co. v. Ruiz*, 281 S.W.3d 177, 183-84 (Tex. App.—Dallas 2009, no pet.); *Sanders v. Am. Prot. Ins. Co.*, 260 S.W.3d 682, 685 (Tex. App.—Dallas 2008, no pet.).

Accordingly, we reverse the court of appeals' judgment, render judgment that SORM did not waive the right to contest the extent of Lawton's knee injury by not disputing the extent of that injury within the initial sixty-day period, and remand this case to the trial court for further proceedings consistent with this opinion. TEX. R. APP. P. 60.2(c),(d).

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Wallace B. Jefferson
Chief Justice

Opinion Delivered: August 28, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0379

IN THE INTEREST OF J.O.A., T.J.A.M., T.J.M., AND C.T.M., CHILDREN, PETITIONERS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

Argued October 14, 2008

JUSTICE MEDINA delivered the opinion of the Court.

JUSTICE WILLETT filed a concurring opinion.

The Texas Family Code requires that a statement of points on which a party intends to appeal be presented to the trial court within fifteen days after the signing of a final order terminating parental rights. TEX. FAM. CODE § 263.405(b). The Code further provides that an appellate court is to consider only those issues presented to the trial court in a timely filed statement of points. *Id.* § 263.405(i). The issue in this parental rights termination case is whether the failure to follow these procedural rules in the Family Code precludes appellate review of an ineffective assistance of counsel claim.

Here, the indigent parents did not file a statement of points, but the court of appeals nevertheless reached the merits of the parents' ineffective assistance of counsel claim. 262 S.W.3d

7. We conclude, like the court of appeals, that an ineffective assistance of counsel claim can be raised on appeal despite the failure to include it in a statement of points. We also agree with the court of appeals that section 263.405(i) is unconstitutional as applied when it precludes a parent from raising a meritorious complaint about the insufficiency of the evidence supporting the termination order.

The court of appeals reversed the parental termination order in part, concluding that the evidence was both legally and factually insufficient to terminate the parental rights of the father in this case, and remanded the case to the trial court for further proceedings on the issue of custody. Although we disagree that the evidence was legally insufficient to support the termination of the father's parental rights, we agree that the cause must be remanded and accordingly modify the court of appeals' judgment to remand the cause for a new trial on the issue of the father's parental rights.

I

This case concerns the parental rights of Timothy and Trena M. The parents have three children: T.J.A.M., born in 1996, and twins, T.J.M. and C.T.M., born in 2005.[1] At the time of the twins' premature birth, Trena and the twins tested positive for cocaine. Trena also tested positive for barbiturates. Timothy and Trena have separated several times, including during some of the pregnancy, but reconciled before the twins' birth.

[1] When this case began, the parental rights to a fourth child, J.O.A., were at issue. J.O.A. is Trena's child from a previous relationship and has lived with his maternal grandmother since the age of four. The trial court did not terminate Trena's parental rights to J.O.A. but appointed the child's maternal grandmother permanent managing conservator. J.O.A., who was born in 1989, is now an adult.

Learning of Trena's drug use, the Department of Family and Protective Services ("Department") intervened, removing the twins from their parents' custody and placing them with foster parents. The older child, T.J.A.M., was placed with her maternal grandmother where she had lived while Trena was previously incarcerated. The trial court appointed the Department temporary sole managing conservator of the children, and the Department implemented a Family Service Plan to improve Timothy's and Trena's parenting skills and reunify the family.

The plan, however, failed, and the case proceeded to a bench trial that resulted in the involuntary termination of the parents' parental rights to the twins, and the appointment of the Department as managing conservator. The trial court did not terminate parental rights to the couple's oldest child, T.J.A.M, but appointed Trena's mother as managing conservator. The trial court's final order was signed February 16, 2007.

Five days later, on February 21st, Trena's trial counsel filed a notice of appeal and a motion to withdraw. Timothy's trial counsel did the same on February 22nd. Although the trial court never ruled on the motions to withdraw, it did subsequently appoint appellate counsel for Timothy and Trena but too late for either to meet the Family Code's fifteen-day deadline for filing a statement of points. TEX. FAM. CODE § 263.405(b).

Even though they had not filed a statement of points, the parents appealed the trial court's termination and custody order, challenging the sufficiency of the evidence, the ineffectiveness of their trial counsel, and the constitutionality of section 263.405. The court of appeals concluded that Timothy's and Trena's trial counsel were both ineffective for failing to file a statement of points but that the failure ultimately deprived only Timothy of due process. 262 S.W.3d at 19-24. The court

accordingly affirmed the termination order as to Trena, but reversed as to Timothy, concluding that the evidence was legally and factually insufficient to support the termination of his parental rights to the twins. The court of appeals remanded the issue of Timothy's custody rights to the twins for further proceedings, affirming the remainder of the trial court's order. *Id*. at 24-25. Only the Department perfected an appeal to this Court.

II

The Family Code provides that in parental termination cases a statement of points, detailing what the party intends to appeal, must be filed with the trial court within fifteen days of the termination order.[2] This statement may be combined with a motion for new trial. TEX. FAM. CODE § 263.405(b). The trial court must hold a hearing within thirty days of the termination order to consider any motion for new trial or issue of indigence. *Id*. § 263.405(d). The Family Code bars an appellate court from considering any issue not presented to the trial court in a timely filed statement of points. *Id*. § 263.405(i).

The Department complains that the court of appeals should not have reviewed the termination order in this case because neither Timothy nor Trena filed a statement of points in the trial court as the Family Code requires. Despite this alleged error, the Department prevailed in the court of

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[2] Section 263.405(b) of the Family Code was amended in 2007, after the commencement of this parental termination proceeding. The amendment made no apparent substantive change to the statement of points requirement. The former provision, applicable here, provided:

> Not later than the 15th day after the date a final order is signed by the trial judge, a party intending to appeal the order must file with the trial court a statement of the point or points on which the party intends to appeal. The statement may be combined with a motion for new trial.

Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 9, 2001 Tex. Gen. Laws 2397 (amended 2007) (current version at TEX. FAM. CODE § 263.405(b)).

appeals as to Trena; the court affirmed termination of her parental rights to the twins, and she has not filed a petition for review. Thus, the court of appeals' judgment affirming the termination of Trena's parental rights is final, and only Timothy's parental rights to the twins remain at issue here.

The Department does not squarely address the constitutional concerns raised in the court of appeals. Instead, the Department submits that the right to appeal a termination order is a statutory right, not a constitutional one, and that the Legislature clearly has the power to restrict, limit, or even deny that right. The Department further submits that the procedural requirements of the statute here are clear and unambiguous, providing for no exceptions. The Department concedes, as it must,[3] that indigent parents are entitled to counsel but argues that counsel need not be competent because the procedural scheme makes no provision for incompetence. The argument ignores our holding in *In re M.S.* "that the statutory right to counsel in parental-rights termination cases embodies the right to effective counsel." 115 S.W.3d 534, 544 (Tex. 2003). In fact, the Department generally ignores our decision in this case altogether.

In *M.S.*, the indigent parent complained that her attorney failed to provide competent representation in violation of her due process rights. *Id.* at 543. Specifically, the parent argued, as in this case, that her attorney was ineffective for not following the appropriate procedure to preserve her complaint regarding the factual sufficiency of the evidence. *Id.* at 543-44, 546. After recognizing the indigent parent's right to competent counsel, we turned to the question of what

[3] Texas Family Code section 107.013(a)(1) guarantees indigent persons a right to counsel in government initiated parental rights termination cases.

constitutes ineffective assistance. In answering that question, we followed the two-pronged analysis of the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

In re M.S., 115 S.W.3d. at 545. Thus, an ineffective assistance of counsel claim requires a showing of a deficient performance by counsel so serious as to deny the defendant a fair and reliable trial.

We further concluded in *M.S.* that due process considerations should control our review of a rule governing preservation of a factual sufficiency complaint in parental rights termination cases. *Id.* at 547. Although we recognized that a right of appeal might not be constitutionally required, once granted, the right could not be unreasonably withdrawn. *Id*. (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996) ("once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts")). And, because error preservation in the trial court is the "threshold to appellate review," we concluded that it should be reviewed under the procedural due process analysis established by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *In re M.S.*, 115 S.W.3d at 547.

Under the *Eldridge* analysis, a court must "weigh three factors – the private interests at stake, the government's interest in the proceeding, and the risk of erroneous deprivation of parental rights – and balance the net result against the presumption that our procedural rule comports with constitutional due process requirements." *Id*. (footnote omitted). When weighing these factors in

M.S., we concluded that "the parent's fundamental liberty interest in maintaining custody and control of his or her child, the risk of permanent loss of the parent-child relationship, and the parent's and child's interest in a just and accurate decision" weighed heavily in favor of permitting appellate review of the sufficiency of the evidence despite counsel's unjustifiable failure to preserve error. *Id.* at 548. We likewise noted the State's fundamental interest in protecting the child's best interests, interests that are not antagonistic to those aforementioned. *Id.* We also noted the associated interests of the State and the child in an efficient and speedy resolution of the matter so as not to compound harm to the child through inaction or delay, but concluded that the State's interests in economy and efficiency paled in comparison to the private interests at stake. *Id*.

We concluded that the State, the parent, and the child shared an interest in an expeditious and final decision but that the State's interest in protecting the child's welfare must begin "by working toward *preserving* the familial bond, rather than severing it." *Id*. (citing *Santosky v. Kramer*, 455 U.S. 745, 766-67 (1982)). We said that "[o]nce it is clear that the parent cannot or will not provide a safe, stable family environment, then the State's interest in protecting the welfare of the child shifts to establishing that safe, stable, and permanent environment for the child elsewhere." *In re M.S.*, 115 S.W.3d at 548-49 (citing *Santosky*, 455 U.S. at 767). Thus, we concluded that the State's goal of ensuring the child's safety and stability was served by procedures promoting an accurate determination of whether the natural parent could provide a normal home and disserved by procedures that did not. *In re M.S.*, 115 S.W.3d at 549.

Finally, we concluded that the fundamental liberty interests at issue were too dear and the risk of erroneous deprivation too significant to countenance the waiver of a parent's appellate rights

through procedural neglect under these circumstances. Instead, we held that "if counsel's failure to preserve a factual sufficiency complaint is unjustified, then counsel's incompetency in failing to preserve the complaint raises the risk of erroneous deprivation too high, and our procedural rule governing factual sufficiency preservation must give way to constitutional due process considerations." *Id*. Although the procedural preservation rule at issue in *M.S.* was a civil court-made rule requiring a motion for new trial as a predicate for appellate review of a factual sufficiency issue, and the procedural rule here is a statute to the same effect, the due process clause applies equally to both situations. U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 19.

We cautioned in *M.S.*, however, that not every failure to preserve factual sufficiency issues would rise to the level of ineffective assistance. *In re M.S.*, 115 S.W.3d at 549. The presumption is that "'counsel's conduct falls within the wide range of reasonable professional assistance,' including the possibility that counsel's decision not to challenge factual sufficiency was based on strategy, or even because counsel, in his professional opinion, believed the evidence factually sufficient such that a motion for new trial was not warranted." *Id.* (quoting *Strickland*, 466 U.S. at 689). The parent's burden is to show that "'counsel's performance fell below an objective standard of reasonableness.'" *In re M.S.*, 115 S.W.3d at 549 (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)); *Thompson v. State*, 9 S.W.3d 808, 812-13 (Tex. Crim. App. 1999). We agree with the court of appeals that Timothy met that burden here.

The failure of Timothy's trial counsel to file a statement of points on his behalf was neither strategic nor a concession to any lack of perceived merit. His trial counsel filed a notice of appeal, but did so simultaneously with his motion to withdraw and did nothing further. There the matter

rested until the trial court appointed appellate counsel some days after the statement was due. Timothy was still represented by his trial counsel when the fifteen-day deadline to file the statement of points passed. TEX. R. CIV. P. 10. Trial counsel's failure to follow through with his representation until relieved of that duty was tantamount to abandoning his client at a critical stage of the proceeding. *See Rogers v. Clinton*, 794 S.W.2d 9, 10 n.1 (Tex. 1990) (stating attorney must satisfy the requirements of Rule 10 of the Texas Rules of Civil Procedure to withdraw). We accordingly agree with the court of appeals that Timothy was entitled to effective assistance of counsel through the deadline date for filing a statement of points and that trial counsel's performance during this period was seriously deficient.

Part of the problem here may be resolved by better communication between trial court and counsel. Often in these cases, there is a transition from trial to appellate counsel after rendition. Because of the accelerated appellate timetable and the critical fifteen-day deadline for the statement of points, and because trial and appellate counsel are often different people, there can be misunderstandings as to which attorney is responsible for filing a motion for new trial, a statement of points on appeal, and a notice of appeal.

Given the accelerated timetable, the burden should logically fall on trial counsel, and in this case necessarily so because Timothy's appellate counsel was not appointed until after the fifteen-day period had run. *See, e.g., In re H.R.*, 87 S.W.3d 691, 703 (Tex. App.—San Antonio 2002, no pet.) (concluding that practical effect of accelerated appellate timetable is to burden trial counsel with responsibility of preserving client's appellate rights). As one court of appeals has noted, the fifteen-day deadline is a trap for the unwary. *In re R.J.S.*, 219 S.W.3d 623, 627 (Tex. App.—Dallas 2007,

pet. denied). That court of appeals has further suggested that trial courts should alert parents to the requirements of section 263.405 at the end of the final order terminating parental rights. *Id*. We agree and suggest further that the best way to avoid ineffective assistance of counsel claims in the future is for the trial courts to take a proactive approach, assuring that indigent parents do not inadvertently waive their appellate rights under the Family Code. Because of the accelerated nature of these cases, trial courts must act expeditiously when appointing new counsel for the appeal.

III

An ineffective assistance of counsel claim, however, requires more than merely showing that appointed counsel was ineffective. There are two elements to the *Strickland* standard, and, under the second, the defendant must show that counsel's "deficient performance prejudiced the defense . . . that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The court of appeals concluded that the second element had been met in this case because, but for counsel's unprofessional error, the result of the proceeding would have been different; specifically, had counsel properly preserved error by filing the statement of points, the court of appeals would have reversed the termination order because the evidence was insufficient to support the relevant grounds for termination of Timothy's parental rights. 262 S.W.3d at 19, 24.

Proceedings to terminate parental rights under the Family Code require proof by clear and convincing evidence. TEX. FAM. CODE § 161.001(1). Clear and convincing evidence is "proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the

allegations sought to be established." *Id.* § 101.007*; In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). When the legal sufficiency of the evidence is challenged:

> [A] court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. This does not mean that a court must disregard *all* evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence. If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient.

In re J.F.C., 96 S.W.3d at 266.

When the factual sufficiency of the evidence is challenged, only then is disputed or conflicting evidence under review. As we said in *J.F.C.*: "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *Id*. The court of appeals should further explain in its opinion "why it has concluded that a reasonable factfinder could not have credited disputed evidence in favor of the finding." *Id*. at 267.

The court of appeals here found the evidence to be both legally and factually insufficient to support the trial court's grounds for terminating Timothy's parental rights. Those grounds included the trial court's determination that Timothy had (1) knowingly placed or knowingly allowed the

children to remain in conditions or surroundings which endanger the physical or emotional well-being of the children; and (2) engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the children. TEX. FAM. CODE § 161.001(1)(D), (E). The court of appeals concluded that there was no evidence to support the first ground because the twins had been removed from Timothy at birth. 262 S.W.3d at 24. The twins had therefore always been in "'conditions or surroundings' dictated by the Department, not Timothy." *Id*.

As to the second ground, the court concluded that while there was evidence calling Timothy's parenting skills into question recent improvements in Timothy's parenting skills, life choices, and living situation prevented a reasonable factfinder from forming a firm belief or conviction that Timothy engaged in conduct exposing the twins to loss or injury or to emotional or physical jeopardy. *See id.* ("insufficient evidence of Timothy's continued drug use, subsequent incarceration, or other anti-social behavior" prevented firm conviction of endangerment). The court noted, however, that a child need not suffer actual injury to have been endangered and that a parent's drug use and its effects might establish an endangering course of conduct. *Id.*

We have previously said that endangering conduct is not limited to actions directed towards the child. *Tex. Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 533 (Tex. 1987). It necessarily follows that the endangering conduct may include the parent's actions before the child's birth, while the parent had custody of older children, including evidence of drug usage. *See id.* (stating that although endanger means more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment, it is not necessary that the parent's conduct be directed at the

child or that the child actually suffers injury); *see also In re M.N.G.*, 147 S.W.3d 521, 536 (Tex. App.—Fort Worth 2004, pet. denied) (holding that courts may look to parental conduct both before and after child's birth to determine whether termination is appropriate). We accordingly agree that a parent's use of narcotics and its effect on his or her ability to parent may qualify as an endangering course of conduct.[4]

Timothy admitted to daily marijuana use before the twins were born, although he testified that he never used drugs in his older daughter's presence. Timothy and Trena also had a history of domestic violence. Timothy's mother testified that there had been two or three incidents of domestic violence. Trena's drug use was the cause of many of the problems in the marriage. Timothy testified about forcing Trena to leave their home "quite a few times" because of her drug use. On the majority of these occasions, he permitted Trena to leave with their daughter although he presumably knew this was not in their daughter's best interests.

After the removal of the children, Timothy was allowed supervised visitation and was given a copy of his service plan. Part of the service plan required Timothy to submit to drug tests, two of which he missed. A few months after the twins were removed, Timothy was incarcerated on domestic violence charges, filed by Trena in 2004, which she later recanted. Upon his release from jail, Timothy was advised to attend parenting classes and take a drug screening test. He did not

[4] *In re S.N.*, 272 S.W.3d 45, 52 (Tex. App.—Waco 2008, no pet.) ("Evidence of illegal drug use or alcohol abuse by a parent is often cited as conduct which will support an affirmative finding that the parent has engaged in a course of conduct which has the effect of endangering the child."); *Toliver v. Tex. Dep't of Family and Protective Servs.*, 217 S.W.3d 85, 98 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("Evidence of narcotics use and its effect on a parent's life and her ability to parent may establish that the parent has engaged in an 'endangering course of conduct.'"); *In re R.W.*, 129 S.W.3d 732, 739 (Tex. App.—Fort Worth 2004, pet. denied) ("As a general rule, conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of a child. Drug use and its effect on a parent's life and his ability to parent may establish an endangering course of conduct.") (citation omitted).

complete the drug screen and subsequently moved to California where he attended a substance abuse program and parenting classes. After returning to Texas, Timothy obtained steady employment, improved housing, and reliable transportation for his children. He also attended parenting classes, exercised regular visitation, and passed three successive drug tests. However, Timothy testified that he tested positive for marijuana shortly before the final hearing commenced in this case. He also remained delinquent in his child support.

Focusing on Timothy's positive improvement as a parent, the court of appeals concluded that the evidence was both "legally and factually insufficient to support the predicate finding of conduct endangering the children." 262 S.W.3d at 24. We disagree regarding the legal sufficiency of the evidence. While the recent improvements made by Timothy are significant, evidence of improved conduct, especially of short-duration, does not conclusively negate the probative value of a long history of drug use and irresponsible choices. Viewing all the evidence in the light most favorable to the trial court's judgment and recognizing that the factfinder, not the appellate court, is the sole arbiter of the witnesses' credibility and demeanor, we conclude that there was some evidence of endangerment on which a reasonable factfinder could have formed a firm belief or conviction of endangerment. TEX. FAM. CODE § 161.001(1)(E); *In re J.F.C.*, 96 S.W.3d at 266.

The court of appeals' analysis here instead suggests a comparison of Timothy's conduct over time, attributing greater weight to his recent improvements and less to his past challenges. While we do not question the court's logic, we do reject its use here as part of the legal sufficiency review. *See In re L.M.I.*, 119 S.W.3d 707, 712 (Tex. 2003) ("Even under the standard we articulated in *In re J.F.C.,* this reweighing of the evidence is improper."). Weighing conflicting evidence and

inferences to determine whether a verdict should be vacated as manifestly unjust is appropriately a part only of the reviewing court's factual sufficiency review, a matter committed under the Texas Constitution to the courts of appeals and not to this Court. TEX. CONST. art. V, § 6.

* * *

In sum, we agree that Timothy's ineffective assistance of counsel claim raises due process concerns and that section 263.405(i) of the Family Code is unconstitutional to the extent it prevents a court from considering those claims. We do not agree with the court of appeals, however, that there was no clear and convincing evidence to support termination of Timothy's parental rights on the ground of endangerment. But even though the court of appeals found no evidence to support this ground, it nevertheless remanded the cause to the trial court for further proceedings on the issue of custody. Because a remand is also the appropriate judgment when evidence is found to have been factually insufficient, we modify the court's judgment to remand the cause to the trial court for a new trial on the issue of Timothy's parental rights.

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David M. Medina
Justice

OPINION ISSUED: May 1, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0379

IN THE INTEREST OF J.O.A., T.J.A.M., T.J.M. AND C.T.M., CHILDREN, PETITIONERS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

Argued October 14, 2008

JUSTICE WILLETT, concurring.

I join the Court's opinion but write separately to stress steps that trial courts can take to thwart the sort of procedural gamesmanship that worries the Texas Department of Family and Protective Services (DFPS). To recap, DFPS fears that any deviation from the hard-and-fast rule that arguments not found in the statement of points are waived will entice counsel to deliberately disregard error-preservation requirements in order to seize tactical advantage. That is, calculating counsel might believe it's effective assistance to argue ineffective assistance, deliberately failing to file the required statement of points in order to strengthen their clients' positions on appeal. This is obviously a high-risk contrivance, for clients and counsel alike: (1) risky for clients because the appellate court may balk and instead impute counsel's failures to the parent, whose appellate rights are then waived; (2) risky for counsel because they may jeopardize their professional reputations, future court appointments, and/or face malpractice claims or disciplinary actions.

I agree with the Solicitor General of Texas, who in an amicus curiae brief filed at the Court's invitation, states: "[O]bjectively unreasonable failures by counsel to preserve a client's appellate rights warrant opprobrium when the failures are inadvertent—and even more so when the failures are deliberate." While the risk of such manipulation may be low, it's worth guarding against, and trial courts can curb such opportunism any number of ways, including:

- Being more proactive in the post-judgment process.
  Trial courts, after issuing an order terminating parental rights, can also issue unambiguous instructions that set forth the steps parents and attorneys must take to preserve their appellate rights and the attendant risks if they fail to do so.

- Specifically reminding trial counsel that while the trial may have ended, their duties have not.
  Failing to adequately preserve appellate rights by timely filing a statement of points could constitute a breach of fiduciary duty to the client that spawns both malpractice claims and disciplinary actions.

- Referring such cases to appropriate disciplinary authorities.
  If suspicious of subterfuge or incompetence, trial courts should make clear that such actions will trigger unpleasant consequences.

I trust that if trial courts are vigilant, making clear that intentional evasion of appellate requirements will not be tolerated, much less rewarded, such gamesmanship will be rare. Better still, this: "Suddenly, as rare things will, it vanished."[1]

Don R. Willett
Justice

OPINION DELIVERED: May 1, 2009

[1] Robert Browning, *One Word More*, st. 4 (1855).

IN THE SUPREME COURT OF TEXAS

NO. 08-0390

MBM FINANCIAL CORPORATION, ET AL., PETITIONERS,

v.

THE WOODLANDS OPERATING COMPANY, L.P., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued March 12, 2009

JUSTICE BRISTER delivered the opinion of the Court.

JUSTICE O'NEILL did not participate in the decision.

Since *Jarndyce v. Jarndyce*,[1] there have been charges that some cases benefit the lawyers more than the clients. But suits cannot be maintained solely for the attorney's fees; a client must gain something before attorney's fees can be awarded. While making losing parties bear their own attorney's fees may add injury to insult, the American Rule has long been that each party pays its own lawyers.

In this case, the plaintiff obtained a judgment for $1,000 in damages and almost $150,000 in attorney's fees. But there was no evidence to support the amount of the $1,000 award, and it is

[1] CHARLES DICKENS, BLEAK HOUSE (1853).

too large to constitute nominal damages. As the award to the client must be set aside, the attorney's fee award must also. Accordingly, we reverse and render a take-nothing judgment.

I. Background

The Woodlands Operating Company leased the 19 copiers at issue here from MBM Financial Corporation[2] and installed them in late 2000 and early 2001. Each machine was covered by a separate four-year lease, with annual renewals thereafter unless notice was sent between 90 and 180 days before the end of the existing term. The leases required the Woodlands to return the copiers to a location MBM specified.

The Woodlands decided not to renew the leases in mid-2004 and asked MBM for the end-of-term dates and instructions for return. MBM employees provided the dates and approved a draft termination letter from the Woodlands. But when the actual termination letter arrived (viewing the evidence in the light favorable to the trial court's judgment),[3] MBM's president unilaterally changed the dates so the notice would be untimely and demanded rent for another year. To bolster MBM's position, he signed the leases and inserted commencement dates for the first time after the Woodlands filed suit. Until suit was filed, MBM also refused to designate a return location for the bulky equipment.

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[2] The equipment was leased from MBM Financial Corporation, now known as MBM Financial Interest L.P., and serviced by Marimon Business Systems, Inc. The two companies were operated from the same location by the same employees, and Anthony Marimon was the chief operating officer of both. Because the parties and judgment treat the two corporations as the same, we refer to both herein as "MBM," the party listed as lessor.

[3] *See City of Keller v. Wilson*, 168 S.W.3d 802, 819-21 (Tex. 2005) (discussing jury verdicts). The same standard of review applies to a trial court's findings following a bench trial. *See Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).

The Woodlands sued, asserting claims for breach of contract, fraud, and declaratory relief. MBM counterclaimed for additional rent of $160,000, though it later dropped that claim. After a two-day bench trial, the trial court rendered judgment awarding the Woodlands $1,000 in damages and $145,091.59 in attorney's fees through trial. The court of appeals affirmed the damages and part of the fee award.[4] On appeal, MBM challenges both.

II. Nominal Damages & Breach of Contract

At trial, the Woodlands requested only nominal damages. The judgment describes the $1,000 award as "actual damages," but the trial court's findings and conclusions describe them as "actual damages in the form of nominal damages." We agree with MBM that no evidence supports $1,000 as either.

The only damages mentioned at trial related to wasted time the Woodlands spent trying to get MBM's cooperation. But there was no evidence about the value of that time—either the quantity or the cost of it. The Woodlands blamed this gap on the difficulty of tracking the lost time, but never explained why it could not have been estimated. If the difficulty of proof always discharged the burden of proof, many litigants would simply not bother.[5] While the Woodlands could have estimated the value of wasted time, it could not ask the trial court to pull a figure from thin air.

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[4] 251 S.W.3d 174, 184.

[5] *See, e.g.*, *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 937 (Tex. 1998) ("[T]hat proof of causation is difficult does not provide a plaintiff with an excuse to avoid introducing some evidence of causation." (quoting *Schaefer v. Tex. Employers' Ins. Ass'n*, 612 S.W.2d 199, 205 (Tex. 1980))).

Nevertheless, the Woodlands argues the award was justified as nominal damages. We agree nominal damages are available for breach of contract, as this Court has stated at least a dozen times.[6] As we wrote in 1853:

> The law is, that if the contract is proven to be broken, the law would give some damage, sufficient to authorize a verdict for the plaintiff, although, in the absence of proof of special loss, the damages would be nominal only.[7]

We are hardly alone in recognizing nominal damages for breach of contract; so do the First and Second Restatements,[8] Williston,[9] Corbin,[10] and Black's Law Dictionary.[11] While more generous

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[6] *See, e.g.*, *Lubbock Mfg. Co. v. Sames*, 598 S.W.2d 234, 237 (Tex. 1980); *Travelers Ins. Co. v. Employers Cas. Co.*, 380 S.W.2d 610, 614-15 (Tex. 1964); *Woodward v. Harlin*, 39 S.W.2d 8, 9 (Tex. 1931); *Malakoff Gin Co. v. Riddlesperger*, 192 S.W. 530, 532 (Tex. 1917); *Porter v. Kruegel*, 155 S.W. 174, 175 (Tex. 1913); *Raymond v. Yarrington*, 73 S.W. 800, 804 (Tex. 1903); *Davis v. Tex. & P. Ry.*, 44 S.W. 822, 823 (Tex. 1898); *Seibert v. Bergman*, 44 S.W. 63, 64 (Tex. 1898); *East Line & Red River R.R. v. Scott*, 10 S.W. 99, 102 (Tex. 1888); *Stuart v. W. Union Tel. Co.*, 18 S.W. 351, 352 (Tex. 1885); *Moore v. Anderson*, 30 Tex. 224, 231 (1867); *Hope v. Alley*, 9 Tex. 394, 395 (1853); *McGuire v. Osage Oil Corp.*, 55 S.W.2d 535, 537 (Tex. Comm'n App. 1932, holdings approved); *see also* Note, *Pleading—Necessity of Damage to Cause of Action*, 9 TEX. L. REV. 111, 112 (1930) (citing cases).

[7] *Hope*, 9 Tex. at 395.

[8] RESTATEMENT (SECOND) OF CONTRACTS § 346(2) (1981) ("If the breach caused no loss or if the amount of the loss is not proved under the rules stated in this Chapter, a small sum fixed without regard to the amount of loss will be awarded as nominal damages."); *accord* RESTATEMENT (FIRST) OF CONTRACTS § 328 (1932).

[9] *See* 24 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 64:6 (4th ed. 2002) ("An unexcused failure to perform a contract is a legal wrong. An action will therefore lie for the breach although it causes no injury. Nominal damages may then be awarded.").

[10] *See* 11 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 55.10 (rev. ed. 2005) ("[F]or every breach of contract, a cause of action exists. . . . If the aggrieved party has suffered no compensable damages, a judgment for nominal damages will be entered.").

[11] BLACK'S LAW DICTIONARY 418 (8th ed. 2004) (defining nominal damages as "[a] small amount fixed as damages for breach of contract without regard to the amount of harm").

damage measures make nominal damages rare, and some judges have questioned the reason behind them,[12] we agree that nominal damages may be recovered for breach of contract.

But $1,000 is not nominal damages. "[T]he usual meaning of the phrase 'nominal damages' refers to an award of one dollar."[13] Despite substantial changes over the centuries in what a dollar will buy, it remains the standard award in federal cases,[14] and in Texas cases as well.[15] A few cases have awarded nominal damages of $10 and even $100,[16] but nominal damages are supposed to be a "trifling sum,"[17] and $1,000 hardly falls in that category.[18]

It appears from the record that the trial court awarded $1,000 as rough compensation for the wasted time the Woodlands incurred. But nominal damages are not for compensation; they are for

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[12] *See Chronister Oil Co. v. Unocal Ref. & Mktg.* (*Union Oil Co. of Ca.*), 34 F.3d 462, 466 (7th Cir. 1994) (Posner, C.J.) (stating that "for reasons we do not understand every victim of a breach of contract, unlike a tort victim, is entitled" to nominal damages).

[13] *Harkins v. Crews*, 907 S.W.2d 51, 61 (Tex. App.—San Antonio 1995, writ denied); *accord ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248, 257 (Tex. App.—Dallas 1990, no writ) (stating that "nominal damages [are] traditionally the sum of one dollar or perhaps ten dollars"); *see also* PERILLO, *supra* note 10 ("The usual amount of nominal damages is six cents or one dollar . . . .").

[14] *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 783 (1998); *Farrar v. Hobby*, 506 U.S. 103, 107 (1992); *Carey v. Piphus*, 435 U.S. 247, 267 (1978).

[15] *See, e.g.*, *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 434 (Tex. 1970); *Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 584 (Tex. App.—Austin 2007, pet. denied); *State v. Miles*, 458 S.W.2d 943, 944 (Tex. Civ. App.—Waco 1970, writ ref'd n.r.e.); *Lucas v. Morrison*, 286 S.W.2d 190, 192 (Tex. Civ. App.—San Antonio 1956, no writ); *Caswell v. J.S. McCall & Sons*, 163 S.W. 1001, 1002 (Tex. Civ. App.—Austin 1913, no writ).

[16] *See, e.g.*, *Williams v. Kaufman County*, 352 F.3d 994, 1014-15 (5th Cir. 2003) (nominal damages of $100); *Malakoff Gin Co. v. Riddlesperger*, 192 S.W. 530, 532 (Tex. 1917) (nominal damages of $10); *see also* David Pearce & Roger Halson, *Damages for Breach of Contract: Compensation, Restitution and Vindication*, 28 OXFORD J. LEGAL STUD. 73, 76 n.25 (2008) (noting that English cases can be found awarding nominal damages of £1, £2, £5, £10, and £15).

[17] BLACK'S LAW DICTIONARY 418 (8th ed. 2004).

[18] *See, e.g.*, *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 146 (3rd Cir. 2000) (Alito, J.) (holding trial court properly reduced nominal damages award from $1,000 to $1).

cases in which there are no damages, or none that could ever be proved.[19] While a few older cases hold otherwise,[20] in recent decades the rule in Texas has been that nominal damages are not available when the harm is entirely economic and subject to proof (as opposed to non-economic harm to civil or property rights).[21] Thus, in *Gulf States Utilities Co. v. Low*, we rejected nominal damages because actual damages had been incurred, yet the plaintiff failed to prove the amount.[22] "While mathematical precision is not required to establish the extent or amount of one's damages, one must bring forward the best evidence of the damage of which the situation admits . . . ."[23] On this record, the $1,000 damage award to the Woodlands cannot be sustained as either actual or nominal damages.

While we normally remand for a new trial when there is some evidence to support an amount of actual damages,[24] in this case there was no evidence about the amount of damages at all. And

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[19] BLACK'S LAW DICTIONARY 418 (8th ed. 2004) (defining nominal damages as "[a] trifling sum awarded when a legal injury is suffered but when there is no substantial loss or injury to be compensated"); *see County of Dallas v. Wiland*, 216 S.W.3d 344, 356 (Tex. 2007) (noting that denial of procedural due process justified award of nominal damages when no harm resulted); *see also Malakoff Gin Co.*, 192 S.W. at 532; *Raymond v. Yarrington*, 73 S.W. 800, 804 (Tex. 1903); *McGuire v. Osage Oil Corp.*, 55 S.W.2d 535, 537 (Tex. Comm'n App. 1932, holdings approved); WILLISTON & LORD, *supra* note 9.

[20] *See State v. Jackson*, 388 S.W.2d 924, 926 (Tex. 1965); *Davis v. Tex. & P. Ry.*, 44 S.W. 822, 823 (Tex. 1898); *Moore v. Anderson*, 30 Tex. 224, 231 (1867); *Hope v. Alley*, 9 Tex. 394, 395 (1853).

[21] *See Gulf Coast Inv. Corp. v. Rothman*, 506 S.W.2d 856, 858 (Tex. 1974) (rejecting claim for nominal damages when evidence showed plaintiff suffered no economic damage); *see also Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 12 n.36 (Tex. 2008) (stating that nominal damages are available for mere trespass against possessory interest, but reversionary interest owner must prove actual economic damages); *Wiland*, 216 S.W.3d at 356-57 (stating that nominal damages are available for denial of procedural due process); *St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.*, 974 S.W.2d 51, 53 (Tex. 1998) (per curiam) (stating that nominal damages are available for loss of credit reputation).

[22] 79 S.W.3d 561, 567 (Tex. 2002).

[23] *Rothman*, 506 S.W.2d at 858.

[24] *See Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 314-15 (Tex. 2006).

"where the record shows as a matter of law that the plaintiff is entitled only to nominal damages, the appellate court will not reverse merely to enable him to recover such damages."[25] Accordingly, we must render judgment that the Woodlands take nothing as damages on its breach of contract claim.

III. Attorney's Fees: Breach of Contract

Chapter 38 of the Civil Practices and Remedies Code allows recovery of attorney's fees in breach of contract cases: "A person may recover reasonable attorney's fees . . . in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract."[26] To recover fees under this statute, a litigant must do two things: (1) prevail on a breach of contract claim, and (2) recover damages.[27] The second requirement is implied from the statute's language: for a fee recovery to be "in *addition* to the amount of a valid claim," the claimant must recover some amount on that claim.

While *some* damages are necessary to recover fees under this statute,[28] this Court has never said whether *nominal* damages are enough. But as the Woodlands can recover neither actual nor nominal damages, that question is not before us. Accordingly, the Woodlands' fee award cannot be affirmed based on Chapter 38.

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[25] *Travelers Ins. Co. v. Employers Cas. Co.*, 380 S.W.2d 610, 614-15 (Tex. 1964); *accord* WILLISTON & LORD, *supra* note 9 ("[A] judgment for the defendant will not be reversed merely to give the plaintiff nominal damages unless some substantial right of the plaintiff will thereby be protected.").

[26] TEX. CIV. PRAC. & REM. CODE § 38.001.

[27] *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 201 (Tex. 2004) (per curiam); *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex. 1995).

[28] *Mustang Pipeline Co.*, 134 S.W.3d at 201; *Green Int'l*, 951 S.W.2d at 390; *Beaston*, 907 S.W.2d at 437.

IV. Attorney's Fees: Fraud Arising From Breach of Contract

Alternatively, the Woodlands argues it is entitled to attorney's fees based on fraud arising from a breach of contract, pointing to this Court's reference to such an award in *Gill Savings Ass'n v. Chair King*.[29] But in *Gill* we merely reinstated bankruptcy and appellate fees; we did not address the court of appeals' award of fees for both contract and fraud on the basis that they were inextricably intertwined.[30] We explicitly rejected this intertwining exception in *Tony Gullo Motors I, L.P. v. Chapa* and reiterated that fees are not allowed for torts like fraud.[31] Thus, even if the Woodlands' fraud claim arose from a breach of contract, that is no basis for an attorney's fee award.

V. Attorney's Fees: Bad Faith & Vexatious Conduct

The Woodlands also argues it is entitled to attorney's fees because MBM "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." The rules of civil procedure allow fees as a sanction against a party who files pleadings in bad faith[32] or abuses the discovery process.[33] But the Woodlands filed no motion for sanctions pursuant to those rules. Its fee claim was not based on MBM's *litigation* conduct but on its *pre-litigation* conduct; such fees are recoverable only if a contract or statute so provides. As the Woodlands cannot recover fees based on contract or fraud, allegations that the breach was in bad faith or the fraud vexatious do not change that result.

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[29] 797 S.W.2d 31, 31 (Tex. 1990) (per curiam).

[30] *See* 783 S.W.2d 674, 680 (Tex. App.—Houston [14th Dist.] 1989), *aff'd as modified*, 797 S.W.2d 31 (Tex. 1990).

[31] 212 S.W.3d 299, 311-14 (Tex. 2006).

[32] *See* TEX. R. CIV. P. 13.

[33] *See, e.g.*, TEX. R. CIV. P. 215.1(d), 215.2(b)(8), 215.4(b), 215.5(b).

VI. Attorney's Fees: Declaratory Judgment & Breach of Contract

The court of appeals affirmed part of the attorney's fee award based on the Declaratory Judgments Act.[34] MBM asserts four reasons why declaratory relief was improper and cannot support a fee award. We disagree that declaratory relief was improper but agree it cannot support the fee award here.

First, MBM argues that declaratory relief is not available for contract claims (like those here) that are "fully matured and predicated upon a terminated relationship." But the Act says relief is available in contract cases "before *or after* there has been a breach,"[35] so a matured breach is explicitly covered by the Act.[36] Further, declaratory relief is often available after a relationship has been terminated, as in cases concerning noncompetition covenants signed by former employees,[37] or offsetting judgments between former litigants.[38] MBM notes that we justified declaratory relief in *BHP Petroleum Co. v. Millard* by referring to an "ongoing and continuing relationship," but that was solely to show that the defendant's counterclaim (relating to the parties' future rights) went

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[34] 251 S.W.3d 174, 183-84.

[35] TEX. CIV. PRAC. & REM. CODE § 37.004(b) (emphasis added).

[36] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 33 cmt. a (1982) ("But while the declaratory action is perhaps most important as a kind of preventive device, its use is not so restricted; it is also sometimes permitted after the wrong has been committed, when a coercive remedy could be awarded to or against the plaintiff in the declaratory action.").

[37] *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, ___ S.W.3d ___, ___ (Tex. 2009) (declaring former employee's noncompetition covenant enforceable); *see also Lowenberg v. City of Dallas* 261 S.W.3d 54, 59 (Tex. 2008) (per curiam) (affirming declaratory judgment regarding unlawful tax that had been repealed).

[38] *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 468 (Tex. 1995).

beyond the plaintiff's claim (relating to past damages alone).[39] We disagree that a party can immunize itself against declaratory relief by simply terminating any ongoing relationship.

Second, MBM urges that declarations of non-liability should be barred in contract cases, just as they are in tort cases. As we said in *Abor v. Black*:

> Because [the Act] appears to give the courts jurisdiction over declarations of non-liability of a potential defendant in a tort action, we find that the . . . District Court had jurisdiction over the suit. However, we hold that the trial court should have declined to exercise such jurisdiction because it deprived the real plaintiff of the traditional right to choose the time and place of suit.[40]

But the "real plaintiff" and the "traditional right to choose the time and place of suit" are materially different in contract and tort cases. The "real" plaintiff in a tort action is the injured party, yet both parties often suffer injury if a contract collapses. When each party claims the other breached (as is usually the case),[41] it is hard to say who ought to be the "real" plaintiff. Here, for example, why should MBM get to choose the time and place of suit rather than the Woodlands? The Act itself specifically contemplates declarations that are negative (non-liability) as well as affirmative

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[39] 800 S.W.2d 838, 841-42 (Tex. 1990).

[40] 695 S.W.2d 564, 566 (Tex. 1985).

[41] *See, e.g.*, *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 200 (Tex. 2004) (per curiam); *Bennett v. Cochran*, 96 S.W.3d 227, 228 (Tex. 2002) (per curiam); *Callahan & Assocs. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 842 (Tex. 2002) (per curiam); *State ex rel. Dep't of Criminal Justice v. VitaPro Foods, Inc.*, 8 S.W.3d 316, 321 (Tex. 1999); *Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998) (per curiam); *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 43 (Tex. 1998); *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 386 (Tex. 1997); *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 70 (Tex. 1997); *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227 (Tex. 1990).

(liability).[42] And historically, declarations of non-liability under a contract have been among the most common suits filed under the Act, including:

- suits by insurers to declare non-liability under a duty-to-defend clause,[43]
- suits by employees to declare non-liability under a covenant not to compete,[44] and
- suits by a party to declare non-liability for higher or additional payments.[45]

Extending the bar against declarations of non-liability from tort to contract cases would drastically handicap declaratory-judgment practice in Texas.

Third, MBM argues that declaratory judgments are available only if there is no adequate alternative cause of action. But this has never been the rule in Texas. Shortly after the Legislature passed the Act in 1943,[46] this Court adopted exactly the opposite rule, stating that "the existence of another adequate remedy does not bar the right to maintain an action for declaratory judgment" and finding this rule supported by "better reasoning."[47] The federal courts follow the same rule, as

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[42] TEX. CIV. PRAC. & REM. CODE § 37.003(b) ("The declaration may be either affirmative or negative in form and effect, and the declaration has the force and effect of a final judgment or decree.").

[43] *See, e.g.*, *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008); *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81 (Tex. 1997) (per curiam); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139 (Tex. 1997) (per curiam); *Liberty Mut. Fire Ins. Co. v. Sanford*, 879 S.W.2d 9 (Tex. 1994) (per curiam).

[44] *See, e.g.*, *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, ___ S.W.3d ___ (Tex. 2009); *In re AutoNation, Inc.*, 228 S.W.3d 663 (Tex. 2007).

[45] *See, e.g.*, *Yzaguirre v. KCS Res., Inc.*, 53 S.W.3d 368, 370 (Tex. 2001); *VitaPro Foods, Inc.*, 8 S.W.3d at 321.

[46] Uniform Declaratory Judgments Act, 48th Leg., R.S., ch. 164, 1943 Tex. Gen. Laws 265.

[47] *Cobb v. Harrington*, 190 S.W.2d 709, 714 (Tex. 1945); *accord Tex. Liquor Control Bd. v. Canyon Creek Land Corp.*, 456 S.W.2d 891, 895 (Tex. 1970); *Crow v. City of Corpus Christi*, 209 S.W.2d 922, 924 (Tex. 1948); *see also McKinley v. McKinley*, 496 S.W.2d 540, 542 (Tex. 1973).

Federal Rule of Civil Procedure 57 makes clear: "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." We agree the Act cannot be invoked when it would interfere with some other exclusive remedy[48] or some other entity's exclusive jurisdiction.[49] But prohibiting declaratory judgments whenever a breach of contract claim is available would negate the Act's explicit terms covering such claims.[50]

Yet while declaratory relief may be obtained under the Act in all these circumstances, that does not mean attorney's fees can too. Texas has long followed the "American Rule" prohibiting fee awards unless specifically provided by contract or statute.[51] By contrast, the Declaratory Judgments Act allows fee awards to either party in all cases.[52] If repleading a claim as a declaratory judgment could justify a fee award, attorney's fees would be available for all parties in all cases. That would repeal not only the American Rule but also the limits imposed on fee awards in other

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[48] *See, e.g.*, *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004) (noting that the Property Code describes trespass-to-try-title actions as "*the* method for determining title"); *John G. & Marie Stella Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 289 (Tex. 2002) (noting that Natural Resources Code provisions authorizing declaratory suits by coastal property owners do not provide for fees).

[49] *See, e.g.*, *In re Sw. Bell Tel. Co.*, 235 S.W.3d 619, 625 (Tex. 2007) (holding declaratory relief unavailable until administrative remedies were exhausted); *Thomas v. Long*, 207 S.W.3d 334, 342 (Tex. 2006) (same); *State v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994) (holding civil courts can declare criminal laws unconstitutional only in limited circumstances); *Canyon Creek Land Corp.*, 456 S.W.2d at 894 (holding civil courts generally should not entertain declaratory actions to overturn an administrative agency's interpretation of a penal statute the agency is to enforce); *Cobb*, 190 S.W.2d at 714 ("We do not hold that the declaratory judgment procedure may be used when a statute provides an administrative board or other special tribunal or special procedure for the particular type of case in hand as, for example, a workmen's compensation case.").

[50] *See* TEX. CIV. PRAC. & REM. CODE § 37.004(a), (b) (stating that "[a] contract may be construed either before or after there has been a breach," and that "[a] person interested under . . . writings constituting a contract . . . may have determined any question of construction or validity arising under the . . . contract").

[51] *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006).

[52] *See* TEX. CIV. PRAC. & REM. CODE § 37.009.

statutes. Accordingly, the rule is that a party cannot use the Act as a vehicle to obtain otherwise impermissible attorney's fees.[53]

The Act was originally "intended as a speedy and effective remedy" for settling disputes before substantial damages were incurred.[54] It is "intended to provide a remedy that is simpler and less harsh than coercive relief, if it appears that a declaration might terminate the potential controversy."[55] But when a claim for declaratory relief is merely tacked onto a standard suit based on a matured breach of contract, allowing fees under Chapter 37 would frustrate the limits Chapter 38 imposes on such fee recoveries. And granting fees under Chapter 37 when they are not permitted under the specific common-law or statutory claims involved would violate the rule that specific provisions should prevail over general ones.[56] While the Legislature intended the Act to be remedial,[57] it did not intend to supplant all other statutes and remedies.[58]

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[53] *See Martin*, 133 S.W.3d at 267; *THPD, Inc. v. Cont'l Imports, Inc.*, 260 S.W.3d 593, 619-20 (Tex. App.—Austin 2008, no pet.); *Warrantech Corp. v. Steadfast Ins. Co.*, 210 S.W.3d 760, 770 (Tex. App.—Fort Worth 2006, pet. denied); *Sani v. Powell*, 153 S.W.3d 736, 745 (Tex. App.—Dallas 2005, pet. denied); *City of Houston v. Texan Land & Cattle Co.*, 138 S.W.3d 382, 392 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Sw. Guar. Trust Co. v. Hardy Road 13.4 Joint Venture*, 981 S.W.2d 951, 957 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Boatman v. Lites*, 970 S.W.2d 41, 43 (Tex. App.—Tyler 1998, no pet.).

[54] *Cobb*, 190 S.W.2d at 713.

[55] RESTATEMENT (SECOND) OF JUDGMENTS § 33 cmt. c (1982).

[56] *See, e.g.*, TEX. GOV'T CODE § 311.026(b) (requiring that specific statutory provisions prevail over general ones in statutory construction); *Strong v. Garrett*, 224 S.W.2d 471, 475 (Tex. 1949) (noting the "general rule" that specific descriptions in deeds prevail over general ones).

[57] *See* TEX. CIV. PRAC. & REM. CODE § 37.002(b).

[58] *Crow v. City of Corpus Christi*, 209 S.W.2d 922, 924 (Tex. 1948) ("[T]he remedy afforded by the Declaratory Judgment Act is additional and does not supplant any existing remedy."); RESTATEMENT (SECOND) OF JUDGMENTS § 33 cmt. c ("[D]eclaratory actions are to supplement rather than supersede other types of litigation.").

At trial, the Woodlands recovered no damages on its breach of contract claim, so it cannot recover fees under Chapter 38. Allowing it to recover the same fees under Chapter 37 would frustrate the provisions and limitations of the neighboring chapter in the same Code.[59] Accordingly, we hold the Woodlands cannot recover attorney's fees under the Declaratory Judgments Act.

Nevertheless, the Woodlands argues it is entitled to fees because the declaratory relief it sought did more than merely duplicate the issues litigated in its contract and fraud claims. The five declarations the Woodlands obtained in the judgment were:

1. that the Woodlands "complied with its contractual obligations to provide notice of its intent not to renew";

2. that MBM "improperly failed to timely designate a carrier and location for the return";

3. that MBM's manipulation of the termination dates barred it from making "any claim that [the Woodlands] failed to provide timely notice";

4. that the Woodlands "relied to its detriment on the termination dates provided by MBM"; and

5. that the Woodlands "has suffered damage as a direct result of its detrimental reliance upon the termination dates provided by MBM."

Whether the Woodlands sent timely notice of cancellation and MBM failed to designate a return location were part and parcel of the Woodlands' contract claim. And whether MBM misrepresented the termination dates and the Woodlands relied on those misrepresentations were duplicative of the

[59] *Cf. City of Waco v. Lopez*, 259 S.W.3d 147, 153-55 (Tex. 2008) (holding the Legislature did not intend to allow claimants to elect between Human Rights and Whistleblower Acts because differing procedures and remedies would frustrate legislative goals).

Woodlands' fraud claim. Thus, the declarations sought by the Woodlands merely duplicated issues already before the trial court.

* * *

It is easy to understand the Woodlands' frustration with MBM. Viewing the evidence in the proper light, MBM withheld information, changed renewal dates, and manipulated the truth to try to get more rent than it was entitled to. It raised dodges, defenses, and counterclaims at various stages that all eventually collapsed in a heap, but only after forcing the Woodlands to incur legal fees and costs. But to recover those fees, the Woodlands had to recover damages for breach of contract. That it failed to do. As Chief Justice Calvert wrote for this Court almost 50 years ago:

> Perhaps every successful litigant should be permitted to recover his attorney fees from the opposite party. But whether that policy would be wise is for the Legislature, not the courts, to decide. Apparently the Legislature has not thought it wise.[60]

Accordingly, we reverse the judgment of the court of appeals and render judgment that the Woodlands take nothing.

Scott Brister
Justice

OPINION DELIVERED: August 28, 2009

[60] *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 896 (Tex. 1962).

IN THE SUPREME COURT OF TEXAS

NO. 08-0398

JERRY GURKOFF, D.O., PETITIONER,

v.

ROSEMARY JERSAK, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

JUSTICE BRISTER, joined by JUSTICE HECHT, dissenting from the denial of the petition for review.

There is no point passing laws if the courts will not enforce them. The point of the law mandating expert reports was to shift the costs of meritless cases to those who filed them. In this case, no expert report was ever filed, so the statute deems it meritless. Yet the courts below refused to shift any costs because the defendant sought recovery from the plaintiff's attorney rather than the plaintiff — who had died without assets. If it was not clear before, it is surely clear now: some courts simply will not enforce this statute. Because the Court declines to enforce it either, I respectfully dissent to the denial of the petition.

Rosemary Jersak sued Dr. Jerry Gurkoff for allegedly operating on the wrong finger of her right hand. Dr. Gurkoff denied that he operated on the wrong finger and asserted that Jersak consented in writing to the operation on the specific finger on which he performed the procedure. Jersak never filed an expert report. Dr. Gurkoff sought dismissal and costs; the trial court sat on the

motion and ordered mediation. More than a year after filing, there was still no expert report when Jersak died from unrelated causes.

Dr. Gurkoff served scire facias on Jersak's husband, who answered indicating he had no interest in pursuing the case, and that Rosemary's estate had no nonexempt assets. Three years after the motion to dismiss was filed, and two and one-half years after Rosemary died, the trial court finally granted Dr. Gurkoff dismissal but refused to award a dime of attorney's fees. The court of appeals affirmed.[1]

The statute then in effect provided that upon dismissal the trial court "shall . . . award[] as sanctions against the claimant or the claimant's attorney, the reasonable attorney's fees and costs."[2] This fee award is mandatory,[3] and explicitly provides for recovery against the claimant's attorney. If a trial court has discretion to award fees solely against a plaintiff with no assets, then this fee award is optional, not mandatory.

The court of appeals held Dr. Gurkoff waived his fee claim by seeking fees only from Jersak's law firm and not from her estate.[4] I agree a defendant cannot choose who should pay sanctions; sanctions must be assessed against the offending party.[5] But nothing in this record supports a finding that the costs here are solely the fault of Jersak rather than her attorneys.

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[1] ___ S.W.3d at ___.

[2] TEX. REV. CIV. STAT. art. 4590i, § 13.01(e) (repealed 2003).

[3] *See Am. Transitional Care Ctrs. of Tex. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001).

[4] ___ S.W.3d at ___.

[5] *See In re SCI Tex. Funeral Servs., Inc.*, 236 S.W.3d 759, 761 (Tex. 2007); *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991).

After Jersak's death, her attorneys could have appeared on behalf of her estate or heirs,[6] but they refused to appear at all, asserting that her death cancelled their attorney-client relationship. They did reappear on behalf of her husband, and insisted that only the probate court had jurisdiction, even though no administration was ever filed. They insisted on completing mediation in a case with no expert support. They insisted that the statute was inapplicable to res ipsa loquitur claims, even though it explicitly applies to all "health care claims" regardless of the underlying theory. And to top it off they insisted that the defendant could get no fees without first trying to recover the fees from their former client rather than themselves. The blame for these faulty jurisdictional and legal hurdles can hardly be placed on Rosemary Jersak, as most were raised after she died.

Generally, trial judges should hesitate to impose sanctions on an attorney lest they chill zealous representation. But the Legislature found that such hesitation was driving physicians from Texas and patients from medical care they needed.[7] When an attorney is responsible for filing a suit without expert support, it is both illogical and wasteful to insist that the defendant pursue a plaintiff with no assets. Accordingly, I would reverse the court of appeals' opinion and order the trial court to assess sanctions against Jersak's attorneys.

_____

Scott Brister, Justice

OPINION DELIVERED: February 27, 2009

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[6] *See* TEX. R. CIV. P. 151 ("If the plaintiff dies, the heirs, or the administrator or executor of such decedent may appear and upon suggestion of such death being entered of record in open court, may be made plaintiff, and the suit shall proceed in his or their name.").

[7] *In re McAllen Med. Ctr., Inc.*, ___ S.W.3d ___, ___ (Tex. 2008).

IN THE SUPREME COURT OF TEXAS

NO. 08-0405

RETAMCO OPERATING, INC., PETITIONER,

v.

DOUGLAS B. MCCALLUM, LLC, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

PER CURIAM

Retamco Operating, Inc. (ROI), a Texas corporation, sued Paradigm Oil, Inc., another Texas corporation, over unpaid royalties involving Texas oil and gas interests. During the litigation, Paradigm transferred a portion of its Texas oil and gas interests to Douglas B. McCallum, LLC (DMLLC), a Colorado company. The contract for the transfer of the interests was executed in Colorado. ROI then sued DMLLC, alleging that the transfer of the interests was in violation of the Texas Uniform Fraudulent Transfer Act. DMLLC filed a special appearance, arguing that because the parties executed the contract in Colorado, the exercise of personal jurisdiction over DMLLC was not warranted. The trial court granted the special appearance and the court of appeals affirmed. ___ S.W.3d at ___.

For the reasons stated in *Retamco Operating, Inc. v. Republic Drilling Co.*, ___ S.W.3d ___, (Tex. 2009), we reverse the court of appeals' judgment and remand for trial.

OPINION DELIVERED: February 27, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0482

IN RE JOANNE LOVITO-NELSON, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

Rule 329b(c) of the Texas Rules of Civil Procedure states that a motion for a new trial can be granted only by a written, signed order:

> In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

In the action underlying this original mandamus proceeding, the trial court determined that its scheduling order had the effect of granting a motion for new trial even though it did not do so explicitly. We disagree.

On September 17, 2007, the trial court signed a "Final Order in Suit Affecting the Parent-Child Relationship." The order recites that petitioner Joanne Lovito-Nelson and respondents Shannon Kline and Joseph Gordon appeared in person for trial but waived a jury and a record of the evidence, and submitted the case to the court. Lovito-Nelson, the relator in the present proceeding, tells us that the parties settled shortly after trial began.

The order appointed Lovito-Nelson, Kline, and Gordon joint managing conservators of three girls, then ages 9, 7, and 3. The order recites that Kline is their mother, Gordon their "father/stepfather," and Lovito-Nelson their grandmother. The order found that Kline and Gordon each owed Lovito-Nelson $1,275 in previously ordered child support and ordered them each to make $100 monthly payments on the arrearage.

On October 16, 2007, Kline and Gordon timely filed a motion for new trial, asserting that although Kline was the mother of all three girls, Gordon was the father of only one; that the other two girls had never been the subject of the action; that Kline and Gordon had not agreed to the appointment of a temporary conservator; and that they had not agreed to the judgment. The court heard the motion on November 6 and initialed this handwritten entry on the docket sheet: "New trial granted. DHL." The same date the trial court and counsel for all parties signed an agreed "Pre-Trial Scheduling Order." The order appears to be a form order with spaces for handwritten dates. The order set various pretrial deadlines and a final trial date and time — "6/2/08 @ 9:30." The order stated: "Trial on the merits is hereby set on this date."

By letter dated January 31, 2008, counsel for Lovito-Nelson wrote to the trial judge that "the Court never signed a written order granting" a new trial, and that since "[m]ore than 105 days have passed since the Final Order . . . was signed by the Court . . . it appears to me that (1) this judgment is now final and (2) the Pre-Trial Scheduling Order in this matter is now moot." *See* TEX. R. CIV. P. 329b(e) ("If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.").

On April 16, 2008, the trial court signed an order denying "Respondent's Motion to Sign the Order on *Motion for New Trial*." The order recited that the court had granted the motion for new trial at the November 6 hearing and made a note to that effect on the docket sheet. The order further recited that the court had determined that the agreed scheduling order "set aside the Final Order" and "satisfied the requirements of Tex. R. Civ. P. 329b(c) . . . for the granting of a Motion for New Trial." Thus, the court concluded, respondent's motion was moot, and the scheduling deadlines "remain in full effect."

Lovito-Nelson petitioned for a writ of mandamus in the court of appeals, which denied relief without opinion, and now seeks relief from this Court.

We have been clear that Rule 329b(c) requires a written order to grant a new trial. In *Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex. 1993) (per curiam), we held that a trial court's "oral pronouncement and docket entry . . . could not be substituted for a written order required by Rule 329b." We added that under Rule 329b(c), "[a]n order granting a new trial or modifying, correcting, or reforming a judgment must be written and signed." We reached the same holding in *Clark & Co. v. Giles*, 639 S.W.2d 449, 450 (Tex. 1982) (per curiam). More recently, we "decline[d to] overrule our precedent (and ignore Texas Rule of Civil Procedure 329b) requiring written orders granting new trials." *Horizon/CMS Healthcare Corp., Inc. v. Fischer*, 111 S.W.3d 67, 68 (Tex. 2003) (per curiam). Although we have never had occasion to apply the rule to scheduling orders, the courts of appeals have, and have mostly held that such orders do not grant new trials. *See In re Nguyen*, 155 S.W.3d 191, 193-194 (Tex. App.–Tyler 2003, orig. proceeding) (holding that a scheduling order setting a trial date signed within the court's plenary jurisdiction did not grant a motion for new trial); *In re Hesser*, No. 05-00-00769-CV, 2000 Tex. App. LEXIS 3548, at *4, 2000 WL 694742, at *2 (Tex. App.–Dallas May 31, 2000, orig. proceeding) (same); *Southland Distrib. Co. v. Hales, Bradford & Allen*, No. 13-99-125-CV, 1999 Tex. App. LEXIS 5442, at *3-4, 1999 WL 34974110, at *1 (Tex. App.–Corpus Christi July 22, 1999, no pet.) (per curiam) (holding that trial court's setting of a hearing on a motion for summary judgment did not set aside the summary judgment previously granted); *Estate of Townes v. Wood*, 934 S.W.2d 806, 807 (Tex. App.–Houston [1st Dist.] 1996, orig. proceeding) (en banc) (holding that an oral pronouncement, docket sheet notation, and trial setting order did not, taken together, substitute for a signed order granting a motion for new trial); *Cortland Line Co. v. Israel*, 874 S.W.2d 178, 182-183 (Tex. App.–Houston [14th Dist.] 1994, writ denied) (holding that an oral pronouncement, docket sheet notation, and trial setting order did not, taken together, substitute for a signed order granting a motion for new trial).

It is important that the requirement of a written order granting a motion for new trial be a bright-line rule. Otherwise, one might argue that all sorts of conduct should be given the same effect — a trial setting or other setting, a status conference, a hearing on a discovery motion, a request for discovery — the list is endless. The uncertainty would carry over to appellate deadlines and possibly give rise to mandamus proceedings, like this one. The requirement is not difficult to meet, and the movant who fails to satisfy it is not left without possibility of relief. He may still attempt to prosecute an appeal, a restricted appeal, or a bill of review. But a motion for new trial is not granted without a signed, written order explicitly granting the motion.

The trial court in this case relied on *Thorpe v. Volkert*, 882 S.W.2d 592 (Tex. App.–Houston [1st Dist.] 1994, no writ). In *Thorpe*, the trial court rendered judgment for the defendant after a bench trial but orally granted the plaintiff's motion for new trial and made a corresponding docket sheet notation. At the same time, the court also signed an agreed order granting the defendant's motion for a preferential trial setting. The court of appeals held that the order effectively granted the motion for new trial. To the extent *Thorpe* is inconsistent with this opinion, it is disapproved.

The trial court's plenary jurisdiction expired before it issued its April 16, 2008 order. Mandamus relief is appropriate when a trial court has acted after its plenary power has expired. *In re Brookshire Grocery Co.*, 250 S.W.3d 66, 68 (Tex. 2008); *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (per curiam). Accordingly, without hearing oral argument, TEX. R. APP. P. 52.8(c), we conditionally grant Lovito-Nelson's petition for writ of mandamus and direct the trial court to vacate its April 16, 2008 order. We are confident the trial court will promptly comply. The writ will issue only if it does not.

Opinion issued: February 27, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0506

MICHAEL LOU GARRETT, PETITIONER,

v.

JACK M. BORDEN, ET AL, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

PER CURIAM

Section 14.005 of the Civil Practice and Remedies Code provides that an inmate, who files a grievance claim subject to section 501.008 of the Government Code, must file with the court "a copy of the written decision from the grievance system." *See* TEX. CIV. PRAC. & REM. CODE § 14.005(a)(2). At issue in this appeal is the meaning of the word "copy." The trial court concluded that copy means only photocopy and dismissed the inmate's grievance claim because he filed a hand-typed, verbatim copy instead. The court of appeals affirmed the dismissal in a memorandum opinion, with one justice dissenting. 2008 Tex. App. LEXIS 3955, 2008 WL 2221807. Because we conclude that a hand-typed, verbatim reproduction satisfies the statutory requirement for a copy of the written grievance decision, we reverse the court of appeals' judgment and remand the case to the trial court.

Chapter 14 of the Civil Practice and Remedies Code applies to lawsuits filed by inmates who assert an inability to pay costs. TEX. CIV. PRAC. & REM. CODE § 14.002(a). Because the inmate's lawsuit here was also one subject to the grievance system established under the Government Code, the inmate was required to exhaust his administrative remedies and demonstrate that to the court by providing "a copy of the written decision from the grievance system" together with the inmate's declaration or affidavit disclosing the date he filed the grievance, and the date he received the written decision. *See id.* § 14.005(a). Rather than file a photocopy of the written decision, the inmate reproduced it manually. No one disputes that the hand-typed reproduction is a verbatim copy.

Unless given a specific statutory definition, courts generally accept the words used in a statute according to their ordinary meaning. *Cities of Austin, Dallas, Ft. Worth & Hereford v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442 (Tex. 2002). Chapter 14 does not define the word "copy," and thus we apply its ordinary or common meaning here. That meaning includes a hand-typed, verbatim reproduction. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 504 (3rd ed. 2002) (defining "copy" as "an imitation, transcript, or reproduction of an original work").

The court of appeals, however, chose a more restrictive definition, interpreting the word "copy" to mean only mechanical reproductions or photocopies. Under certain circumstances, a court may reject the ordinary meaning of an undefined term, such as when a different meaning is apparent from the context or when the statute's purpose indicates a more specific meaning was intended. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008). Neither instance is apparent here. Section 14.005(a)(2)'s purpose is to demonstrate that an inmate, proceeding *in forma pauperis*, has exhausted his or her administrative remedies through the TDCJ's grievance system by providing

certain information to the court, including a copy of the written decision from the grievance system. *See Smith v. Tex. Dep't of Criminal Justice - Inst. Div.*, 33 S.W.3d 338, 341. (Tex. App.—Texarkana 2000, pet. denied). A hand-typed, verbatim reproduction of the written decision will not frustrate this purpose and accordingly satisfies the statutory requirement.

Statutory construction is a question of law we review de novo. *Tex. Parks and Wildlife Dep't v. Shumake*, 199 S.W.3d 279, 284. (Tex. 2006). Because the court of appeals erred in construing the word "copy" in section 14.005(a)(2) to mean photocopies only and in dismissing the inmate's claim based upon that erroneous construction, we grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment and remand the case to the trial court for further proceedings. *See* TEX. R. APP. P. 59.1.

OPINION ISSUED: May 1, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0524

IN RE DEPARTMENT OF FAMILY & PROTECTIVE SERVICES, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued November 12, 2008

JUSTICE JOHNSON delivered the opinion of the Court in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE GREEN, and JUSTICE WILLETT joined.

JUSTICE HECHT filed a dissenting opinion, in which JUSTICE BRISTER joined.

JUSTICE BRISTER filed a dissenting opinion, in which JUSTICE HECHT, JUSTICE O'NEILL and JUSTICE MEDINA joined.

The Department of Family and Protective Services brought this parental-rights termination case and was appointed temporary managing conservator of two children. The trial court ordered the mother's parental rights terminated before the one-year dismissal date prescribed by the Family Code, but then, after the dismissal date, granted the mother's motion for new trial. The trial court neither rendered another final order nor entered an extension order, and the mother moved to dismiss the case more than nineteen months after the Department was first appointed temporary managing conservator. Her motion to dismiss was denied. We hold that the Family Code required the case to be dismissed and the trial court abused its discretion by failing to do so.

I. Background

The Department of Family and Protective Services filed suit to terminate K.W.'s parental rights to two children. On July 18, 2006, the trial court entered an order appointing the Department managing conservator of the children. In accordance with the Family Code in effect at the time, the order also set a dismissal date of July 23, 2007. *See* TEX. FAM. CODE § 263.401(a).[1] A bench trial took place on June 28, 2007 and July 10, 2007. On July 10, 2007, the judge orally ordered K.W.'s parental rights terminated. In August 2007, K.W. filed a motion for new trial. On August 21, 2007, the court entered a written order of termination, but on August 28, 2007, it granted K.W.'s motion for new trial. The court did not enter an order extending the time for which the case was to be retained on its docket. *Id.* § 263.401(b).[2]

The case was set for trial on December 4, 2007, but the trial was continued by agreement because the attorneys were in trial elsewhere and reset for April 22, 2008. On March 6, 2008, almost eight months after the one-year dismissal date, K.W. filed a motion to dismiss. The court denied the motion.

K.W. petitioned the court of appeals for mandamus directing the trial court to dismiss the case. The court of appeals held that the granting of a new trial had the legal effect of vacating both the July 10, 2007 and the August 21, 2007 orders of termination and returning the case to the docket as though there had been no previous trial or hearing. 265 S.W.3d 545, 550. It also held that

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[1] *See* Act of May 28, 1997, 75th Leg., R.S., ch. 600, 1997 Tex. Gen. Laws 2108, 2112 (amended 2007). Various parts of the Family Code have been amended since the Department filed suit in 2006. Unless otherwise specified, all references in this opinion are to the version of the statute in effect when the Department filed suit.

[2] *See* Act of May 29, 2005, 79th Leg., R.S., ch. 268, 2005 Tex. Gen. Laws 621, 636 (amended 2007).

because the effect of granting the new trial was to return the case to the docket, K.W.'s motion to dismiss was timely. *Id.* at 553; *see* TEX. FAM. CODE § 263.402(b).[3] The court of appeals granted mandamus relief directing the trial court to dismiss the case.

One justice in the court of appeals dissented to the denial of en banc review and argued that the time limits specified in the Family Code are jurisdictional. 265 S.W.3d at 557-58 (Keyes, J., dissenting). The dissenting justice would have denied relief on the basis that the trial court lost jurisdiction to take any action when the one-year dismissal date passed and an extension order had not been entered. *Id.*

The Department asserts that the court of appeals abused its discretion and seeks a writ of mandamus ordering the court of appeals to vacate its directive to the trial court.

II. Jurisdiction

If the dismissal dates set by the Family Code are jurisdictional, then the trial court had jurisdiction only to dismiss the case once the dates had passed, and its orders beyond those dates are void. Thus, we first address whether the trial court retained jurisdiction over the case after the time limits set by the Family Code had passed.

Family Code section 263.401, in relevant part, provided that when the Department files a suit to terminate the parent-child relationship and is appointed conservator of the children, as was the case here, then

> (a) Unless the court has rendered a final order or granted an extension under Subsection (b), on the first Monday after the first anniversary of the date the court

[3] Act of May 22, 2001, 77th Leg., R.S., ch. 1090, 2001 Tex. Gen. Laws 2395, 2396-97 (amended 2007).

> rendered a temporary order appointing the department as temporary managing conservator, the court shall dismiss the suit affecting the parent-child relationship filed by the department that requests termination of the parent-child relationship or requests that the department be named conservator of the child.
>
> (b) The court may not retain the suit on the court's docket after the time described by Subsection (a) unless the court finds that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the department and that continuing the appointment of the department as temporary managing conservator is in the best interest of the child. If the court makes those findings, the court may retain the suit on the court's docket for a period not to exceed 180 days after the time described by Subsection (a).
>
> . . . .
>
> (c) If the court grants an extension but does not render a final order or dismiss the suit on or before the required date for dismissal under Subsection (b), the court shall dismiss the suit. The court may not grant an additional extension that extends the suit beyond the required date for dismissal under Subsection (b).[4]

In construing these statutory provisions, our objective is to determine and give effect to the Legislature's intent. *State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002); *see also* TEX. GOV'T CODE § 312.005; *Am. Home Prods. Corp. v. Clark*, 38 S.W.3d 92, 95 (Tex. 2000). We look first to the plain and common meaning of the statute's words. *Gonzalez*, 82 S.W.3d at 327. We determine legislative intent from the statute as a whole and not from isolated portions of it. *Id.*

Construing the relevant provisions according to the foregoing principles, we conclude that the trial court did not lose jurisdiction when the dismissal dates passed. Both subsections 263.401(a) and (b) provide time limits for which the trial court may retain the case on its docket, and for which

[4] Act of May 22, 2001, 77th Leg., R.S., ch. 1090, 2001 Tex. Gen. Laws 2395, 2396 (amended 2007).

it would clearly have jurisdiction. But, although subsection 263.401(a) provides for what is called the "one-year dismissal date" and subsection 263.401(b) provides for a 180-day extension of that one-year dismissal date (if the trial court finds that certain circumstances exist), nothing in the language of section 263.401 indicates that these deadlines are jurisdictional. The statute merely states that the trial court "shall dismiss the suit" and "may not retain the suit on the court's docket" when the deadlines expire. TEX. FAM. CODE § 263.401(a), (b).

On the other hand, section 263.402 provides that a party may waive its right to dismissal if the party "fails to make a timely motion to dismiss the suit or to make a motion requesting the court to render a final order before the deadline for dismissal." *Id.* § 263.402. Subject-matter jurisdiction, however, cannot be waived. *Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008) (per curiam) (citing *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004)). Thus, if the Legislature intended for the deadlines to be jurisdictional, it would not have expressly permitted them to be waived.[5]

Additionally, treating the statutory deadlines as jurisdictional could result in collateral attacks upon some termination orders well after completion of the termination proceedings and even after adoption of the children by other parties. *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex.

[5] The applicable language of the statute does not make the dismissal dates jurisdictional and we need not look further than the language itself. Nevertheless, we note that before the Legislature amended the statute in 2001, subsection 263.401(b) contained language specifically referencing jurisdiction. Act of May 31, 1997, 75th Leg., R.S., ch. 1022, 1997 Tex. Gen. Laws 3733, 3769. The 2001 amendments deleted the reference to jurisdiction and substituted language providing that a trial court could take actions that allow it to "retain the suit on the court's docket for a period not to exceed 180 days." Act of May 22, 2001, 77th Leg., R.S., ch. 1090, 2001 Tex. Gen. Laws 2395, 2396. At the same time, the Legislature amended section 263.402 to provide that a party may waive its right to dismissal if the party "fails to make a timely motion to dismiss the suit or to make a motion requesting the court to render a final order before the deadline for dismissal." *Id.* at 2396-97.

2000) ("[A] judgment will never be considered final if the court lacked subject-matter jurisdiction."). Construing the dismissal dates as jurisdictional would not be reasonable in light of the Legislature's rationale in promulgating them to begin with: prompt and final resolution of parental-rights termination cases. *See* TEX. GOV'T CODE § 311.021(3) (providing that it is to be presumed the Legislature intends just and reasonable results when it enacts statutes); *In re B.L.D.*, 113 S.W.3d 340, 353 (Tex. 2003). We hold that the dismissal dates are not jurisdictional.

III. Failure to Dismiss

A. Standard of Review

We review a trial court's interpretation of the law de novo. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). A trial court has no discretion in determining what the law is or properly applying the law. *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d 609, 612 (Tex. 2006). If the trial court fails to properly interpret the law or applies the law incorrectly, it abuses its discretion. *Id.*

Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004). A court of appeals improperly issues mandamus if the trial court did not abuse its discretion or if the record fails to demonstrate the lack of an adequate remedy on appeal. *Id.*

B. Discussion

The Legislature has granted the Department authority to take possession of children and file suit to seek the termination of parental rights, as it did in this case. *See* TEX. FAM. CODE §§ 161.001, 262.001(a). However, the Legislature has prescribed with particularity how certain aspects of such

suits must be conducted. The statute is clear that the suits must be dismissed on the first Monday after the first anniversary of the date the Department was appointed temporary managing conservator of the children, absent the rendering of a final order or the granting of an extension. *Id.* § 263.401(a); *see In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d at 612 ("Subsection 263.401(a) of the Texas Family Code requires a trial court to dismiss a SAPCR filed by the Department if a final order has not been rendered" by the deadline.). The court cannot just enter an extension order, though. In order for the suit to remain on the court's docket beyond the one-year dismissal date, the court must make specific findings to support the extension order: "the court *may not* retain the suit on the court's docket" after the one-year dismissal date unless the court makes specific findings as set out in the statute. TEX. FAM. CODE § 263.401(b) (emphasis added). Even if a trial court enters an extension order, the suit may be retained on the court's docket for a maximum of 180 days after the one-year dismissal date, and the trial court must make specific provision in the order setting (1) the new dismissal date for not later than the 180-day limit, and (2) the trial on the merits for a date that complies with the 180-day limit. *Id.* § 263.401(b)(1), (3). A trial court may not grant a second extension to retain the suit on the court's docket beyond the 180-day limit. *Id.* § 263.401(c). Parties may not extend the deadlines set by the court "by agreement or otherwise." *Id.* § 263.402(a).[6]

[6] As the statute is clear by its terms, we do not consult extrinsic sources to construe it. We do note, however, that the statute's clear aim to help children awaiting adoption by requiring the Department to expedite termination proceedings is fleshed out in the House and Senate bill analyses. The House Bill Analysis states

> [The bill] would make the Texas adoption system more decisive, efficient and accountable. Statistics for fiscal years 1991-1995 show that children spent an average of 40.8 months in the state system before being adopted. For children, such a delay seems like a lifetime and can be extremely detrimental to healthy emotional development . . . . [The bill] would help provide [a stable]

At the time K.W. moved for dismissal of the suit in March 2008, the one-year dismissal date had passed as well as had the 180-day period for the trial court to retain the suit on its docket had it made the required findings for extending the date and entered an extension order, both of which it had not done. The trial court could have retained the suit if K.W. waived her right to dismissal by failing to make (1) a timely motion to dismiss, or (2) a motion requesting the court to render a final order before the deadline for dismissal. *Id.* § 263.402(b). The two motions are alternative methods of obtaining a dismissal. *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d at 613. We agree with the court of appeals that K.W. did not waive her right to dismissal by failing to request that the trial court render a final order before the one-year dismissal date of July 23, 2008 because the trial court *did* render such an order on July 10. It would make no sense to hold that K.W. waived her right to dismissal when the trial court did exactly what she would have been required to request that it do to avoid waiver. Moreover, when the trial court granted a new trial, the one-year dismissal date had passed and another dismissal date had not been set. At that point, K.W. did not have an opportunity to request that the court enter a final order before a dismissal date. Because there was no final order in place as of the time K.W. filed her March 2008 motion to dismiss, her motion was timely when it was filed before the Department had introduced all its evidence, other than rebuttal

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> environment more quickly to children in foster care by expediting the adoption process.
>
> The bill would do this by establishing a 12-month deadline for resolving each child's case. This would prevent children from remaining in the state's care for long periods of time or being moved through a long string of foster homes.

House Comm. on Juvenile Justice and Family Issues, Bill Analysis, Tex. S.B. 34, 75th Leg., R.S. (1997). The Senate Bill Analysis states that subsections 263.401(a) and (b) "require" the trial court to dismiss the suit if the Department fails to obtain a final order within the one-year deadline or 180-day extension, if granted. Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 34, 75th Leg., R.S. (1997).

evidence, at the pending trial on the merits. TEX. FAM. CODE § 263.402(b). Thus, under the clear provisions of the Family Code, the trial court had no discretion to deny K.W.'s motion to dismiss the Department's suit and abused its discretion in doing so. *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d at 612-13.

The Department argues that the trial court rendered a "final order" on July 10, 2007 before the one-year dismissal date and the rendition of that order allowed the court to retain the case on its docket. We agree that the trial court rendered a final order on July 10 when it orally pronounced the termination of K.W.'s parental rights. *See* TEX. FAM. CODE § 101.026 (defining "render" to include an oral pronouncement in the presence of the court reporter); *Id.* § 263.401(d)[7] (providing that for the purposes of section 263.401, an order terminating the parent-child relationship and appointing the Department as managing conservator of the children is a final order). However, we disagree that the July 10, 2007 order survived the granting of a new trial.

When a trial court grants a motion for new trial, the case is reinstated on the trial court's docket as though no trial had occurred, and the slate is essentially wiped clean as to orders such as an oral pronouncement of judgment and written judgment based on the trial. *See In re Baylor Med. Ctr. at Garland*, ___ S.W.3d___, ___ (Tex. 2008). Therefore, both the written and oral orders terminating K.W.'s parental rights were vacated by the order granting a new trial. We agree with the Department that the order granting a new trial could be "ungranted" or set aside. *See id.* But if

[7] *See* Act of May 28, 1997, 75th Leg., R.S., ch. 600, 1997 Tex. Gen. Laws 2108, 2112 (amended 2007).

the trial court did so, the original oral order and written judgment terminating K.W.'s rights would not be reinstated; the trial court would have to enter a new judgment. *See id.*

The Department also argues that an interpretation such as the one we make is unreasonable and unworkable because it would be rare or nearly impossible for a trial court to conduct a new trial and render a final order within the one-year statutory deadline if the trial court granted a new trial or an appellate court concluded a new trial was warranted. However, as for a trial court granting a new trial, there are two answers to the Department's argument. First, under the statute, the court may retain the case on its docket for up to an additional 180 days in order to conduct a new trial. TEX. FAM. CODE § 263.401(b). Second, the time limits are set by the Legislature, and it is not for courts to decide if legislative enactments are wise or if particular provisions of statutes could be more effectively worded to reach what courts or litigants might believe to be better or more equitable results. *See McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003) ("Our role . . . is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent."). As for an appellate court granting a new trial, section 263.401 requires dismissal only if the trial court has not rendered a final order by the prescribed or permitted dismissal dates. A predicate for appeal is the existence of a final order. *See* TEX. FAM. CODE § 263.405 (allowing an appeal of a "final order"). Further, the statutory deadlines mandate only the trial court's rendition of a final order, not deadlines after appellate review of such an order. The Legislature addressed appellate deadlines in section 263.405, and nothing in that provision creates deadlines after a final order has been appealed. *See id.*

The foregoing interpretation accords with our prior decisions as to the effect of new trial orders and respects the statutory construct. The Legislature set time limits with the intent to expedite resolution of cases of this type. *See In re B.L.D.*, 113 S.W.3d at 353. If rendering a timely order and then granting a new trial would suffice to allow the trial court to retain the case on its docket indefinitely despite motions to dismiss, the time limitations specified by the Legislature would effectively be nullified. We decline to adopt such a construction.

C. Mandamus Relief

Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of the costs and benefits of interlocutory review. *In re McAllen Med. Ctr., Inc.*, ___ S.W.3d ___, ___ (Tex. 2008). In cases involving child custody, "[j]ustice demands a speedy resolution," and we have acknowledged that appeal is "frequently inadequate to protect the rights of parents and children." *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d at 613. Here, because the children would remain in the Department's custody despite its retaining them in violation of a statutory provision and it is unknown when the trial court would issue a final order subject to appeal, K.W. has no adequate remedy by appeal.

D. The Dissents

The dissenting Justices would avoid requiring dismissal of the case by holding that because K.W. requested a new trial and later agreed with the Department to a trial setting beyond 180 days from the one-year dismissal date (even though the trial court had not made findings required for it to retain the suit on its docket for the 180 days or entered an order with a new dismissal date), she either waived or is estopped from asserting the trial court erred by denying her motion to dismiss.

The Department does not raise either of these theories in support of its position, and even if it did, they are not applicable here.

The invited error doctrine applies to situations where a party requests the court to make a specific ruling, then complains of that ruling on appeal. *See Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 862 (Tex. 2005) ("[A] party cannot complain on appeal that the trial court took a specific action that the complaining party requested, a doctrine commonly referred to as 'the invited error' doctrine."); *see also Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94-95 (Tex. 1999); *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 321-22 (Tex. 1984); *Patton v. Dallas Gas Co.*, 192 S.W. 1060, 1062-63 (Tex. 1917). The only request K.W. made to the trial court in regard to dismissal was that the suit be dismissed. She does not assert error in regard to what she asked the trial court to do and it *did* do—grant her a new trial at a time the trial court was statutorily authorized to grant a new trial and enter an extension order setting a new dismissal date. She asserts error in regard to what she asked the trial court to do and it *did not* do—dismiss the Department's suit at a point in time beyond any statutorily authorized dismissal date. It was not incumbent on K.W. to advise the trial court of all the ramifications of its granting her motion for new trial. She was entitled to have the trial court consider the motion on its merits, and so far as the record before us shows, that is what the trial court did. The Department makes no claim that K.W. somehow tried to ambush the trial court, or that she had any motive in pursuing a new trial or in agreeing to a continuance of the December 4, 2007 trial date other than protecting her parental and familial rights. The record before us does not show that K.W. was the party who requested continuance of the December trial date; the docket sheet shows only that the court granted the continuance because the attorneys were in trial

elsewhere. To the extent the dissents assert or imply that K.W. instigated continuance of the December trial date, the mandamus record does not support that position. K.W.'s actions do not come within the invited error rule.

As to estoppel, K.W. takes no position that differs from the one she took in the trial court. For a party to be estopped from asserting a position in an appellate court based on actions it took in the trial court, the party must have "unequivocally taken a position in the trial court that is clearly adverse to its position on appeal." *Tittizer*, 171 S.W.3d at 862; *see also Diamond Shamrock Ref. Co., L.P. v. Hall*, 168 S.W.3d 164, 170 (Tex. 2005); *Scoggins v. Curtiss & Taylor*, 219 S.W.2d 451, 454 (Tex. 1949). In the trial court, K.W. moved for a new trial and does not complain about the granting of that motion. In fact, none of the parties claim the trial court erred in granting a new trial. As noted above, K.W.'s complaint pertains to the trial court's refusal to dismiss the case long after it had granted the new trial but had not entered a final order. Nothing in the record before us or the briefs shows that she made any type of representation regarding her right to have the proceedings dismissed other than moving for dismissal. Certainly there is no indication she made a representation to the effect that the case would not be subject to statutory dismissal provisions if her motion for new trial were to be granted, or that she would not move for dismissal if the trial court and Department did not comply with statutory timeframes.

Further, the Family Code specifies that "the parties to a suit under this chapter may not extend the deadlines set by the court under this subchapter *by agreement or otherwise*." TEX. FAM. CODE § 263.402(a) (emphasis added). Although K.W.'s motion for new trial might be construed as impliedly waiving her right to complain that the Department failed to comply with the one-year

dismissal date, it had nothing to do with the extended dismissal date the trial court was permitted to, but did not, set. The parties agreed to a continuance from the December 2007 trial date and that caused the case to be on the court's docket longer than the statutorily permitted 180-day extension period. The trial court was not authorized to extend the time for dismissal again. *Id.* § 263.401(c) ("The court may not grant an additional extension that extends the suit beyond the [180-day] required date for dismissal under Subsection (b)."). However, the agreed continuance which the trial court granted did not extend the dismissal deadline because the trial court never set a dismissal date beyond the one-year dismissal date; and even if it had, the statute specifically precludes parties from extending deadlines by agreement.

The Family Code evidences a clear intent by the Legislature to prevent cases from lingering on court dockets for extended periods beyond specified timeframes by agreement *or otherwise*. *Id.* § 263.402(a). The dissenting Justices would rely on the parties' agreed continuance to effectively negate the statutes' deadlines. That would offend the Family Code by (1) impermissibly extending the statutory deadlines, and (2) doing so by agreement of the parties.

The legal problem here is not one K.W. created, and she should not forfeit protections designed to assure prompt processing of both children and parents through the system because she sought to protect her rights via a procedural vehicle provided for by rule and by statute. *See* TEX. R. CIV. P. 320; TEX. FAM. CODE § 263.405. Motions for new trial are not only allowed, but in some instances are required to preserve error. *See* TEX. R. CIV. P. 324(b); TEX. R. APP. P. 33.1. Here, the result was the granting of a new trial—exactly what motions for new trial are designed to allow. The trial court did not set out its reasons for granting a new trial, but the judge apparently concluded that

there was cause to grant the motion and retry the case.[8] And the statute allowed time for retrial if the trial court had proceeded according to the statute. It was up to the Department or the children's attorney, if the children's attorney believed it was in their best interests, to oppose K.W.'s motion for new trial or move for an extension order. The trial court could have addressed the issues of timeliness of trial settings and extension orders on its own, but did not do so. *See In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008) (noting that where a parental termination statute gives the trial court authority to grant a deadline extension, the trial court should adhere to the statute's instruction). Or, the trial court could have denied the parties' agreed motion for continuance as to the December trial date. The one person who did *not* have a legal burden to tell the trial court the means by which to terminate her parental rights and who should not be penalized by the doctrines of invited error or estoppel for not doing so, is K.W.

The dissents charge that our holding, in effect, makes the deadlines non-waivable. That is wrong. We hold only that the statute specifies the requirements for a party to waive the deadlines, K.W. did not waive them as the statute provides she could, and this record does not show that K.W. otherwise waived them.[9] TEX. FAM. CODE § 263.402(b).

The dissents also accuse the Court of giving no thought to the best interests of the children. That also is wrong. The members of this Court recognize the significance of this proceeding to the lives of the children involved—anyone would. But as noted above, it is the Legislature, not the

[8] The motion for new trial is not before us, but K.W.'s brief states that her motion was based on insufficiency of the evidence. The Department does not challenge that assertion.

[9] The question of whether the statutory waiver provisions are the exclusive means by which K.W. could have waived the deadlines is not before us and we express no opinion on it.

judiciary, that has enacted the Family Code and given the Department the right to intrude into family relationships. And it is the Legislature that has placed limits and restrictions on how the Department can conduct its intrusions. As appellate judges, we cannot ignore or misconstrue statutory language on the basis that in a particular case we as individuals might disagree with the outcome dictated by the policy choices made and embodied in legislation. *See McIntyre*, 109 S.W.3d at 748; *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985) (noting that courts must be willing to take statutes as they find them, giving true and fair effect to all provisions of the statutes). By our holding, we adhere to the Legislature's policy decisions as reflected in the statute, not to our own individual senses of how this case should turn out based on a mandamus record that does not even contain a statement of facts from the trial.

The dissents further decry the Court's decision to deny relief to the Department because there is no evidence that K.W.'s situation has changed and that as far as this Court knows, the children are going back to the same living conditions that necessitated emergency intervention to begin with. Justice Hecht also would answer the question of whether the Department can refile the same suit, retain custody of the children, and continue its quest to terminate K.W.'s parental rights. Both positions are unwarranted.

As to the first charge, this is a mandamus proceeding. The record before us does not contain any discovery or a statement of facts from the trial. Evaluation of (1) whether the mother's situation has changed, and (2) the living conditions into which the children will go if they are returned to the mother are manifestly factual determinations based on weighing and assessing the evidence. Not only do we not have a record on which to fairly make those types of decisions, even if we did, it is

not this Court's business to be making factual determinations in mandamus proceedings. *See In re Meador*, 968 S.W.2d 346, 354 (Tex. 1998). Further, the argument assumes the children will be returned to the mother with no further action by the Department and no further review by the trial court. These assumptions are not based on anything in the record before us. At oral argument, counsel for K.W. stated his opinion that the Department could refile the case and expected it to do so. Counsel for the Department did not dispute that argument.

As to the issue of whether the Department can refile the same suit, retain custody of the children, and continue as before to seek termination of K.W.'s parental rights, the question simply is not before us. We recognize that courts of appeals have not been unanimous in their decisions on the matter and the issue is important. But that does not justify our addressing it when it has not been preserved, briefed, or presented as an issue, and when no relief has been requested based on its resolution. *See In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 70 (Tex. 2005).

IV. Conclusion

At the time the trial court denied K.W.'s timely motion to dismiss, the case had been pending for a longer time than that allowed by statute. We agree with the court of appeals that the trial court clearly abused its discretion by not granting K.W.'s motion to dismiss and that a remedy by appeal is not adequate under these circumstances. We deny the Department's request for relief.

Phil Johnson
Justice

OPINION DELIVERED: January 9, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0524

IN RE DEPARTMENT OF FAMILY & PROTECTIVE SERVICES, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued November 12, 2008

JUSTICE HECHT, joined by JUSTICE BRISTER, dissenting.

When K.W.'s daughters were ages 3 and 2, the district court issued an emergency order removing them from her and giving custody to the Department of Family and Protective Services. Within a year, following a two-day bench trial, the district court found by clear and convincing evidence that K.W. had endangered her daughters, that she had been convicted or placed on community supervision for indecency with a child, that she had failed to comply with a court-ordered service plan to obtain the return of her children, and that termination of her rights in her daughters was in their best interest.[1] K.W. moved for a new trial. The court granted her motion and set a trial date three months away. When that date came, K.W. agreed to a postponement, and the court set another trial date four months away. Before that date arrived, K.W. moved to have the case dismissed and her children returned to her because of the delays caused by granting her motion for new trial and the agreed postponement. Not surprisingly, the court denied her motion.

The girls are now 6 and 5 and have been in foster care for two-and-a-half years. Today the Court orders them returned to their mother. There is no evidence that her situation has changed. No

[1] TEX. FAM. CODE § 161.001 (1) (E), (L) (iv), (O), (2). It appears from allegations in the record submitted to this Court that K.W. was 18 and the alleged father was 13 when the elder of their two children was conceived.

consideration is given to the children's best interests. As far as we know, they are going back to the same living conditions that necessitated emergency intervention two-and-a-half years ago. K.W. recovers her daughters, not because they are now safe with her, but because of delays in these termination proceedings that she herself requested or agreed to. The Court explains that K.W. is simply taking advantage of "protections designed to assure prompt processing of both children and parents through the system".[2] The Court's notion of "prompt processing" is an odd one. If K.W. wanted prompt processing of her children and herself through the system, she could have gone to trial in December 2007, April 2008, or June 2008 instead of trying to force dismissal of the case so that it can be refiled and the parties can start over, further delaying a final resolution. The Court blames this startling result on the trial court for not following statutory procedures to continue the case, and on the Legislature for setting deadlines the way it did. But the result is unnecessary, in my view, for two reasons. I respectfully dissent.

I

The question that really matters is the one the Court refuses to answer: after a suit by the Department to terminate parental rights is dismissed due to a failure to meet the deadlines in section 263.401 of the Family Code, can the Department simply refile the same suit, retain custody of the child, and continue on as before, essentially unaffected?[3] If the answer is yes, and dismissal does not affect the Department's ability to proceed, then all the consternation over whether this case should have been dismissed has been a waste of time — not just our time, the Department's time, and a young mother's time, but more than eighteen months out of the lives of two little girls whose futures are at stake here. If the Department can proceed after dismissal the same as before, then a determination whether dismissal was required is largely irrelevant. And if the answer is no, the

[2] *Ante* at ___.

[3] *Ante* at ___ ("As to the issue of whether the Department can refile the same suit, retain custody of the children, and continue as before to seek termination of K.W.'s parental rights, the question simply is not before us").

Department cannot refile and retain custody, or can do so only with substantially new grounds for termination, then surely we should say so now rather than leaving the parties and trial court to continue in further proceedings the Department has no authority to pursue.

The four courts of appeals that have addressed the question have all concluded that a dismissal under section 263.401 is without prejudice and therefore does not bar the Department from filing another petition seeking termination on the same legal grounds.[4] One court has indicated that the petition in the later action must allege facts not alleged in the prior case,[5] but the author of the Court's decision today disagreed.[6] All four courts agree that the Department cannot retain custody of a child after the dismissal of a termination action without alleging a new factual basis,[7] but the

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[4] *In re Bishop*, 8 S.W.3d 412, 420 (Tex. App.–Waco 1999, orig. proceeding) ("In addition, we observe that the dismissal mandated by section 263.401 does not constitute a decision on the merits of the suit. Therefore, such a dismissal is without prejudice to the rights of DPRS to assert the same grounds in a subsequently filed suit."); *In re Ruiz*, 16 S.W.3d 921, 927 (Tex. App.–Waco 2000, orig. proceeding) ("We have already determined that a dismissal under section 263.401(a) is without prejudice, so DPRS would be able to re-file the case asserting the same grounds *for termination* as originally alleged." (citing *Bishop*)); *In re T.M.*, 33 S.W.3d 341, 347 (Tex. App.–Amarillo 2000, orig. proceeding) ("[A]uthority holds that a dismissal under section 263.401 does not constitute an adjudication on the merits. So too does it conclude that the DPRS may refile the case and assert the same grounds for termination as originally alleged." (citing *Ruiz*, citations omitted)); *In re M.N.G.*, 147 S.W.3d 521, 528 (Tex. App.–Fort Worth 2004, pet. denied) ("A dismissal under section 263.401(a) is without prejudice so that DFPS may refile the case asserting the same grounds for termination as originally alleged." (citing *Ruiz*)); *In re K.Y.*, ___ S.W.3d ___, ___ (Tex. App.–Houston [14th Dist.] 2008, no pet. h.) ("Once a suit is dismissed without prejudice, DFPS may refile the suit asserting the same grounds for termination originally alleged." (citing *M.N.G.* and *Ruiz*)).

[5] *In re L.J.S.*, 96 S.W.3d 692, 694 (Tex. App.–Amarillo 2003, pet. denied) ("[A]uthority clearly allows [the Department] to reinitiate the proceeding if new facts are alleged justifying relief on the same grounds averred in the first action.").

[6] *Id.* at 695-696 (Johnson, C.J., concurring) ("The Legislature has set out detailed standards and procedures for suits involving protection of children and families. . . . If the collective will of the Legislature had been to preclude the TDPRS from dismissing and then re-filing suit . . . , it could have easily so provided. . . . Section 263.401 does not require trial courts to determine that a subsequent suit is based on 'new facts' of some timing and character, or to otherwise dismiss the suit. Regardless of whether new facts were pled and regardless of the nature of any new facts pled, the plain language of Section 263.401 neither precluded TDPRS from filing the second suit seeking to terminate the [parents'] relationship with [their child], nor mandated dismissal of the second suit.").

[7] *In re Ruiz*, 16 S.W.3d at 927 ("[W]e conclude that DPRS cannot again remove R.R. from her home or keep her in foster care absent new facts which support removal under chapter 262 of the Family Code. . . . To support a subsequent removal, DPRS must rely on facts warranting removal which have occurred after the adversary hearing [on the first temporary orders]. To hold otherwise would render section 263.401(a) meaningless because DPRS would be permitted to maintain custody of a child in its care indefinitely merely by annually re-filing suit. This is clearly contrary to the purpose of the statute."); *In re T.M.*, 33 S.W.3d at 347 ("However, the right to rely upon the same grounds for termination does not permit the entity to use the same facts as the basis for removing the child from her parents or maintaining her in a foster home pending resolution of the suit. New facts justifying the temporary relief must be propounded." (citations omitted)); *In re M.N.G.*, 147 S.W.3d at 528 ("DFPS cannot keep a child in foster care absent

only reason the courts have ever given is purely practical: otherwise the Department could retain custody indefinitely simply by dismissing and refiling the same action over and over. One court has indicated that the public policy behind the statute would be violated if the Department could repeatedly refile termination proceedings without moving toward a final adjudication.[8] Undermining these concerns, courts have taken a very permissive view of what would constitute "new" facts.[9]

I agree with the courts of appeals that the dismissal required by section 263.401 is without prejudice. Subsection (a), as originally enacted in 1997, provided that "the court shall dismiss" a termination suit unless, within a year after issuing temporary orders, a final order is rendered.[10] A

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new facts supporting removal from the home."); *In re K.Y.*, ___ S.W.3d at ___ ("However, DFPS cannot maintain temporary custody of the children without alleging new facts to support the termination.").

[8] *In re L.J.S.*, 96 S.W.3d at 693-694 ("Assuming *arguendo* that the TDPRS may be free to non-suit and reinitiate proceedings, they cannot do so in a manner that violates statute or public policy. The public policy here involved is encapsulated in § 263.401(a) of the Texas Family Code. That statute exists to facilitate permanence and stability in the lives of children subjected to TDPRS involvement by limiting the time within which the TDPRS can prosecute actions to terminate parental rights or have it designated conservator. And, that time is 12 months with, generally, no more than an extension of 180 days. Now, to allow the statutory time period to be exceeded through legal maneuvering of the TDPRS or any other party would undoubtedly run afoul of the public policy underlying the provision." (citations omitted)).

[9] *See, e..g.*, *In re K.Y.*, ___ S.W.3d at ___ ("DFPS argues that it did allege new facts because the second petition alleged that appellant was incarcerated on charges of murdering A.F. while the third petition alleged that appellant had been convicted of the murder and requested termination on an additional ground based on this conviction. . . . We agree with DFPS that these new facts and the additional ground for termination based on these facts were sufficient to allow DFPS to refile and maintain temporary custody of the children."); *In re M.N.G.*, 147 S.W.3d at 528-529 (affidavit attached to the second termination petition differed from prior affidavit only by providing more details of mother's employment and residence and alleging that her rights to three other children had been terminated, whereas the prior affidavit alleged that those rights were only in the process of being terminated); *In re L.J.S.*, 96 S.W.3d at 694 (noting that new facts could include facts which "involved a continuation of the conduct precipitating the first suit"); *but see In re Ruiz,* 16 S.W.3d at 927 ("To support a subsequent removal, DPRS must rely on facts warranting removal which have occurred after the adversary hearing").

[10] Section 263.401 was originally enacted in 1997 by three separate, nearly identical bills: Act of May 28, 1997, 75th Leg., R.S., ch. 600, § 17, 1997 Tex. Gen. Laws 2108, 2112-2114 (this bill did not include section 263.402(d), found in the other two bills, and now at section 263.403(d)); Act of May 28, 1997, 75th Leg., R.S., ch. 603, § 12, 1997 Tex. Gen. Laws 2119, 2123-2124 (this bill did not include section 263.404, found in chapter 600, and now at section 263.406); and Act of May 31, 1997, 75th Leg., R.S., ch. 1022, § 90, 1997 Tex. Gen. Laws 3733, 3768-3770. Subsection (a) provided:

> Unless the court has rendered a final order or granted an extension under Subsection (b), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator, the court shall dismiss the suit affecting the parent-child relationship filed by the department that requests termination of the parent-child relationship or requests that the department be named conservator of the child.

2007 amendment changed the condition to commencement of trial.[11] Subsection (b) permits a 180-day extension on specified conditions that have varied over the years.[12] The 1997 version of

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[11] Act of May 27, 2007, 80th Leg., R.S., ch. 866, §§ 2-5, 2007 Tex. Gen. Laws 1837, 1837-1838. Subsection (a) was amended to read:

> Unless the court has commenced the trial on the merits or granted an extension under Subsection (b), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator, the court shall dismiss the suit affecting the parent-child relationship filed by the department that requests termination of the parent-child relationship or requests that the department be named conservator of the child.

[12] As originally enacted in 1997, subsection (b) read:

> On or before the time described by Subsection (a) for the dismissal of the suit, the court may extend the court's jurisdiction of the suit for a period stated in the extension order, but not longer than 180 days after the time described by Subsection (a), if the court has continuing jurisdiction of the suit and the appointment of the department as temporary managing conservator is in the best interest of the child. If the court grants an extension, the extension order must also:
>
> (1) schedule the new date for dismissal of the suit; and
>
> (2) make further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit.

See supra note 7. In 2001, the subsection was amended to read:

> The court may retain the suit on the court's docket for a period not to exceed 180 days after the time described by Subsection (a), if the court finds that continuing the appointment of the department as temporary managing conservator is in the best interest of the child. If the court retains the suit on the court's docket, the court shall render an order in which the court:
>
> (1) schedules the new date for dismissal of the suit not later than the 180th day after the time described by Subsection (a);
>
> (2) makes further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit; and
>
> (3) sets a final hearing on a date that allows the court to render a final order before the required date for dismissal of the suit under this subsection.

Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 8, 2001 Tex. Gen. Laws 2395, 2396. In 2005, the first sentence of the paragraph was amended to read:

> The court may not retain the suit on the court's docket after the time described by Subsection (a) unless the court finds that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the department and that continuing the appointment of the department as temporary managing conservator is in the best interest of the child. If the court makes those findings, the court may retain the suit on the court's docket for a period not to exceed 180 days after the time described by Subsection (a).

Act of May 29, 2005, 79th Leg., R.S., ch. 268, § 1.40, 2005 Tex. Gen. Laws 621, 636. In 2007, the phrase "Unless the court has commenced the trial on the merits," was added to the beginning of the first sentence, and subsection (1) and (3) were changed to the current version, which now provides:

subsection (b) spoke in terms of "extend[ing] the court's jurisdiction",[13] but since the 2001 amendments the provision has referred instead to "retain[ing] the suit on the court's docket".[14] The dismissal contemplated by these provisions is clearly for want of prosecution without reference to the merits of the case. Such a dismissal is without prejudice to claims not adjudicated.[15]

A dismissal with prejudice is an adjudication of the parties' rights;[16] a dismissal without prejudice is not.[17] A dismissal under section 263.401 does not involve a decision on the merits of

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> Unless the court has commenced the trial on the merits, the court may not retain the suit on the court's docket after the time described by Subsection (a) unless the court finds that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the department and that continuing the appointment of the department as temporary managing conservator is in the best interest of the child. If the court makes those findings, the court may retain the suit on the court's docket for a period not to exceed 180 days after the time described by Subsection (a). If the court retains the suit on the court's docket, the court shall render an order in which the court:
>
> (1) schedules the new date on which the suit will be dismissed if the trial on the merits has not commenced, which date must be not later than the 180th day after the time described by Subsection (a);
>
> (2) makes further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit; and
>
> (3) sets the trial on the merits on a date not later than the date specified under Subdivision (1).

Act of May 27, 2007, 80th Leg., R.S., ch. 866, § 2, 2007 Tex. Gen. Laws 1837, 1837-1838.

[13] *See supra* note 12.

[14] *See supra* note 12.

[15] *Newco Drilling Co. v. Weyand*, 960 S.W.2d 654, 656 (Tex. 1998) (per curiam) ("[T]he trial court's dismissal of the plaintiffs' case for want of prosecution following the rendition of the partial summary judgment resulted in a dismissal with prejudice of those issues already adjudicated in the partial summary judgment and a dismissal without prejudice of those issues not covered in the partial summary judgment."); *Gracey v. West*, 422 S.W.2d 913, 917 (Tex. 1968) ("The judgment of dismissal of the cause for want of prosecution is not a judgment on the merits of the cause.").

[16] *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991) (per curiam) ("[I]t is well established that a dismissal with prejudice functions as a final determination on the merits."); *accord Ritchey v. Vasquez*, 986 S.W.2d 611, 612 (Tex. 1999) (per curiam).

[17] *Crofts v. Court of Civil Appeals for Eighth Supreme Judicial Dist.*, 362 S.W.2d 101, 104 (Tex. 1962) ("It is elementary that a dismissal is in no way an adjudication of the rights of parties; it merely places the parties in the position that they were in before the court's jurisdiction was invoked just as if the suit had never been brought. ").

the case, but dismissal with prejudice can be ordered as a sanction.[18] Section 263.401 does not contemplate dismissal as a sanction because it can occur without any fault of the Department, as in this case, or without any fault at all, as when the press of the trial court's business simply does not allow compliance. Ordinarily, "'there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'"[19] But having given the Department the authority to sue to terminate parental rights, the Legislature could certainly restrict that authority and prohibit the Department absolutely from prosecuting an action with respect to a child after a certain period of time. There is no indication that the Legislature has done so in section 263.401. The Legislature has made crystal clear that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child."[20] To require dismissal of a termination suit after a period of time without a determination that it is in the child's best interest means either that the child's best interest is sometimes irrelevant, or that delay past a certain time, for whatever reason, is never in the child's best interest. Neither is possible.

Thus, a dismissal under section 263.401 must be without prejudice. A dismissal without prejudice presents no bar to refiling the same action.[21] The courts of appeals are therefore correct

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[18] *See*, *e.g.*, TEX. CIV. PRAC. & REM. CODE § 74.351(b)(2) ("If, as to a defendant physician or health care provider, an expert report has not been served within the period specified . . . , the court . . . shall . . . enter an order that . . . dismisses the claim . . . with prejudice . . . ."); *Villafani v. Trejo*, 251 S.W.3d 466, 468 (Tex. 2008) ("If the plaintiff fails to provide an adequate expert report or to voluntarily nonsuit the claim, the statute allows a defendant to move for sanctions against the plaintiff, including: . . . (3) dismissal of the case with prejudice."); TEX. R. CIV. P. 13 (providing that a court may sanction pleading abuse with any appropriate sanction permitted by Rule 215); TEX. R. CIV. P. 215.2(b) (providing that a court may sanction certain discovery abuse by dismissing the action with prejudice).

[19] *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991) (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 209-10 (1958)).

[20] TEX. FAM. CODE § 153.002.

[21] *See Rizk v. Mayad*, 603 S.W.2d 773, 775 (Tex. 1980) ("[A] litigant may refile an action that has been dismissed for want of prosecution, since the merits of such an action remain undecided.").

that the Department, after dismissal of a termination action under section 263.401, can file a new action asserting the same legal grounds. But they are incorrect in holding that the Department must allege new facts. Without prejudice is without prejudice. The pragmatic concern that the Department "would be permitted to maintain custody of a child in its care indefinitely merely by annually re-filing suit"[22] is unfounded. If the Department acts without sufficient grounds, merely to prolong custody of a child without a final adjudication, the trial court has ample authority to impose sanctions.[23] Section 263.401 does not suggest that the Department should be prohibited from refiling suit to protect a child.

The ostensible purpose of section 263.401 is to expedite termination cases. Threatening the Department with dismissal may not be the best means to that end. It makes no sense to punish children by returning them to dangerous circumstances because the Department or the court did not move swiftly enough to protect them. A better way might have been to set deadlines enforceable by mandamus along with procedures to monitor the status of termination cases throughout the State and ensure compliance. The Court shrugs: "it is not for courts to decide if legislative enactments are wise or if particular provisions of statutes could be better-worded to reach what courts or litigants might believe to be better or more equitable results."[24] Perhaps, but we are required to presume that the Legislature intended "a just and reasonable result" in favor of the public interest over any private

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[22] *In re Ruiz*, 16 S.W.3d 921, 927 (Tex. App.–Waco 2000, orig. proceeding).

[23] *See* TEX. R. CIV. P. 13 ("Attorneys or parties who shall . . . make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215, upon the person who signed it, a represented party, or both."); TEX. CIV. PRAC. & REM. CODE § 10.001 ("The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry: (1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . ."); *id.* § 10.004(a) ("A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.").

[24] *Ante* at ___.

interest.[25] And we should consider the consequences.[26] We are obliged to adopt a reasonable construction of a statute that avoids results as unreasonable as returning children to unsafe environments.

Whether the threat of dismissal adequately serves the Legislature's purpose of expediting termination cases, judicial wrangling over whether dismissal should or should not occur does not. The trial court last set this case for trial on June 4, 2008. Had judgment been rendered at that time, the case could be close to being final on appeal. Even though this Court and the court of appeals have expedited consideration of K.W.'s petition for mandamus, if the Department is permitted to proceed anyway, months have been lost unnecessarily. Despite the energy expended in this case, adjudication remains distant. The Court states: "The Family Code evidences a clear intent by the Legislature to prevent cases from lingering on court dockets for extended periods beyond specified timeframes by agreement *or otherwise*."[27] Then the Court proceeds to adopt a construction in this case that requires that a final resolution of the issues be delayed interminably.

I would hold that even if this suit is dismissed, the Department can refile the same action as long as there are factual and legal grounds to do so.[28] I would leave it to the ample mechanisms already in place for assuring prompt resolution of cases to require that the Department move expeditiously.

II

That said, I do not believe that section 263.401 requires dismissal.

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[25] TEX. GOV'T CODE § 311.021 ("In enacting a statute, it is presumed that: . . . (3) a just and reasonable result is intended; . . . and (5) public interest is favored over any private interest.").

[26] *Id*. § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: . . . (5) consequences of a particular construction . . . .").

[27] *Ante* at ___ (emphasis in original).

[28] It may be, of course, that the situation has changed in the two-and-one-half years since the case began.

The trial court rendered a final order before the one-year deadline prescribed by subsection (a). K.W. timely filed a motion for new trial,[29] and the trial court held a timely hearing.[30] While the Family Code prescribes deadlines for filing and hearing a motion for new trial, it says nothing specific about deadlines after a motion for new trial is granted. The statutory provisions cannot reasonably be construed to allow a party to file a motion for new trial but deny the court a reasonable opportunity to grant the motion and retry the case.

While the court's order granting a new trial set aside the final order, it did not erase the fact that a final order was rendered within the time prescribed by subsection (a). Subsection (b) allowed the court to retain the case on its docket for 180 days if it found that continuing the Department's conservatorship of K.W.'s children was necessitated by extraordinary circumstances and was in the children's best interest. While the court did not make those findings on the record, subsection (b) does not impose that requirement, and the findings are certainly implied in the court's rulings, as they would be in other cases.[31] Subsection (b) does require an additional order setting a new dismissal deadline within 180 days, a trial date enough in advance for a final ruling by the deadline, and any further orders necessary. The court issued no additional order but did set a new trial date well within the 180 days. It issued no further temporary orders, but there is no indication that any were necessary. In any event, K.W. never objected that an additional order did not issue. I would hold that the court properly retained the case under that subsection (b).

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[29] TEX. FAM. CODE § 263.405(b) (requiring that a motion for new trial be filed within 15 days of the date a final order is signed).

[30] *Id.* § 263.405(d) (requiring a hearing within 30 days of the date a final order is signed).

[31] *E.g. In re Lynd Co.*, 195 S.W.3d 682, 686 (Tex. 2006) (holding that absent a trial court's express finding that a party received late notice of the judgment, a finding should be implied by the court's granting of a motion for new trial); *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003) ("When neither party requests findings of fact and conclusions of law, it is implied that the trial court made all fact findings necessary to support its judgment."); *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) ("When a trial court does not issue findings of fact and conclusions of law with its special appearance ruling, all facts necessary to support the judgment and supported by the evidence are implied."); *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam) (holding that findings should be implied in favor of an order modifying child support).

The new trial was postponed until after the 180-day deadline. Section 263.401(c) prohibited this extension.[32] K.W. did not object to the delay; she requested it. Under section 263.402(b), she waived the right to object because she did not move for a final order before the extended deadline and did not move to dismiss before the Department rested its case-in-chief at the first trial.[33] K.W. contends that she was entitled to move for dismissal until the Department rested at the second trial, but she cannot be permitted to agree to postpone the trial and then object that it was not conducted sooner.

This construction of the statutory provisions does not force a parent to choose between moving for a new trial and insisting on expedited proceedings. Having obtained a new trial, K.W. was entitled to insist that it occur within 180 days, and the trial court complied with a setting well within that period. But K.W. did not move for a final order within the period; to the contrary, she requested a postponement. At that point, she could no longer object to the delay.

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[32] The version of section 263.401(c) applicable to this case provided:

> If the court grants an extension but does not render a final order or dismiss the suit on or before the required date for dismissal under Subsection (b), the court shall dismiss the suit. The court may not grant an additional extension that extends the suit beyond the required date for dismissal under Subsection (b).

Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 8, 2001 Tex. Gen. Laws 2395, 2396.

[33] The version of § 263.402(b) applicable in this case provided:

> A party to a suit under this chapter who fails to make a timely motion to dismiss the suit or to make a motion requesting the court to render a final order before the deadline for dismissal under this subchapter waives the right to object to the court's failure to dismiss the suit. A motion to dismiss under this subsection is timely if the motion is made before the department has introduced all of the department's evidence, other than rebuttal evidence, at the trial on the merits.

Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 9, 2001 Tex. Gen. Laws 2395, 2396-2398. I agree with the Court that the deadlines in section 263.401 are not jurisdictional. The fact that they can be waived under section 263.402(b) seems to prove that.

The Court states: "The members of this Court recognize the significance of this proceeding to the lives of the children involved — anyone would."[34] Then it releases to K.W., who was found in emergency proceedings and after trial on the merits to have been an unfit parent, two small children who have been in foster care for over two years, though the Court acknowledges that it has no idea what the present circumstances are or what the risks may be. The Court seems to take comfort in the possibility the Department will refile termination proceedings,[35] actions that will no doubt extend by years a final resolution of this case. Recognizing the significance of this case to the children, and trying to avoid harm, appear to be different things.

I would direct the court of appeals to vacate its judgment and allow the trial court to proceed. Because the Court does not do so, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: January 9, 2009

[34] *Ante* at ___.

[35] *Ante* at ___ ("At oral argument, counsel for K.W. stated his opinion that the Department could refile the case and expected it to do so. Counsel for the Department did not dispute that argument.").

IN THE SUPREME COURT OF TEXAS

NO. 08-0524

IN RE DEPARTMENT OF FAMILY & PROTECTIVE SERVICES, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued November 12, 2008

JUSTICE BRISTER, joined by JUSTICE HECHT, JUSTICE O'NEILL and JUSTICE MEDINA, dissenting.

Surely no one — not even a mother fighting to keep her kids — can ask for a new trial and then demand dismissal because she got it. There *was* a final order before the statutory one-year deadline in this case, but the mother asked the trial court to set it aside and give her a new trial and later a resetting after the deadline had passed. Having gotten what she wanted, she is not entitled to complain that the trial court should have turned her down. Because the Court holds otherwise, I respectfully dissent.

The Family Code prohibits parties from extending the one-year deadline by agreement, but it expressly allows them to waive the deadline by inaction.[1] This is not a subtle distinction: litigants (for example) cannot change the Constitution by agreement, but they can certainly waive

[1] *See* TEX. FAM. CODE § 263.402.

constitutional complaints.[2] Even the analogous right to a speedy trial (an explicit constitutional right) can be waived if the accused is responsible for the delay.[3] By holding this deadline nonwaivable, the Court makes it stricter than the Legislature did, stricter even than the Constitution itself.

It has long been the rule in Texas that a party cannot complain of an error it invited:

> The principle is that if, during the progress of a cause, any party thereto request or move the court to make an erroneous ruling, and the court rule in accordance with such request or motion, he cannot take advantage of the error upon appeal.[4]

This rule "is grounded in justice and dictated by common sense."[5] If a party can consent to an order and then seek reversal if it is granted, then both justice and common sense have been set aside. It makes no difference that this is a parental-termination case; justice and common sense apply there too.[6]

Until today there has been only one exception to the invited-error doctrine: absence of subject-matter jurisdiction. That is not an issue here, as the Legislature allowed this deadline to be

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[2] *See, e.g.*, *In re K.A.F.*, 160 S.W.3d 923, 928 (Tex. 2005); *In re L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003); *In re A.V.*, 113 S.W.3d 355, 358 (Tex. 2003); *Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001).

[3] *See Barker v. Wingo*, 407 U.S. 514, 529 (1972); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

[4] *Gresham v. Harcourt*, 53 S.W. 1019, 1021 (Tex. 1899); *see, e.g.*, *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 861 (Tex. 2005); *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 668 (Tex. 1984); *Hamilton v. Hamilton*, 280 S.W.2d 588, 591 (Tex. 1955); *Ne. Tex. Motor Lines v. Hodges*, 158 S.W.2d 487, 488 (Tex. 1942); *Patton v. Dallas Gas Co.*, 192 S.W. 1060, 1062 (Tex. 1917).

[5] *Tittizer*, 171 S.W.3d at 861; *Hodges*, 158 S.W.2d at 488.

[6] *See In re B.L.D.*, 113 S.W.3d 340, 351, 354 (Tex. 2003) (declining to review unpreserved complaints in parental-termination case).

waived.[7] By creating a second exception, the Court invites future error by suggesting parties can sandbag a trial court and then ask the court of appeals to create new exceptions for them too.

The Court states two reasons for this unprecedented step. First, it says we cannot apply the invited-error doctrine because the Department did not raise it in its appellate brief. But invited error is an issue of error preservation;[8] a party who invites error has not obtained an adverse ruling when they get it. Because the mother failed to preserve error regarding this deadline, she cannot prevail even if the Department had filed no brief at all.

Second, the Court says this is not a case of invited error because the mother complains only of denial of her motion to dismiss and not the granting of her earlier motions for a new trial and a resetting. Surely we cannot be so naïve. While her last motion requested dismissal, the only bases for that motion were her earlier motions asking the trial court to set aside its final order and give her a new trial after all deadlines had passed.

Twice in recent years we have rejected attempts to focus the invited-error rule narrowly on the contested motion and not on the surrounding context. In 1999 and 2008, we held the invited-error doctrine did not bar a party from complaining about a jury question it had requested, because in both instances the party had made clear throughout the case that it objected to submission but

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[7] *See Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008) (holding subject-matter jurisdiction cannot be waived).

[8] *See* TEX. R. APP. P. 33.1.; *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 777 (Tex. 2008) (addressing invited error under the heading "Preservation of Error").

nevertheless wanted to make sure the issue was properly drafted.[9] The Court now takes the opposite approach, reviewing only the last motion and disregarding the context in which it occurred.

Finally, the Court also ignores the context and consequences of its own ruling. It is hard to find anything in today's opinion about the best interest of these children; indeed, the Court resolutely refuses to consider what may happen to them, or whether this case will start over from scratch. While "it is not this Court's business" to make factual determinations,[10] it must be our business to consider the potential consequences of statutory construction, because the Legislature has instructed us to do so.[11]

The Court blames "the Legislature, not the judiciary" for whatever may happen to these children, but it is the Court not the Legislature that says the *exclusive* means of waiving complaints about these deadlines are the two in the statute. The Court says the possibility of starting the case over "is not before us,"[12] but we are ordering this case dismissed; is that with or without prejudice? And shouldn't a court think about these questions before deciding whether rigid application of these deadlines will actually ensure "prompt and final resolution of parental-rights termination cases"?[13]

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[9] *See Ulico*, 262 S.W.3d at 777; *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999).

[10] ___ S.W.3d at ___.

[11] *See* TEX. GOV'T CODE § 311.023(5).

[12] ___ S.W.3d at ___.

[13] *Id.* at ___.

Because a party cannot complain of a ruling it asked for, I would reverse the court of appeals' judgment and remand the case to the trial court for an immediate trial. Because the Court holds otherwise, I respectfully dissent.

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Scott Brister
Justice

OPINION DELIVERED: January 9, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0531

IN RE INTERNATIONAL PROFIT ASSOCIATES, INC., INTEGRATED BUSINESS ANALYSIS, INC., ACCOUNTANCY ASSOCIATES, LLC, INTERNATIONAL TAX ADVISORS, INC., AND HUEY MITCHELL, JR.

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this original proceeding, we consider whether a trial court abused its discretion by requiring parties who seek to enforce a forum-selection clause to prove they showed the specific clause to the opposing party when they entered the agreement as a condition to enforcing the clause. We conclude that the trial court abused its discretion and conditionally grant the writ of mandamus. Accordingly, we do not address whether the trial court abused its discretion by denying admission of the original contract at the hearing on the motion to reconsider.

Riddell Plumbing, Inc. (Riddell) hired International Profit Associates, Inc. to provide a business analysis and an initial profitability recommendation. Riddell then decided to move forward with more extensive consulting services and signed a contract with International Profit Associates,

Integrated Business Analysis, Inc., Accountancy Associates, LLC, and International Tax Advisors, Inc.[1] The first page of the contract contains a forum-selection clause explaining:

> At [Riddell's] election, [IPA agrees] that all disputes of any kind between the parties arising out of or in connection with these respective independent agreements shall be submitted to binding arbitration . . . . With regard to all other matters, exclusive jurisdiction and venue shall vest in the Nineteenth Judicial District of Lake County, Illinois, Illinois Law applying.

When Riddell became dissatisfied with IPA's services under the agreement, it did not elect to pursue arbitration. Instead, Riddell filed suit against IPA in Dallas County, Texas. IPA filed a motion to dismiss based on the forum-selection clause in its contract with Riddell.

The trial court denied IPA's motion to dismiss, explaining in an official letter to both parties that IPA "did not sustain [its] burden of proving that the page of the contract containing the forum-selection clause was ever presented [to Riddell]." The court also denied IPA's subsequent motion to reconsider the motion to dismiss. IPA sought a writ of mandamus from the court of appeals, arguing that the trial court abused its discretion in not granting the motion to dismiss because IPA did not have the burden of proving that it showed the forum-selection clause to Riddell. The court of appeals denied IPA's petition for writ of mandamus without explanation.

IPA complains to this Court that the trial court abused its discretion by requiring IPA to prove that it showed the forum-selection clause to Riddell because: (1) there is no obligation to show a specific contractual provision to a party who signs a contract, *In re U.S. Home Corp.*, 236 S.W.3d 761, 764 (Tex. 2007), and (2) the burden of proof is not on the party seeking to enforce a forum-

[1] The entities, as well as Huey Mitchell, a sales representative for International Profit Associates who was individually sued by Riddell, will be referred to as IPA because the relators filed motions to enforce the forum-selection clause. In response to the motion and in its briefs, real party Riddell Plumbing addresses IPA's arguments collectively.

selection clause, but on the party challenging the clause. *In re AIU Ins. Co.*, 148 S.W.3d 109, 113 (Tex. 2004). IPA also argues that the trial court abused its discretion because a party's failure to show a portion of a contract to the other contracting party, absent fraud, is not one of the methods a party can use to challenge a forum-selection clause as established by this Court in *In re Lyon Financial Services*, *Inc.* 257 S.W.3d 228, 231–32 (Tex. 2008).

Riddell counters that failing to show it the forum-selection clause constitutes fraud or overreaching. Riddell explains that the United States Supreme Court established in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991), that forum-selection clauses are subject to judicial scrutiny for fundamental unfairness. Applying this principle to the present case, Riddell argues that it would be fundamentally unfair to enforce a forum-selection clause that Riddell's representative, Scott Riddell, was never shown when he signed the contract.

In a recent case also involving IPA and the enforceability of a forum-selection clause, we explained that, as a general rule, forum-selection clauses are enforceable, and the party challenging the forum-selection clause bears a heavy burden of proof. *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 675 (Tex. 2009) (citing *In re Lyon*, 257 S.W.3d at 231–32). A trial court abuses its discretion in refusing to enforce the forum-selection clause, unless the party opposing enforcement of the clause can clearly show that: (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. *Id.* Applying this standard to the present case, we conclude that the trial court clearly abused its

discretion by placing the burden of proof on IPA to demonstrate that it showed the forum-selection clause to Riddell.

Riddell primarily supports its challenge to the forum-selection clause with Scott Riddell's testimony that IPA never showed him the first page of the contract, which contained the clause. Riddell further argues that evidence IPA did not show the forum-selection clause to Scott Riddell proves that Riddell's compliance was obtained by fraud or overreaching. Evidence that a party concealed a forum-selection clause combined with evidence proving that concealment was part of an intent to defraud a party may be sufficient to invalidate the clause; here, however, Riddell's evidence that IPA did not direct Scott Riddell to the forum-selection clause is insufficient as a matter of law to prove fraud or overreaching. *In re Lyon*, 257 S.W.3d at 231–32.

First, as we explained in *Lyon*, "[a] party who signs a document is presumed to know its contents," including "documents specifically incorporated by reference." 257 S.W.3d at 232. Scott Riddell claims not to have seen page one of the contract containing the forum-selection clause at the time he signed it. There is specific evidence demonstrating that he knew or should have known of the existence of the clause when he signed the contract. Most notably, Scott Riddell signed page four of the contract. A clause two lines above his signature noted: "This document, *4 pages in total*, constitutes the entire agreement for services . . ." (emphasis in original). Furthermore, each of the three pages that Riddell claims he saw and endorsed states that the respective pages are "2 of 4," "3 of 4," and "4 of 4." Even assuming that Riddell was not shown page one of the contract, the statements on pages two through four of the contract put him on notice that page one existed; he could have asked for the missing page. *See In re U.S. Home*, 236 S.W.3d at 764 (explaining that a

party cannot avoid a contract clause by simply failing to read it and that if a party was not prevented from reading a contract provision, then there is no evidence of fraud). We conclude that Scott Riddell's testimony, as well as the affidavits of Riddell's other representatives stating that he was never shown the first page of the contract, is insufficient evidence to meet Riddell's heavy burden of proof to avoid enforcement of the contract provision.

Second, simply being unaware of a forum-selection clause does not make it invalid. *In re Lyon*, 257 S.W.3d at 233. We explained in *Lyon* that "parties to a contract have an obligation to protect themselves by reading what they sign and, absent a showing of fraud, cannot excuse themselves from the consequences of failing to meet that obligation." *Id.* Scott Riddell's inattention to page one of the contract is not evidence of fraud or overreaching because there is no evidence that IPA made any misrepresentations about or fraudulently concealed the existence of page one or any other portion of the contract. To the contrary, the existence of page one is referenced on every page of the agreement that Scott Riddell read and endorsed. *In re U.S. Home*, 236 S.W.3d at 764. If we were to determine otherwise, it would require a party seeking to enforce a forum-selection clause to prove that the opposing party was separately shown each provision of every contract sought to be enforced and was subjectively aware of each clause. Parties who sign contracts bear the responsibility of reading the documents they sign.

Riddell also claims that the Supreme Court's decision in *Shute* stands for the proposition that courts must evaluate forum-selection clauses for fundamental unfairness. While this is correct, Riddell misapplies the analysis used in *Shute*. *See* 499 U.S. at 595. In *Shute*, the Supreme Court looked for evidence that the forum-selection clause was "used as a means of discouraging cruise

passengers from pursuing legitimate claims," as well as evidence of bad faith. *Id.* Conversely, Riddell argues that the forum-selection clause is unfair because its representative was never given the first page of the agreement that included the forum-selection clause and not because the clause itself was fundamentally unfair.[2] Furthermore, Riddell offers no evidence that the selected forum, Illinois, or choice of law, Illinois law, was chosen to deprive the company of its day in court by subverting its substantive rights. *See In re AIU*, 148 S.W.3d at 113 (citing *Shute*, 499 U.S. at 595).

In conclusion, the party challenging a forum-selection clause has the burden of proving the clause is invalid, and the party seeking to enforce the forum-selection clause is not obligated to prove that it specifically showed the clause to the opposing party as a condition of enforcement. Because the trial court placed the burden of proof on IPA and required the company to prove that it showed the forum-selection clause to Riddell, it clearly abused its discretion in denying IPA's motion to dismiss. Accordingly, we conditionally grant mandamus relief and direct the trial court to vacate its order denying IPA's motion to dismiss and enter an order granting the motion. *See* TEX. R. APP. P. 52.8(c). We are confident the trial court will comply with our directive, and the writ will issue only if the trial court fails to do so.

OPINION DELIVERED: June 12, 2009

[2] Riddell spends a considerable portion of its brief enumerating unrelated allegations of misconduct or impropriety by IPA and its principals. None of those allegations against IPA is relevant to this appeal. They have no relation to the forum-selection clause at issue in this petition or any actions taken related to the clause itself.

IN THE SUPREME COURT OF TEXAS

NO. 08-0584

IN RE MACY'S TEXAS, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

Erica Tomsic alleges injury to her back while working as an employee at a Macy's department store in April 2007. On May 9, 2007, she signed an "Arbitration Acknowledgment" stating she had "received and read (or had the opportunity to read) the Summary Plan Description . . . for the Federated Department Stores, Inc. Injury Benefit Plan for Texas Employees, effective February 1, 2005."[1] In the one-page Acknowledgment, she agreed to "immediately report to my supervisor" any accidents involving employees, customers, or herself. She also acknowledged that the Plan required arbitration of on-the-job injuries against "the Company." On page 1 in bold black lettering, the Plan defined "the Company" as "your particular employer":

> All Texas employees of Federated Department Stores, Inc, Macy's West, Inc., and Federated Systems Group, Inc. will be covered by this program. References to the word "Company" in this booklet will mean your particular employer.

[1] The Plan's effective date predated her injury, even though her Acknowledgment did not. As it is undisputed that the Plan adopted the Federal Arbitration Act, the limitations on such post-injury agreements in the Texas Act do not apply. *See* TEX. CIV. PRAC. & REM. CODE § 171.002(c) (prohibiting post-injury arbitration agreements unless signed by each party's attorney).

Tomsic nevertheless sued her employer in court, naming Macy's Texas, Inc. as her employer and the only defendant. At a hearing on the latter's motion to compel arbitration, she argued that she was not employed by any of the entities the Plan expressly named, and offered pay stubs showing she was paid by "Macy's South, Paying Agent for Macy's TX I, L.P." In response, the defendant presented an affidavit by an assistant manager for human relations at Tomsic's store who said he was an employee of "Macy's South," Tomsic was an employee of "Macy's West," and that both entities were retail divisions of Macy's Inc., formerly known as Federated Department Stores, Inc. The trial court denied the motion to compel arbitration, and the court of appeals denied mandamus relief. __ S.W.3d __.

We agree with Tomsic that the affidavit alone is insufficient to require relief. While the trademark laws make it hard to believe Macy's South or Macy's West are not affiliated with Macy's Inc., it was the defendant's burden to prove they were. *See In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005). On that issue the affidavit was conclusory rather than conclusive, failing to establish any basis for the affiant's knowledge of corporate structure or attach any supporting documents whatsoever. And even if they were affiliates, treating affiliates as one entity for purposes of arbitration may be inconsistent with their separate creation. *See In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 191 (Tex. 2007).

But in this case the Plan itself stated that "the Company" would mean "your particular employer." This definition is certainly nonspecific, but it serves to avoid the kind of disputes about corporate divisions and affiliates that Tomsic tries to raise here. The FAA contains no requirements for the form or specificity of arbitration agreements except that they be in writing; it does not even

require that they be signed. *See* 9 U.S.C. § 2; *Seawright v. Am. Gen. Fin. Servs., Inc*., 507 F.3d 967, 978 (6th Cir. 2007) (citing cases from the 2nd, 5th, 7th, and 10th Circuits). But in this case the defendant's affidavit establishes that the Acknowledgment was signed "For the Company" by an assistant manager at the Macy's store where Tomsic worked.

Tomsic offers no explanation why she would agree with anyone other than her employer on a health-benefits plan or arbitration for on-the-job injuries. Her suit asserts failure to provide proper equipment and a safe workplace — both nondelegable duties owed by her employer. *See Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 215 (Tex. 2008). As Tomsic agreed to arbitrate with her employer and purported to sue her employer, she cannot avoid arbitration by raising factual disputes about her employer's correct legal name.

Accordingly, without hearing oral argument, TEX. R. APP. P. 52.8(c), we conditionally grant the petition for writ of mandamus and direct the trial court to enter an order compelling arbitration. We are confident the trial court will comply, and our writ will issue only if it does not.

OPINION DELIVERED: June 26, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0589

JASON FERGUSON AND BOBBIE FERGUSON, PETITIONERS,

v.

BUILDING MATERIALS CORPORATION OF AMERICA, CPC LOGISTICS, INC., AND ROBERT JAMES MADDOX, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

PER CURIAM

At issue in this appeal is whether the plaintiffs in a personal injury suit should be estopped from pursuing their claim because they initially omitted it as a listed asset in a pending bankruptcy. The court of appeals, in a divided opinion, concluded that the doctrine of judicial estoppel should apply and affirmed the trial court's dismissal of the plaintiffs' personal injury claim. 276 S.W.3d 45. The court of appeals reasoned that the doctrine applied because of the plaintiffs failure to add the personal injury claim as an asset in their bankruptcy proceeding before the personal-injury defendant pointed out the omission and moved for dismissal. Because we disagree that the doctrine is invoked under the circumstances of this case, we reverse and remand the personal injury claim to the trial court.

Jason Ferguson and his wife sued Building Materials Corporations of America and others for injuries Ferguson suffered when an eighteen-wheeler crashed into a building, which collapsed on him. A few months after filing the personal injury suit against Building Materials, the Fergusons filed for bankruptcy, which required them to disclose their income, assets, and liabilities to the bankruptcy court, the bankruptcy trustee, and their creditors. *See* 11 U.S.C. § 521 (a)(1)(A) & (B)(i),(ii),(iii). To comply with these disclosures, the Fergusons completed several forms, including a Statement of Financial Affairs and a Schedule of Personal Property. The Fergusons disclosed the pending lawsuit in the Statement of Financial Affairs, providing the caption and style of the suit, nature of the claim, cause number, and the court in which it had been filed. The Fergusons, however, failed to include it on their Schedule of Personal Property.

The Fergusons also participated in a creditors meeting at which they again disclosed the pending personal injury suit to the bankruptcy trustee. *See* 11 U.S.C. § 341(c). The trustee acknowledged the existence of the pending litigation in his report, which was given to the bankruptcy court and creditors. None of the creditors objected to the final bankruptcy plan that failed to include the lawsuit as an asset.

Within weeks of the plan's approval, Building Materials, the defendant in the personal injury lawsuit, filed a motion for summary judgment, claiming the personal injury action was barred on the basis of judicial estoppel. The trial court granted the motion, and a divided court of appeals affirmed, reasoning that the Fergusons were judicially estopped from pursuing the personal injury lawsuit. 276 S.W.3d at 49-52.

Judicial estoppel precludes a party who successfully maintains a position in one proceeding from afterwards adopting a clearly inconsistent position in another proceeding to obtain an unfair advantage. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2008). Accordingly, a party cannot be judicially estopped if it did not prevail in the prior action. *See Long v. Knox*, 291 S.W.2d 292, 295 (Tex. 1956). The doctrine is not intended to punish inadvertent omissions or inconsistencies but rather to prevent parties from playing fast and loose with the judicial system for their own benefit. *Pleasant Glade Assembly of God*, 264 S.W.3d at 7.

The Fergusons have neither taken a clearly inconsistent position nor gained an unfair advantage in their bankruptcy proceeding. As the dissenting justice in the court of appeals noted, the Fergusons never attempted to conceal the existence of the personal injury suit. 276 S.W.3d at 54. Rather, the Fergusons listed it on their Statement of Financial Affairs and also disclosed it to the trustee at the creditors meeting, at which time they acknowledged the suit and directed the trustee to contact plaintiffs' counsel if the trustee needed additional information. And, although the Fergusons omitted it from the bankruptcy plan initially confirmed by the court, when the omission was called to their attention, they amended their bankruptcy plan to include its value and agreed to recalculate the amount owed to the creditors. Thus, even assuming the existence of an inconsistent position, the Fergusons have gained no advantage and more importantly, neither Building Materials in the pending personal injury suit nor the creditors in the bankruptcy have suffered any disadvantage. The doctrine of judicial estoppel simply does not apply under these circumstances. *See Pleasant Glade Assembly of God*, 264 S.W.3d at 6-8.

We review a grant of summary judgment de novo. *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007). Because the Fergusons have taken neither a clearly inconsistent position nor obtained an unfair advantage, the court of appeals erred in affirming the dismissal of their personal injury claim under the doctrine of judicial estoppel. We accordingly grant the petition for review and, without hearing oral argument, reverse the court of appeals' judgment and remand the case to the trial court for further proceedings. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0618

BENNY BENNETT AND MARY BENNETT,

v.

RICHARD MCDANIEL, INDIVIDUALLY AND D/B/A RICHARD MCDANIEL, INC., D/B/A B.R. ROOFING, A/K/A B&R ROOFING

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

PER CURIAM

In this restricted appeal of a post-answer default judgment, the court of appeals held that the plaintiffs presented legally insufficient evidence of damages and rendered a take-nothing judgment. ___ S.W.3d at ___. We agree that the damages evidence was legally insufficient, but the court of appeals' disposition was improper under our recent opinion in *Dolgencorp v. Lerma*, ___ S.W.3d at ___. Accordingly, we reverse the court of appeals' judgment and remand to the trial court.

Benny and Mary Bennett sued Richard McDaniel alleging that McDaniel had damaged the roof of their home, which the Bennetts had hired him to repair. McDaniel filed an answer denying their allegations, but did not appear when the case was called for trial. At trial, Mary Bennett testified that she received an estimate to repair the roof in the amount of "approximately 72 or $7300.00," and that she incurred "actual damages of $7500.00 to repair this roof." The estimate,

however, does not appear in the record. The trial court rendered a default judgment in favor of the Bennetts for $7,500 in actual damages, $10,000 in punitive damages, and $1,500 in attorney's fees.

It is unclear whether the estimate that Mary Bennett referred to was submitted to the trial court and omitted from the appellate record, or whether it was not submitted at all. In either case, we disagree with the court of appeals' statement that "an estimate without the testimony of the person who created the estimate or other expert testimony is no evidence of the necessity of the repair or the reasonableness of the cost of the repair." ___S.W.3d___. Such evidence might ordinarily be properly excluded as hearsay, but no hearsay objection was lodged in this case. The record indicates, however, that Mary Bennett merely stated an estimated price and did not testify that the estimate was reasonable. For this reason, we agree with the court of appeals that the Bennetts did not present legally sufficient evidence of damages.

While this petition was pending, we held in *Dolgencorp*, ___S.W.3d ___, that when the evidence is legally insufficient to support a post-answer default judgment the proper disposition is to remand for a new trial. Accordingly, we grant the Bennetts' petition for review and, without hearing oral argument, TEX. R. APP. P. 59.1, reverse the court of appeals' judgment and remand this case to the trial court for a new trial.

OPINION DELIVERED: August 21, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0625

IN RE E.I. DU PONT DE NEMOURS AND COMPANY, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE JOHNSON delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE BRISTER, and JUSTICE WILLETT joined.

JUSTICE O'NEILL filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON, JUSTICE MEDINA, and JUSTICE GREEN joined.

At issue in this mandamus proceeding is whether the trial court abused its discretion by disregarding the jury verdict and granting a new trial without giving its reasons for doing so. Based on *In re Columbia Medical Center of Las Colinas*, ___ S.W.3d ___ (Tex. 2009), we hold that it did and grant relief.

Willis Whisnant's estate and beneficiaries (collectively, Whisnant) sued E.I. du Pont de Nemours and Company (DuPont) for wrongful death. Whisnant asserted that Willis was exposed to asbestos fibers while working for DuPont, which caused him to develop mesothelioma. After a five-week trial, the jury failed to find DuPont negligent and the trial judge entered a take nothing judgment. Whisnant filed a motion for new trial. The grounds were (1) the verdict was contrary to the weight of the evidence, and (2) some jurors may have read newspaper articles about the trial that

Whisnant contended were biased toward DuPont. The trial court granted Whisnant's motion for new trial but did not state a reason for doing so.

DuPont sought, but was denied, a writ of mandamus from the court of appeals. In this Court, DuPont argues that the trial court abused its discretion by (1) granting a new trial without stating a reason for disregarding the jury verdict, and (2) granting the new trial motion in any event.

In *In re Columbia*, we held that a trial court acted arbitrarily and abused its discretion by not specifically and in a reasonable manner setting out the reasons it disregarded a jury verdict and granted a new trial. *Id.* at ___. We also held that the relator did not have an adequate remedy by appeal. *Id.* at ___. We granted mandamus relief directing the trial court to set out its reasons for disregarding the jury verdict. *Id.* Based on our holding in *In re Columbia*, DuPont is entitled to relief.

In addition to seeking the reasons for the trial court's disregarding the jury verdict in its favor, DuPont asks that we review the grounds Whisnant asserted in his motion for new trial to determine whether granting his motion on any of those grounds would have been an abuse of discretion. We decline to do so. We do not presume the trial court limited its consideration of grounds for granting the motion to only the grounds asserted in the motion; it may have granted the motion on other grounds. *See id.* at ___. Accordingly, we deny, without prejudice, any relief beyond directing the trial court to specify its reasons for granting the new trial.

Without hearing oral argument, we conditionally grant DuPont's petition for writ of mandamus. *See* TEX. R. APP. P. 52.8(c). The trial court is directed to specify the reasons for which

it disregarded the jury verdict and ordered a new trial. We are confident the trial court will comply, and the writ will issue only if it fails to do so.

_____

Phil Johnson
Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0625

IN RE E.I. DU PONT DE NEMOURS AND COMPANY, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE O'NEILL, joined by CHIEF JUSTICE JEFFERSON, JUSTICE MEDINA, and JUSTICE GREEN, dissenting.

For the reasons expressed today in my dissenting opinion in *In re Columbia Medical Center of Las Colinas*, Cause No. 06-0416, I respectfully dissent.

Harriet O'Neill
Justice

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0705

IN THE MATTER OF BOMA O. ALLISON

ON APPEAL FROM THE BOARD OF DISCIPLINARY APPEALS

Argued March 11, 2009

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

Boma Allison, an attorney licensed by the State Bar of Texas, challenges a judgment issued by a State Bar grievance committee's evidentiary panel, in which the panel suspended Allison for violating provisions of the Texas Disciplinary Rules of Professional Conduct. Allison alleges that the evidentiary panel, composed of three attorney members and one public member, lacked a quorum. She asks that the judgment be vacated and the case either dismissed or remanded for a new hearing before a statewide evidentiary panel. Because we hold that the panel constituted a proper quorum under the Texas Rules of Disciplinary Procedure, we affirm the Board of Disciplinary Appeals' judgment.

I

Background

In 2005, the State Bar's Chief Disciplinary Counsel notified Allison that a grievance filed against her by one of her clients had been classified as a complaint, necessitating a hearing to determine whether Allison violated the rules of disciplinary procedure. After six unsuccessful

attempts[1] at scheduling the hearing, the evidentiary panel convened for Allison's disciplinary matter in 2007. The panel ultimately found that Allison violated the rules as alleged and issued a judgment of partially probated suspension.

Allison then moved for a stay of suspension and for a new hearing, alleging the absence of a quorum.[2] Allison argued that the panel's composition—three attorney members and one public member—violated Rule 2.07 of the Rules of Disciplinary Procedure. TEX. R. DISCIPLINARY P. 2.07, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. A-1. The panel denied her motion, and Allison appealed that decision to the Board of Disciplinary Appeals. By a 6-4 vote, the Board, sitting en banc, affirmed the evidentiary panel's judgment, holding that the three-attorney-to-one-public-member ratio satisfied Rule 2.07. Bd. of Disciplinary Appeals Case No. 41135 (June 20, 2008). Allison appealed that decision, and we set the case for oral argument. 52 Tex. Sup. Ct. J. 333 (Feb. 13, 2009).

II

Discussion

The Texas Rules of Disciplinary Procedure govern "the procedures to be used in the professional disciplinary and disability system for attorneys in the State of Texas." TEX. R. DISCIPLINARY P. 1.02. The Commission for Lawyer Discipline, the permanent committee of the

[1] Although the record does not indicate the reason for all of the delays, at least two of the hearings had to be rescheduled because of the panel's inability to convene a quorum: "The December [2006] continuance is the second based on the lack of a quorum, specifically the absence of public members."

[2] Allison also argued that the case had previously been settled and was therefore barred under res judicata, but she did not appeal that issue to our Court.

State Bar of Texas responsible for handling attorney discipline, is represented by the Chief Disciplinary Counsel.[3] TEX. GOV'T CODE § 81.075(a). Proceedings under the Rules of Disciplinary Procedure commence with the filing of a grievance against an attorney. TEX. R. DISCIPLINARY P. 1.06(L). Within thirty days, the Chief Disciplinary Counsel must examine the grievance and "determine whether it constitutes an Inquiry or a Complaint." *Id.* at 2.10. If the grievance is an "Inquiry," it is dismissed, and the client may appeal that classification to the Board of Disciplinary Appeals. *Id.* If the grievance is a "Complaint," the Counsel determines if there is just cause to proceed. *Id.* at 2.12. Upon a finding of just cause, the attorney may elect to have the complaint heard either in a district court or by an evidentiary panel of the grievance committee within the attorney's district. *Id.* at 2.15. If the attorney does not make a timely election, the hearing is assigned to an evidentiary panel by default. *Id.* In this case, by default, the evidentiary panel presided over Allison's case.

Evidentiary panel proceedings are similar to administrative adjudications; the Chief Disciplinary Counsel has the burden to prove the attorney's misconduct by a preponderance of the evidence. *Id.* at 2.17(M). If the panel determines the attorney violated one of the rules of professional conduct, it issues findings of fact and conclusions of law and determines the sanctions to be imposed, *id.* at 2.17(P), which include disbarment, suspension, probation of suspension, public or private reprimand, among others. *Id.* at 1.06(Y). The evidentiary panel's judgment may be

[3] The Chief Disciplinary Counsel is an attorney selected by the Commission for Lawyer Discipline and is supported by "deputies and assistants" who comprise the Office of the Chief Disciplinary Counsel. TEX. R. DISCIPLINARY P. 5.01.

appealed to the Board of Disciplinary Appeals, and the Board of Disciplinary Appeals' judgment is appealable to this Court. *Id.* at 2.24, 2.28.

In 2001, the Legislature passed a number of changes to the attorney grievance procedure. Among them was the addition of subsection (j) to section 81.072 of the Texas Government Code, which provides that "[a] quorum of a panel of a district grievance committee of the state bar must include one public member for each two attorney members." TEX. GOV'T CODE § 81.072(j). This ensured that non-lawyer members of the general public would be represented in attorney grievance proceedings. Under Rule 2.02, grievance committees, from which the evidentiary panels are drawn, are required to "consist of no fewer than nine members, two-thirds of whom must be attorneys licensed to practice law in the State of Texas and in good standing, and one-third of whom must be public members." TEX. R. DISCIPLINARY P. 2.02. That rule also provides that "[a]ll Committee panels must be composed of two-thirds attorneys and one-third public members." *Id.* Similarly, panels that conduct evidentiary hearings "must have a ratio of two attorney members for every public member." *Id.* at 2.17.

A quorum is required to render a decision in an evidentiary hearing. *Id.* at 2.07. Before section 81.072(j) was enacted, a quorum could be created with a numeric majority of the panel members, without regard to its composition. Following the enactment of 81.072(j), this Court enacted Rule 2.07, which provides: "[a] quorum must include at least one public member for every two attorney members present and consists of a majority of the membership of the panel." TEX. R. DISCIPLINARY P. 2.07.

Rule 2.07's quorum provision is at issue in this case. The evidentiary panel responsible for Allison's case was composed of four attorney members and two public members, but the group that heard her case consisted of three attorneys and one public member, a ratio Allison complains is improper. She argues that the "at least one public member for every two attorney members" language requires no fewer than two public members if there are four attorney members. She notes that the other rules require a two-to-one ratio of attorneys to public members, and therefore, in order to satisfy the "at least one public member" requirement in a group of four, the quorum must have two public members.

The Commission responds that "one public member for every two attorney members" means that for every two lawyer members present, one or more public members must be present. Accordingly, when four lawyers are present, a quorum would require no fewer than two public members. When the lawyers comprise an odd lot (three in this case), no additional public member is required because there is only one "group" of two lawyers.

Both parties rely on the Board of Disciplinary Appeals' decision in *Cafiero v. Commission for Lawyer Discipline*, Bd. of Disciplinary Appeals Case No. 37811 (Mar. 23, 2007). In *Cafiero*, the disciplinary proceeding was initially presided over by the full panel of four attorneys and two public members. *Id.* at 7. At some point, though, one of the public members left the proceeding. *Id.* at 8. The hearing continued with the four attorney members and one public member. *Id.* At the conclusion of the evidence, the remaining panel members deliberated; however, only three of the attorney members voted, apparently in an attempt to comply with the quorum requirements. *Id.* The

panel found that Cafiero had violated multiple disciplinary rules, and he appealed to the Board of Disciplinary Appeals, alleging, among other things, an improper quorum. *Id.* at 8, 10.

The Board of Disciplinary Appeals held that the panel of four attorney members and one public member violated Rule 2.07's quorum requirement. *Id.* at 12. The Board also noted that the panel's proceeding with four attorney members and one public member was improper, even if one of the attorney members did not vote:

> Although there were enough members present to constitute a quorum numerically, the remaining members violated the statutory requirement by proceeding without at least one public member being present for every two attorneys. Having one member abstain from voting after all four lawyers had heard the balance of the evidence—and possibly participated in the misconduct deliberations—could not cure the defect.

Id.

Allison argues that *Cafiero* means that a ratio of at least one-third public members to two-thirds attorney members is required in order to harmonize the language in Rule 2.07 with that found in Rules 2.02 and 2.17 and Texas Government Code section 81.072(j). The Commission responds that *Cafiero* is not inconsistent with the Board's decision in the present case because a four attorney member to one public member ratio clearly violates the one public member for every group of two attorney members ratio applied in the case below. We agree with the Commission.

Rule 2.07's wording differs from that in Rules 2.02 and 2.17. Rule 2.02, which governs the composition of committees and panels as a whole, explicitly states that a two-thirds attorney members to one-third public members ratio is required: "Each Committee must consist of no fewer than nine members, *two-thirds of whom must be attorneys . . ., and one-third of whom must be public*

members. All Committee panels *must be composed of two-thirds attorneys and one-third public members*." TEX. R. DISCIPLINARY P. 2.02 (emphasis added). Rule 2.17, though worded slightly differently than 2.02, restates this requirement for evidentiary panels: "Each Evidentiary Panel *must have a ratio of two attorney members for every public member*. . . ." *Id.* at 2.17 (emphasis added). The mandatory "must have" means that there is no flexibility built into the requirement; for every public member, there must be two attorneys.

In stating the quorum composition requirement, though, the Legislature said: "A quorum of a panel of a district grievance committee of the state bar must include one public member for each two attorney members." TEX. GOV'T CODE § 81.072(j). And while there is a slight variation in the corresponding rule, we agree with the Board that the result is the same. Rule 2.07 states "A quorum must include at least one public member for every two attorney members present . . . ." TEX. R. DISCIPLINARY P. 2.07. Though Allison argues that reading these provisions to require only one public member for every "group of two" attorneys is inconsistent with the other rules, we agree with the Board of Disciplinary Appeals that the language of the statute and the rule compels this result. Allison concedes that a literal application of her argument would require a minimum (and impossible) 1.5 public members to counter the three lawyers. If an exact one-third to two-thirds ratio of public members to attorneys were required, a quorum could be achieved only if the panel were evenly divisible by three. Allison's proposed solution to this mathematical conundrum—to increase the ratio of public members to attorney members, either by including two public members if there are three attorney members, or by removing one of the attorney members for a one-to-one public member to attorney ratio—finds no support in the rule. We hold instead that the factor-of-two rule

applies only when there is an even number of attorneys. Thus, if there are four attorney members (two sets of two) a quorum would require two public members. If there were six lawyers, three public members would be required. But for five lawyers, two public members is adequate. For eight, four, but for seven, three. Or, as in this case, when three attorney members are present, only one public member is necessary. Accordingly, we hold that the panel of three attorney members and one public member in Allison's hearing satisfied Rule 2.07's quorum requirement. We therefore affirm the Board of Disciplinary Appeals' judgment. TEX. R. APP. P. 60.2(a).

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 26, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0742

IN RE LIBERTY MUTUAL FIRE INSURANCE COMPANY, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

Raymond Nickelson seeks bad-faith damages against his workers' compensation carrier, Liberty Mutual Fire Insurance Company, for denying preauthorization of medical treatment. But he only alleges the carrier turned down office visits (for which preauthorization was not required) and possible back surgery (for which preauthorization was not sought). By demanding preauthorization when it was not required and failing to request it when it was, Nickelson avoided all the administrative remedies that governed his claims. As his bad-faith suit could not be brought before first exhausting these administrative remedies, the courts below erred in denying Liberty's plea to the jurisdiction.

Nickelson alleged total and permanent disability from neck and back injuries he received when he jumped off a four-foot platform on June 4, 2003. After failing to timely dispute compensability, Liberty paid temporary income benefits for seven months and medical care that included thrice-weekly chiropractic treatments. Liberty stopped paying temporary income benefits

in January 2004 when a designated doctor found Nickelson had reached maximum medical improvement with an impairment rating of zero percent. *See* TEX. LAB. CODE §§ 408.0041, .102.

Nickelson sought additional temporary income benefits through two benefit review conferences, a contested case hearing, an appeal to an appeals panel, and finally an appeal in Nueces County district court. At about the same time he filed suit, he phoned an adjustor who allegedly said Liberty was "not required to pay any more medical visits while my impairment rating was being contested." He also asserted that he "continued to try to make appointments with my doctor hoping that [Liberty] would not cut me off and worrying that I wouldn't be seen by the doctors and that I wouldn't get the neck surgery or back surgery I needed when the time came."

A year later, the parties settled all claims except a claim for bad-faith denial of access to medical care. Because medical care had not been raised in the previous administrative proceedings (which had addressed only income benefits), Liberty filed a plea to the jurisdiction seeking dismissal for failure to exhaust them. The trial court and court of appeals denied the plea. *See* ___ S.W.3d ___.

The Workers' Compensation Act vests the Workers' Compensation Division with exclusive jurisdiction to determine a claimant's entitlement to medical benefits. *See* TEX. LAB. CODE § 413.031; *Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 803-04 (Tex. 2001). As Nickelson's bad-faith claim depends upon whether he was entitled to further medical care, that issue must first be addressed administratively. *Fodge*, 63 S.W.3d at 804. As it was not, the trial court should have granted Liberty's plea to the jurisdiction and dismissed the suit. *See id.* at 805. Its failure to do so is correctable by mandamus to prevent a disruption of the orderly processes of government. *In re*

Sw. Bell Tel. Co., 235 S.W.3d 619, 624 (Tex. 2007); *In re Entergy Corp.*, 142 S.W.3d 316, 321 (Tex. 2004).

Nickelson opposes dismissal on three grounds. First, he points to a provision in the parties' settlement that he "remains entitled to medical benefits for the compensable injury in accordance with Section 408.021." The referenced section requires carriers to pay for treatment "reasonably required" for compensable injuries, a duty that cannot be cut off by settlement. TEX. LAB. CODE § 408.021(a), (d). But while Nickelson (as all other workers) remained entitled to medical care, disputes about whether further care was reasonably required had to be pursued administratively; the settlement said nothing about dispensing with that.

Second, Nickelson argues exhaustion was not required of his claims because there were no administrative remedies to exhaust, relying on *Gregson v. Zurich American Insurance Co.*, 322 F.3d 883, 887 (5th Cir. 2003). In *Gregson*, the carrier preauthorized back surgery but then refused payment for an antiobiotic incident to the surgery. *Id.* at 885-86. We agree that once preauthorization for surgery is obtained, it does not have to be obtained again for medications incident thereto. But the treatment here was not incident to a preauthorized procedure because surgery preauthorization was never requested.[1]

Third, Nickelson argues alternatively that he exhausted administrative remedies by requesting approval for treatment which Liberty's adjustor denied in a phone conversation. We disagree that

[1] The parties disagree whether Nickelson could voluntarily apply for preauthorization for office visits under former Commission Rule 134.650, allowing written requests for "specific care, which does not otherwise require preauthorization, being proposed for the treatment of the current medical condition." 29 Tex. Reg. 8597 (2004), *repealed by* 33 Tex. Reg. 189-90 (2008) (former 28 TEX. ADMIN. CODE § 134.650). We need not decide whether this rule provided administrative review before as well as after Nickelson's proposed office visit, as he never requested either.

this complied with the administrative requirements. Nickelson says he was "worried" about whether he would get back surgery but never says he requested preauthorization for it, which was required before Liberty had a duty to pay for it. *See* TEX. LAB. CODE § 413.014(c)(1), (d). And preauthorization for office visits was not required; nothing prevented Nickelson from seeing a doctor and then seeking reimbursement administratively. *See* TEX. LAB. CODE § 413.031. In sum, Nickelson did not seek preauthorization when it was required, and did seek it when it was not. A party does not exhaust administrative procedures by ignoring the applicable rules.

Given the history of disputes between these litigants, we understand Nickelson's "worry" about whether his medical bills would be approved. But parties cannot avoid exhaustion of administrative remedies because they fear they might not prevail. If the treatment Nickelson was seeking was either unreasonable or unnecessary, then it was proper that both he and his doctor should be concerned about who was going to pay for it.

Accordingly, without hearing oral argument, TEX. R. APP. P. 52.8(c), we conditionally grant the petition for writ of mandamus and direct the trial court to enter an order granting the plea to the jurisdiction and dismissing the case. We are confident the trial court will comply, and our writ will issue only if it does not.

OPINION DELIVERED: August 28, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0800

IN RE HOUSTON PIPE LINE COMPANY, ET AL., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

When deciding a motion to compel arbitration under the Federal Arbitration Act, a Texas trial court applies Texas procedure, which permits discovery to be taken when it is needed before the arbitration or to permit the arbitration to be conducted in an orderly manner. TEX. CIV. PRAC. & REM. CODE § 171.086 (a)(4),(6); *see also Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992). At issue in this proceeding is whether the trial court abused its discretion by permitting discovery on damage calculations and other potential defendants, instead of deciding the motion to compel arbitration. For the reasons below, we conclude the trial court should not have ordered pre-arbitration discovery, but rather should have decided the motion to compel arbitration.

Houston Pipe Line Company, L.P., signed an agreement to purchase gas from O'Connor & Hewitt, Ltd., based on the Houston Ship Channel Price Index.[1] Several years later, O'Connor sued Houston Pipe Line, Energy Transfer Partners, L.P., Energy Transfer Equity, L.P., and La Grange Acquisition, L.P., for manipulating the Index downward, which caused O'Connor to receive lower

[1] This index is published monthly in the natural gas industry trade journal *Inside FERC*.

payments for gas delivered pursuant to the contract. As a signatory to the contract, Houston Pipe Line sought to enforce the arbitration provision.[2] Energy Transfer and La Grange were not parties to the agreement, but tried to compel arbitration based on a direct benefits equitable estoppel theory. *See Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 305 (Tex. 2006); *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 382 (5th Cir. 2008). O'Connor resisted arbitration by attacking the scope of the arbitration provision and contending that it would be impossible to identify all potential defendants and to complete damages calculations within the sixty days allotted for discovery, as set out in the arbitration provision. Rather than rule on the motion to compel, the trial court ordered discovery to aid it in deciding the motion. Specifically, the trial court ordered discovery to determine if additional defendants could equitably invoke the arbitration clause, whether O'Connor's claims fell within the scope of the arbitration clause, and if the time limitations imposed by the clause were jurisdictional. In its order, the trial court suggested that it would be virtually impossible[3] to conduct the necessary discovery within the sixty-day time frame allotted to the arbitrator under the agreement and that O'Connor:

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[2] The arbitration provision provided:

> Except for matters within the jurisdiction of the Railroad Commission of Texas, any and all claims, demands, causes of action, disputes, controversies, and other matters in question arising out of or relating to this Agreement, any of its provisions, or the relationship between the Parties created by this Agreement . . . shall be resolved by binding arbitration pursuant to the Federal Arbitration Act. . . .If a Party refuses to . . . arbitrate, the other Party may seek to compel arbitration in either federal or state court. . . .The final hearing shall be conducted within 60 days of the selection of the third arbitrator. . . [and] shall not exceed 10 business days.

[3] Although not determinative here, ordinarily the arbitrator, rather than the trial court, will be better able to determine the preclusive effects of discovery limitations in the arbitration agreement. *See In re Poly-America, L.P.,* 262 S.W.3d 337, 358 (Tex. 2008).

> lacks sufficient information [regarding the possible price manipulation]. . . and that discovery is needed so that the scope of the Arbitration clause . . . may be properly applied to the actual party responsible . . . Moreover, the documents sought by [O'Connor] from [Houston Pipe Line and Energy Transfer]: (1) Would be needed before any Arbitration proceedings begin; (2) Will permit any Arbitration to be conducted in an orderly manner; (3) Will facilitate any Arbitration under Section 171.086 of the Texas Civil Practice and Remedies Code; and (4) Will aid in determining the issues of arbitrability. . .

Houston Pipe Line and Energy Transfer sought mandamus relief in the court of appeals, arguing that the trial court had abused its discretion by not ruling on the motion to compel. The court of appeals refused to issue the writ, concluding that the trial court had acted within its discretion. We disagree that the discovery ordered by the trial court was needed for it to rule on the motion to compel.

When a party disputes the scope of an arbitration provision or raises a defense to the provision, the trial court, not the arbitrator, must decide the issues. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). And "[w]hen Texas courts are called on to decide if disputed claims fall within the scope of an arbitration clause under the Federal Act, Texas procedure controls that determination." *Tipps*, 842 S.W.2d at 268. Pre-arbitration discovery is expressly authorized under the Texas Arbitration Act when a trial court cannot fairly and properly make its decision on the motion to compel because it lacks sufficient information regarding the scope of an arbitration provision or other issues of arbitrability. *See* TEX. CIV. PRAC. & REM. CODE §§ 171.023(b), 171.086(a)(4),(6). This, however, is not an authorization to order discovery as to the merits of the

underlying controversy. Motions to compel arbitration and any reasonably needed discovery should be resolved without delay. *Tipps*, 842 S.W.2d at 269.

The discovery authorized by the trial court seeks to determine the identity of all potential defendants and to what extent each defendant is liable, including Houston Pipe Line. Such an inquiry is inappropriate because determinations of ultimate liability ordinarily must be answered during the arbitration proceeding, while questions regarding the scope of the arbitration clause should be decided by the trial court. *See AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). The necessity of identifying other culpable parties could, under some circumstances, be related to arbitrability. But, a party cannot avoid its agreement to arbitrate merely by alleging that there may be other potential defendants; it must link the identity of the defendants to an issue of arbitrability, such as scope, or a defense to arbitration. *See* 9 U.S.C. § 4; TEX. CIV. PRAC. & REM. CODE §§ 171.021, 171.026; *see also J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).

Because the discovery ordered here is overbroad and beyond the issues raised in the motion to compel, we conclude that the trial court abused its discretion by ordering this discovery rather than ruling on the legal issues raised by the motion to compel. Accordingly, without hearing oral argument, we conditionally grant the writ and direct the trial court to vacate the discovery order and to rule on the motion to compel arbitration. TEX. R. APP. P. 52.8(c). We are confident the trial court will comply, and our writ will issue only if it does not.

OPINION DELIVERED: July 3, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0805

IN RE JINDAL SAW LIMITED, JINDAL ENTERPRISES LLC, AND SAW PIPES USA, RELATOR

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

PER CURIAM

At issue in this case is whether an arbitration agreement between a decedent and his employer requires the employee's wrongful death beneficiaries to arbitrate their claims against the employer. In light of our opinion in *In re Labatt Food Service, L.P.*, ___ S.W.3d ___ (Tex. 2009), we conclude that it does.

Saw Pipes USA, Inc. did not provide workers' compensation insurance to cover its employees in the event of on-the-job injuries. Rather, it provided a benefit plan in which its employees could elect to participate. Attached to the benefit plan was an arbitration agreement providing that all disputes related to either the benefit plan, the arbitration agreement, or the employee's employment must be submitted to binding arbitration pursuant to the Federal Arbitration Act (FAA).

Carlos Lara, a Saw Pipes USA employee, elected to participate in the benefit plan and signed the arbitration agreement. Lara later died from injuries that occurred while he was working. His

wife and children filed wrongful death and survival actions against Saw Pipes USA, Jindal Saw Limited, and Jindal Enterprises LLC (collectively Saw Pipes). Saw Pipes moved to compel arbitration, asserting that the arbitration agreement signed by Lara bound his wife and children. The trial court refused to compel arbitration.

Saw Pipes sought a writ of mandamus from the court of appeals directing the trial court to compel arbitration. The court of appeals held the trial court's refusal to compel arbitration of the survival action was a clear abuse of discretion and granted mandamus relief, but it also determined the trial court did not abuse its discretion by refusing to compel arbitration of the wrongful death claims. 264 S.W.3d 755, 757. The court of appeals did not have the benefit of our holding in *In re Labatt Food Service*, when it considered Saw Pipes's petition. In *Labatt*, we held that a decedent's pre-death arbitration agreement binds his or her wrongful death beneficiaries because under Texas law the wrongful death cause of action is entirely derivative of the decedent's rights. *In re Labatt*, ___ S.W.3d at ___; *see Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345 (Tex. 1992).

Saw Pipes seeks a writ of mandamus directing the trial court to compel arbitration of the wrongful death claims. A party denied the right to arbitrate pursuant to an agreement subject to the FAA does not have an adequate remedy by appeal and is entitled to mandamus relief to correct a clear abuse of discretion. *In re L & L Kempwood Assocs., L.P.*, 9 S.W.3d 125, 128 (Tex. 1999). In this case, the arbitration agreement executed by Lara provides that any disputes related to the benefit plan or to his employment with Saw Pipes must be arbitrated. Pursuant to the agreement, if Lara had sued for his own injuries immediately prior to his death, he would have been compelled to arbitrate

his claims. Accordingly, his beneficiaries must arbitrate. *See In re Labatt*, ___ S.W.3d at ___. The trial court clearly abused its discretion by refusing to compel arbitration.

We grant Saw Pipes's petition for writ of mandamus and without hearing oral argument, conditionally grant mandamus relief. *See* TEX. R. APP. P. 52.8(c). The trial court is directed to enter an order compelling arbitration of the beneficiaries' wrongful death claims. We are confident the trial court will comply, and the writ will issue only if it fails to do so.

OPINION DELIVERED: February 27, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0820

IN RE GREATER HOUSTON ORTHOPAEDIC SPECIALISTS, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

PER CURIAM

Jody Griswold required surgery as a result of allegedly negligent medical care. Griswold and his attorney, Peter Zavaletta, entered into an agreement with Greater Houston Orthopaedic Specialists ("GHOS"), whereby GHOS would perform the surgery in exchange for payment from the anticipated proceeds of Griswold's pending health care liability suit.

GHOS later sued Griswold and Zavaletta in Cameron County, alleging that they failed to pay GHOS approximately $35,000 for medical services rendered. GHOS subsequently nonsuited that action. The nonsuit was signed by GHOS's attorney as "attorney for plaintiff" and included the correct cause number and style, but it identified GHOS as "Orthopaedic Specialists, L.L.P.," omitting the "Greater Houston" predicate. GHOS then sued Griswold and Zavaletta in Harris County. The parties settled, and the Harris County court signed an agreed judgment on January 7, 2008.

Meanwhile, the Cameron County court had not yet dismissed the case. On February 28, 2008, the Cameron County court issued an order notifying the parties that the case would be dismissed for want of prosecution unless they appeared and showed good cause for the matter to

remain on the docket. On March 10, Griswold and Zavaletta filed a counterclaim alleging that the Cameron County suit was frivolous. On April 3, the trial court signed an order dismissing the case without prejudice, but on April 7, the court set aside that order and set the case for trial. The court of appeals denied GHOS's request for mandamus relief. ___ S.W.3d ___. We conditionally grant the writ.

A plaintiff may nonsuit a case "[a]t any time before the plaintiff has introduced all of his evidence other than rebuttal evidence," but dismissal "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief . . . ." TEX. R. CIV. P. 162. "The plaintiff's right to take a nonsuit is unqualified and absolute as long as the defendant has not made a claim for affirmative relief." *B.H.P. Pet. Co. v. Millard*, 800 S.W.2d 838, 840 (Tex. 1990). Granting a nonsuit is a ministerial act, and a plaintiff's right to a nonsuit exists from the moment a written motion is filed or an oral motion is made in open court, unless the defendant has, prior to that time, sought affirmative relief. *Greenberg v. Brookshire*, 640 S.W.2d 870, 872 (Tex. 1982) (per curiam).

Griswold and Zavaletta concede that their counterclaim was first filed after GHOS nonsuited its claims on May 15, 2006. They argue, however, that GHOS's nonsuit was ineffective because it was filed not by the plaintiff, GHOS, but by "Orthopaedic Specialists, L.L.P.," a nonexistent entity. They argue that the first time GHOS effectively moved for nonsuit was April 3, 2008, after they filed their counterclaim. We hold that despite the misnomer, GHOS filed a valid notice of nonsuit before Griswold and Zavaletta filed counterclaims. Therefore, the trial court abused its discretion in setting the case for trial, and we conditionally order the trial court to dismiss the case. A misnomer

differs from a misidentification. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 4 (Tex. 1990). Misidentification—the consequences of which are generally harsh[1]—arises when two separate legal entities exist and a plaintiff mistakenly sues an entity with a name similar to that of the correct entity. *Chilkewitz v. Hyson*, 22 S.W.3d 825, 828 (Tex. 1999). A misnomer occurs when a party misnames itself or another party, but the correct parties are involved. *Id.* (noting that "[m]isnomer arises when a plaintiff sues the correct entity but misnames it"); *see also Chen v. Breckenridge Estates Homeowners Ass'n, Inc.*, 227 S.W.3d 419, 421 (Tex. App.—Dallas 2007, no pet.) (holding that misnomer occurred when enforcement order referred to actual plaintiff "Breckenridge Estates Homeowners Association, Inc." as "Breckenridge Park Estates No. 1 and No. 2 Homeowner's Association, a Texas non-profit corporation, also identified in the pleadings and known as Breckenridge Estates Homeowners Association, Inc."); *Pierson v. SMS Fin. II, L.L.C.*, 959 S.W.2d 343, 347 (Tex. App.—Texarkana 1998, no pet.) (determining that misnomer occurred when actual plaintiff, SMS II, instead named another entity, SMS I, in its original petition). Courts generally allow parties to correct a misnomer so long as it is not misleading. *See, e.g.*, *Enserch*, 794 S.W.2d

[1] *See, e.g.*, *Enserch*, 794 S.W.2d at 5 (holding that in the case of a misidentification, "the plaintiff has sued the wrong party and limitations is not tolled"); *State Office of Risk Mgmt. v. Herrera*, No. 07-07-0288-CV, 2009 WL 1491870, at *3 (Tex. App.—Amarillo May 28, 2009, no pet.) (holding that statute of limitations was not tolled when the State Office of Risk Management sued the Texas Municipal League Intergovernmental Risk Pool and not a city because they are "separate entities" and "not related entities that operate or carry on their respective functions under a similar trade name"). We have, however, allowed equitable tolling of the statute of limitations even in misidentification cases if the correct party had notice of the suit. *Flour Bluff Indep. Sch. Dist. v. Bass*, 133 S.W.3d 272, 274 (Tex. 2004) (per curiam) (holding that the statute of limitations may be tolled in a misidentification case "if there are two separate, but related, entities that use a similar trade name and the correct entity had notice of the suit and was not misled or disadvantaged by the mistake."); *Continental Southern Lines, Inc. v. Hilland*, 528 S.W.2d 828, 831 (Tex. 1975) (holding that "[w]hile the plaintiff made a mistake in her original petition as to the defendant that should have been sued, it is our opinion that she should be given, under the circumstances here present, an opportunity to prove that the Continental Southern Lines, Inc., was cognizant of the facts, was not misled, or placed at a disadvantage in obtaining relevant evidence to defend the suit").

at 4-5 (holding that when a plaintiff misnames a defendant, limitations is tolled and a subsequent amendment of the petition relates back to the date of the original petition); *Chen*, 227 S.W.3d at 420 ("A misnomer does not invalidate a judgment as between parties where the record and judgment together point out, with certainty, the persons and subject matter to be bound."); *Sheldon v. Emergency Med. Consultants, I.P.A.*, 43 S.W.3d 701, 702 (Tex. App.—Fort Worth 2001, no pet.) ("[W]hen an intended defendant is sued under an incorrect name, the court acquires jurisdiction after service with the misnomer if it is clear that no one was misled or placed at a disadvantage by the error.").

Typically, misnomer cases involve a plaintiff who has misnamed the defendant, and a petition involving this type of misnomer is nonetheless effective, for limitations purposes, when filed, with any subsequent amendment relating back to the date of the original filing. *See* 1 WILLIAM V. DORSANEO, III ET AL., TEXAS LITIGATION GUIDE § 12.02[4] (2009); *Enserch*, 794 S.W.2d at 4-5. Courts are flexible in these cases because the party intended to be sued has been served and put on notice that it is the intended defendant. *Pierson*, 959 S.W.2d at 347; *see also Charles Brown, L.L.P. v. Lanier Worldwide, Inc.*, 124 S.W.3d 883, 895 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding that a misnomer does not render a judgment void "provided the intention to sue the correct defendant is evident from the pleadings and process, such that the defendant could not have been misled"); *see also Adams v. Consol. Underwriters*, 124 S.W.2d 840, 841 (Tex. 1939) ("When a corporation intended to be sued is sued and served by a wrong corporate name . . . and suffers judgment to be obtained, it is bound by such judgment . . . .").

In a case like this, in which the plaintiff misnames itself, the rationale for flexibility in the typical misnomer case–in which a plaintiff misnames the defendant–applies with even greater force. At this stage in the litigation, there is no risk that Griswold and Zavaletta would not know that GHOS, the sole plaintiff, and the entity named in the caption of the notice of nonsuit, was the entity that had filed the nonsuit. Griswold and Zavaletta counter that "Orthopaedic Specialists, L.L.P." is a nonexistent entity, as their search of Secretary of State records revealed no organization by that name. But this demonstrates only that Griswold and Zavaletta were not under the mistaken assumption that a nonparty with this name filed the notice of nonsuit.

Griswold and Zavaletta concede that GHOS–and not a nonparty–moved for nonsuit on April 3, 2008. This motion relates back to May 2006, when GHOS filed the notice of nonsuit containing the misnomer. Because that nonsuit preceded the counterclaim, the trial court abused its discretion in refusing to dismiss the case. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004); *Greenberg*, 640 S.W.2d at 871. Mandamus relief is appropriate when a trial judge refuses to grant a nonsuit in the absence of a pending claim for affirmative relief. *Greenberg*, 640 S.W.2d at 871-72. Accordingly, without hearing oral argument, TEX. R. APP. P. 52.8(c), we conditionally grant GHOS's petition for writ of mandamus and direct the trial court to vacate its order setting trial and dismiss the case. We are confident the trial court will comply, and our writ will issue only if it does not.

OPINION DELIVERED: August 28, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0836

IN RE WEEKLEY HOMES, L.P., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued March 31, 2009

JUSTICE O'NEILL delivered the opinion of the Court.

In this mandamus proceeding, we must decide whether the trial court abused its discretion by ordering four of the defendant's employees to turn over their computer hard drives to forensic experts for imaging, copying, and searching for deleted emails. Because the plaintiff failed to demonstrate the particular characteristics of the electronic storage devices involved, the familiarity of its experts with those characteristics, or a reasonable likelihood that the proposed search methodology would yield the information sought, and considering the highly intrusive nature of computer storage search and the sensitivity of the subject matter, we hold that the trial court abused its discretion.

I. Background

In October 2002, relator Weekley Homes, L.P., a homebuilder, entered into an agreement with Enclave at Fortney Branch, Ltd. (Enclave), a residential real estate developer, to purchase 136

developed lots in a subdivision pursuant to a take-down schedule[1] (the Builder Contract). In November 2004, after Weekley had purchased some of the lots from Enclave pursuant to the Builder Contract, Enclave and HFG Enclave Land Interests, Ltd. (HFG)[2] entered into an agreement whereby Enclave would sell and convey seventy-four of the remaining developed lots to HFG (the Warehouse Contract). Under the Warehouse Contract, Enclave also assigned to HFG its rights to those seventy-four lots under the Builder Contract such that Weekley would be obligated to purchase those lots from HFG.

One day before the Warehouse Contract's execution, Weekley executed a Consent to Assignment and Estoppel Certificate (the Estoppel Certificate), in which Weekley made various express representations, warranties, and covenants to HFG about the state of Enclave's performance under the Builder Contract up to that point. According to HFG, it relied upon the Estoppel Certificate when it agreed to the terms of the Warehouse Contract.

Enclave allegedly failed to perform various obligations owed to HFG under the Warehouse Contract, and HFG sued Enclave in August 2006. Two months later, HFG subpoenaed documents

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[1] In the real estate development context, a take-down schedule is an agreement between a developer and a home builder under which the homebuilder agrees to purchase a number of developed lots over a scheduled period of time. *See, e.g.*, *Medallion Homes, Inc. v. Thermar Inv., Inc.*, 698 S.W.2d 400, 402 (Tex. App.—Houston [14th Dist.] 1985, no pet. h.), *overruled by Ojeda De Toca v. Wise*, 748 S.W.2d 449 (Tex. 1988).

[2] HFG is a lot warehouser. According to HFG,

> Lot warehousing is a sophisticated financing enterprise wherein a real estate developer (typically a business that obtains acreage, subdivides it, installs streets and utilities, thereby creating lots available for sale to homebuilders) conveys vacant lots to a lot warehouser. In turn, the lot warehouser holds the lots and then sells them to one or more pre-arranged homebuilders. By virtue of this agreement, the developer is assured of having money in hand for the lots on a more immediate basis than it would had it sold the lots over time on a take-down basis to the builders.

from a number of third parties, including Weekley. After reviewing several of the documents Weekley produced, HFG's counsel began asking Weekley about the possible existence of other potentially responsive documents relating to the subdivision. In response, Weekley eventually produced approximately 400 additional pages of documents in March 2007. According to HFG, information contained in the documents led it to believe Weekley had made a number of material misrepresentations in the Estoppel Certificate relating to Enclave's performance under the Builder Contract.

In June 2007, HFG added Weekley as a defendant to its pending suit against Enclave, seeking damages for common law fraud and fraudulent inducement, statutory fraud, fraud by nondisclosure, negligence per se, and negligent misrepresentation. In July and December 2007, HFG served Weekley with requests for production including requests that Weekley produce a broad variety of emails[3] to and from Weekley and its employees relating to Enclave, the subdivision, and the Builder Contract. HFG specifically requested emails between Enclave and Russell Rice (Weekley's Division President), Joe Vastano (Weekley's Area President), Scott Thompson (Weekley's Project Manager for the subdivision), and Biff Bailey (Weekley's Land Acquisitions Manager) (collectively "the Employees"), relating to Enclave and the Builder Contract. HFG received thirty-one responsive emails, one of which discussed a third-party engineering analysis (the Slope Stability Analysis) pre-dating the Estoppel Certificate and Warehouse Contract and addressing the existence of multiple

[3] In some requests, Weekley asked for "documents," which the requests defined to include "electronic or email messages." In others, Weekley specifically asked for emails.

unsafe subdivision lots that required remedial measures.[4] Weekley produced a copy of the Slope Stability Analysis, but did not produce any additional communications to or from the Employees discussing it. Considering the safety issues HFG contends the Slope Stability Analysis highlighted, and that Weekley allegedly spent $92,000 to remedy those issues, HFG was unconvinced that there was only one email discussing the report.

HFG moved to compel Weekley to "search for any emails stored on servers or back up tapes or other media, [and] any email folders in the email accounts of [the Employees]." At the hearing on HFG's motion, John Burchfield, Weekley's General Counsel, testified that "each [Weekley] employee has an [email] inbox that's limited in size. And once you bump that size limit, you have to start deleting things off the inbox in order to be able to receive any more emails." Burchfield further testified that "[Weekley] forces [employees] to clear out [their] inbox[es] on a regular basis," so that deleted emails will only be saved if an employee "back[s] them up on [the employee's] own personal hard drive somehow." And while deleted emails are saved on backup tapes, they are only retained "[f]or a thirty-day cycle." The trial court denied HFG's motion.

Based upon information learned at the hearing, HFG filed a "Motion for Limited Access to [Weekley's] Computers" directing its discovery efforts at the Employees' hard drives. In essence the motion would, at HFG's expense, allow any two of four named PricewaterhouseCoopers forensic experts to access the Employees' computers "for the limited purpose of creating forensic images of the hard drives." According to the motion, the experts would "make an evidentiary image of the

[4] In response to HFG's First Motion to Compel, Weekley contested the relevance of the Slope Stability Analysis contending it only discussed lots that Weekley had already purchased from Enclave pursuant to the Builder Contract and prior to the Warehouse Agreement. However, Weekley does not request mandamus relief on that basis.

[hard drives] using a procedure that is generally accepted as forensically sound." Once the images are created, the experts would search the images for deleted emails from 2004, the relevant year, containing twenty-one specified terms: slope stability, retaining wall, Holigan, HFG, fence, mow!, landscap!, screening wall, LSI, limited site, Alpha, entry, earnest money, Legacy, defective, lot 1, lot 8, grading, substantial completion, letter of credit, and Site Concrete. Once the responsive documents had been identified, extracted, and copied to some form of electronic media by the experts, Weekley would have the right to review the extracted data

> and designate which documents or information [Weekley] claims are not relevant, not discoverable, or are subject to any claim of privilege or immunity from which they are withheld under such claims, identifying such withheld documents by page identification number, directory and subdirectory identification, statement of claimed privilege or immunity from discovery, and brief description of the information in question as is required by Tex. R. Civ. Pro. 193.3.

After reviewing the extracted data, Weekley would be required to furnish HFG with any responsive documents that were not being withheld. According to the Motion, should HFG, its counsel, or the experts incidentally observe privileged or confidential information, the information would be maintained in strict confidence and otherwise valid privileges or confidentiality rights would not be waived. Failure to comply with the order's confidentiality provisions would subject the violator to penalties and contempt of court.

At the hearing on HFG's motion, Weekley complained about the intrusiveness of the suggested protocol, pointing out that the forensic experts would have access to private conversations, trade secrets, and privileged communications stored on the Employees' hard drives. Weekly also complained that requiring the Employees' hard drives to be "taken out of commission" for imaging

would be burdensome and disruptive. And Weekley complained that HFG failed to show the feasibility of "obtain[ing] data that may have been deleted in 2004" using the protocol set forth in the Motion.[5]

The trial court granted HFG's motion, and Weekley sought mandamus relief from the court of appeals. In a brief memorandum opinion, the court of appeals denied Weekley's petition. ___ S.W.3d ___. We granted oral argument in this case to determine whether the trial court abused its discretion by allowing forensic experts direct access to Weekley's Employees' electronic storage devices for imaging and searching.

II. Analysis

A. Rule 196.4's Application

1. Emails are electronic information

Texas Rule of Civil Procedure 192.3(b) provides for discovery of documents, defined to include electronic information that is relevant to the subject matter of the action. *See* TEX. R. CIV. P. 192.3(b) cmt.—1999. Rule 196 governs requests for production of documents, and Rule 196.4 applies specifically to requests for production of "data or information that exists in electronic or magnetic form." As a threshhold matter, Weekley contends the trial court abused its discretion because HFG did not comply with Texas Rule of Civil Procedure 196.4 governing requests for production of electronic or magnetic data. HFG responds that Rule 196.4 does not apply because

[5] Weekley does not contend that the relevant computers or hard drives are unavailable, so access to the actual hard drives in use by the Employees during the relevant time period is not an issue.

deleted emails are simply documents governed by the general discovery rules. According to HFG, Rule 196.4 only applies to spreadsheets and statistics, not emails and deleted emails.

We see nothing in the rule that would support HFG's interpretation. Emails and deleted emails stored in electronic or magnetic form (as opposed to being printed out) are clearly "electronic information." *See* Conference of Chief Justices, Guidelines for State Courts Regarding Discovery of Electronically-Stored Information v (2006), *available at* http://www.ncsconline.org/images/EDisCCJGuidelinesFinal.pdf. Accordingly, we look to Rule 196.4 in analyzing HFG's requests.

B. Rule 196.4's Requirements

1. Specificity

Weekley argues that HFG failed to comply with Rule 196.4 because it never specifically requested production of "deleted emails." Rule 196.4 provides that, "[t]o obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced." TEX. R. CIV. P. 196.4. As we have said, email communications constitute "electronic data," and their characterization as such does not change when they are deleted from a party's inbox. Thus, deleted emails are within Rule 196.4's purview and their production was implied by HFG's request. However, for parties unsophisticated in electronic discovery, such an implication might be easily missed. Rule 196.4 requires specificity, and HFG did not specifically request deleted emails. HFG counters that it did not know how Weekley's computer system and electronic information storage worked, and thus did not know what to ask for. But it is a simple

matter to request emails that have been deleted; knowledge as to the particular method or means of retrieving them is not necessary at the requesting stage of discovery. Once a specific request is made the parties can, and should, communicate as to the particularities of a party's computer storage system and potential methods of retrieval to assess the feasibility of their recovery.[6] But even though it was not stated in HFG's written request that deleted emails were included within its scope, that HFG thought they were and was seeking this form of electronic information became abundantly clear in the course of discovery and before the hearing on the motion to compel. The purpose of Rule 196.4's specificity requirement is to ensure that requests for electronic information are clearly understood and disputes avoided. Because the scope of HFG's requests was understood before trial court intervention, Weekley was not prejudiced by HFG's failure to follow the rule and the trial court did not abuse its discretion by ordering production of the deleted emails. To ensure compliance with the rules and avoid confusion, however, parties seeking production of deleted emails should expressly request them.

Weekley additionally complains that HFG's "Motion for Limited Access to [Weekley's] Computers" is not a permissible discovery device. We agree with HFG, however, that the motion was, in effect, a motion to compel and the trial court properly treated it as such.

C. The Trial Court Abused Its Discretion in Allowing Access to Weekley's Hard Drives on this Record

1. The appropriate procedures under the rules

[6] The federal rules recognize the importance of early communication between parties on how electronic information is stored. *See* FED. R. CIV. P. 16(b), 26(f). While the Texas rules have no counterpart, early discussions between the parties or early discovery directed toward learning about an opposing party's electronic storage systems and procedures is encouraged.

Weekley next contends that, even if a motion to compel may be used to access another party's hard drives, the trial court abused its discretion by permitting the experts to rummage through the Employees' computers in search of deleted emails that may no longer exist. Such an invasive procedure is only permissible, Weekley argues, when the requesting party has produced some evidence of good cause or bad faith, together with some evidence that the information sought exists and is retrievable. According to Weekley, HFG failed to make such a demonstration. HFG responds that inconsistencies and discrepancies in a party's production justify granting access to a party's hard drives. Additionally, HFG claims it was not required to show the feasibility of retrieval because it is well-settled that deleted emails can, at least in some cases, be retrieved from computer hard drives. Once again, we turn to Rule 196.4 for guidance.

When a specific request for electronic information has been lodged, Rule 196.4 requires the responding party to either produce responsive electronic information that is "reasonably available to the responding party in its ordinary course of business," or object on grounds that the information cannot through reasonable efforts be retrieved or produced in the form requested. Once the responding party raises a Rule 196.4 objection, either party may request a hearing at which the responding party must present evidence to support the objection. TEX. R. CIV. P. 193.4(a). To determine whether requested information is reasonably available in the ordinary course of business, the trial court may order discovery, such as requiring the responding party to sample or inspect the sources potentially containing information identified as not reasonably available. *See* TEX. R. CIV. P. 193.4(a); *cf.* TEX. R. CIV. P. 196.7 & cmts.—1999; *accord* FED. R. CIV. P. 26(b)(2)(b) notes of the advisory committee to the 2006 amendments. The trial court may also allow deposition of

witnesses knowledgeable about the responding party's information systems. *See* TEX. R. CIV. P. 195.1. Because parties' electronic systems, electronic storage, and retrieval capabilities will vary in each case, trial courts should assess the reasonable availability of information on a case-by-case basis.

Should the responding party fail to meet its burden, the trial court may order production subject to the discovery limitations imposed by Rule 192.4. If the responding party meets its burden by demonstrating that retrieval and production of the requested information would be overly burdensome, the trial court may nevertheless order targeted production upon a showing by the requesting party that the benefits of ordering production outweigh the costs. TEX. R. CIV. P. 192.4. Like assessing the reasonable availability of information, determining the scope of production may require some focused discovery, "which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery." FED. R. CIV. P. 26(b)(2)(b) notes of the advisory committee to the 2006 amendments; *see also* TEX. R. CIV. P. 196.7. To the extent possible, courts should be mindful of protecting sensitive information and should choose the least intrusive means of retrieval. And when the court orders production of not-reasonably-available information, the court "must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information." TEX. R. CIV. P. 196.4.

Because HFG did not initially specifically request deleted emails as Rule 196.4 requires, Weekley had no obligation to object in its response that deleted emails were not "reasonably

available . . . in its ordinary course of business." *Id.* However, because HFG's motion to compel clarified the scope of its original request, Weekley was required in its response to HFG's motion and at the subsequent hearing to make the Rule 196.4 showing. Our limited record does not reflect whether Weekley met its burden.[7] However, the trial court's ultimate decision to order imaging of the Employees' hard drives and forensic examination implies a finding that the deleted emails were not reasonably available and required extraordinary steps for their retrieval and production. We must decide, then, whether the measures the trial court crafted for retrieving the Employees' deleted emails were proper under the circumstances presented. Although Rule 196.4 does not provide express guidelines for the manner or means by which electronic information that is not reasonably available in the ordinary course of business may be ordered produced, the federal rules and courts applying them offer some guidance.

2. The federal rules

Beginning in 2000, the federal Committee on Rules of Practice and Procedure began intensive work on the subject of computer-based discovery because of growing confusion in the area. *See* Comm. on Rules of Practice and Procedure, Summary of the Report of the Judicial Conference 22 (2005), *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf. The Committee's purpose was to "determine whether changes could be effected to reduce the costs of discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management when appropriate." *Id.* at 24. In 2005, the Committee proposed

[7] The court reporter's record from the hearing on HFG's First Motion to Compel is absent from the record.

amendments to the Federal Rules to better accommodate electronic discovery. *Id.* at 22. The amendments were supported by The American Bar Association Section on Litigation, the Federal Bar Council, the New York State Bar Association Commercial and Federal Litigation Section, and the Department of Justice, and most of the amendments were unanimously approved by the Committee. *Id.* at 25. The amendments were ultimately approved by the Judicial Conference and the United States Supreme Court, and have been in effect since December 1, 2006. Although we have not amended our rules to mirror the federal language, our rules as written are not inconsistent with the federal rules or the case law interpreting them.

Under Federal Rule of Civil Procedure 26(b)(2)(B), a trial court may order production of information that is not reasonably available only "if the requesting party shows good cause." In determining whether the requesting party has demonstrated "good cause," the court must consider, among other factors, whether

> the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(C)(iii). The Texas rules do not expressly require a "good cause" showing before production of not-reasonably-available electronic information may be ordered, but they do require a trial court to limit discovery when

> the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

TEX. R. CIV. P. 192.4(b). Thus, both the federal rule and ours require trial courts to weigh the benefits of production against the burdens imposed when the requested information is not reasonably available in the ordinary course of business. We see no difference in the considerations that would apply when weighing the benefits against the burdens of electronic-information production; therefore we look to the federal rules for guidance.

Providing access to information by ordering examination of a party's electronic storage device is particularly intrusive and should be generally discouraged, just as permitting open access to a party's file cabinets for general perusal would be. The comments to the federal rules make clear that, while direct "access [to a party's electronic storage device] might be justified in some circumstances," the rules are "not meant to create a routine right of direct access." FED. R. CIV. P. 34 notes of the advisory committee to the 2006 amendments. When allowing such access, the comments to Rule 34 warn courts to "guard against undue intrusiveness." *Id.*

3. Federal case law

Since the 2006 amendments to the federal rules were promulgated, federal case law has established some basic principles regarding direct access to a party's electronic storage device. As a threshold matter, the requesting party must show that the responding party has somehow defaulted in its obligation to search its records and produce the requested data. *See The Scotts Co. v. Liberty Mut. Ins. Co.*, Civil Action 2:06-CV-899, 2007 U.S. Dist. LEXIS 43005, at *5 (S.D. Ohio June 12, 2007); *Diepenhorst v. City of Battle Creek*, Case No. 1:05-CV-734, 2006 U.S. Dist. LEXIS 48551, at *10 (W.D. Mich. June 30, 2006) (citing *In re Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003)); *Powers v. Thomas M. Cooley Law Sch.*, Case No. 5:05-CV-117, 2006 U.S. Dist. LEXIS 67706, at

*14 (W.D. Mich. Sept. 21, 2006). The requesting party should also show that the responding party's production "has been inadequate and that a search of the opponent's [electronic storage device] could recover deleted relevant materials." *Diepenhorst*, 2006 U.S. Dist. LEXIS 48551, at *9 (citing *Simon Prop. Group LP v. MySimon, Inc.*, 194 F.R.D. 639, 640–641 (S.D. Ind. 2000)). Courts have been reluctant to rely on mere skepticism or bare allegations that the responding party has failed to comply with its discovery duties. *The Scotts Co.*, 2007 U.S. Dist. LEXIS 43005, at *6; *Powers*, 2006 U.S. Dist. LEXIS 67706, at *15;[8] *cf. Balfour Beatty Rail, Inc. v. Vaccarello*, Case No. 3:06-CV-551-J-20MCR, 2007 U.S. Dist. LEXIS 3581, at *7 (M.D. Fl. Jan. 18, 2007) (denying access to responding party's hard drives where requesting party failed to demonstrate responding party's non-compliance with its discovery duties); *see also McCurdy Group v. Am. Biomedical Group, Inc.*, 9 Fed. Appx. 822, 831 (10th Cir. 2001) (noting that skepticism alone is not sufficient to permit direct access to an opponent's electronic storage device).

Even if the requesting party makes this threshold showing, courts should not permit the requesting party itself to access the opponent's storage device; rather, only a qualified expert should be afforded such access, *Diepenhorst*, 2006 U.S. Dist. LEXIS 48851, at *7; *accord In re Honza*, 242 S.W.3d 578, 583 n.8 (Tex. App.—Waco 2008, pet. denied) (noting that "the expert's qualifications

[8] *See also White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, Inc.*, Civil Action No. 07-2319-CM, 2009 U.S. Dist. LEXIS 22068, at *13 (D. Kan. Mar. 18, 2009) (allowing direct access where requesting party's expert noted discrepancies in the metadata of certain produced emails); *Matthews v. Baumhaft*, Case No. 06-11618, 2008 U.S. Dist. LEXIS 42396, at *5 (E.D. Mich. May 29, 2008) (allowing direct access upon a showing of responding party's discovery misconduct); *Ferron v. Search Cactus, L.L.C.*, Case No. 2:06-CV-327, 2008 U.S. Dist. LEXIS 34599, at *8 (S.D. Ohio Apr. 28, 2008) (allowing direct access where responding party "failed to fulfill his 'duty to preserve information because of pending or reasonably anticipated litigation'") (quoting FED. R. CIV. P. 37 notes of the advisory committee to the 2006 amendments).

are of critical importance when access to another party's computer hard drives or similar data storage is sought"), and only when there is some indication that retrieval of the data sought is feasible. *See Calyon v. Mizuho Sec. USA Inc.*, 07 Civ. 02241 (RO) (DF), 2007 U.S. Dist. LEXIS 36961, at *17–18 (S.D.N.Y. May 18, 2007); *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002) (citing *Playboy Enters. v. Welles*, 60 F. Supp. 2d 1050, 1055 (S.D. Cal. 1999)). Due to the broad array of electronic information storage methodologies, the requesting party must become knowledgeable about the characteristics of the storage devices sought to be searched in order to demonstrate the feasibility of electronic retrieval in a particular case. And consistent with standard prohibitions against "fishing expeditions," *see, e.g.*, *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995), a court may not give the expert carte blanche authorization to sort through the responding party's electronic storage device. *See Thielen v. Buongiorno USA, Inc.*, Case No. 1:06-CV-16, 2007 U.S. Dist. LEXIS 8998, at *7–8 (W.D. Mich. Feb. 8, 2007). Instead, courts are advised to impose reasonable limits on production. *See In re CSX Corp.*, 124 S.W.3d at 152; *The Scotts Co.*, 2007 U.S. Dist. LEXIS 43005, at *5; *see also Ford*, 345 F.3d at 1317 (noting the importance of establishing protocols for the forensic search of a party's hard drives, such as designating search terms to restrict the search). Courts must also address privilege, privacy, and confidentiality concerns. *Calyon*, 2007 U.S. Dist. LEXIS 36961, at *14; *Frees, Inc. v. McMillian*, Civil Action No.. 05-1979, 2007 U.S. Dist. LEXIS 4343, *9 (W.D. La. Jan. 22, 2007).

Finally, federal courts have been more likely to order direct access to a responding party's electronic storage devices when there is some direct relationship between the electronic storage

device and the claim itself. *See Cenveo Corp. v. Slater*, No. 06-CV-2632, 2007 U.S. Dist. LEXIS 8281, at *4 (E.D. Penn. Feb. 2, 2007)*; Frees,* 2007 U.S. Dist. LEXIS 4343, at *9*; Ameriwood Indus., Inc. v. Liberman*, No. 4:06CV524-DJS, 2006 U.S. Dist. LEXIS 93380, at *5 (E.D. Mo. Dec. 27, 2006); *Balboa Threadworks, Inc. v. Stucky*, Case No. 05-1157-JTM-DWB, 2006 U.S. Dist. LEXIS 29265, *12 (D. Kan. Mar. 24, 2006). For example, in *Ameriwood Industries*, Ameriwood sued several former employees claiming they improperly used Ameriwood's computers, confidential files, and confidential information to sabotage Ameriwood's business by forwarding its customer information and other trade secrets from Ameriwood's computers to the employees' personal email accounts. 2006 U.S. Dist. LEXIS 93380, at *2, *9. Based in part on the close relationship between Ameriwood's claims and the employees' computer equipment, the trial court justified "allowing an expert to obtain and search a mirror image of [the employee] defendants" hard drives. *Id.*, at *6. Similarly, in *Cenveo Corp.*, Cenveo sued several former employees for improperly using its computers, confidential trade information, and trade secrets to divert business from Cenveo to themselves. 2007 U.S. Dist. LEXIS 8281, at *1. Borrowing from *Ameriwood*, the district court authorized a similar order "[b]ecause of the close relationship between plaintiff's claims and defendants' computer equipment." *Id.* at *4. Finally, in *Frees*, a former employee was sued for using company computers to remove certain proprietary information. 2007 U.S. Dist. LEXIS 4343, at *2. Noting that the employee's computers would be "among the most likely places [the employee] would have downloaded or stored the data allegedly missing," *id.,* at *5, the court allowed direct access to the employee's work and home computers. *Id.*

4. HFG did not make the necessary showing

In this case, HFG's motion relied primarily upon discrepancies and inconsistencies in Weekley's production. According to HFG, Weekley only produced "a handful of emails from Russell Rice, and one email from Biff Bailey," Weekley's Division President and Land Acquisitions Manager respectively, while producing "no emails from the email accounts of Scott Thompson or Joe Vastano, both of whom . . . were very involved with the [s]ubdivision." Additionally, HFG expressed concern about the limited number of emails relating to the Slope Stability Analysis it received despite the importance of that report. Beyond Weekley's meager document production, HFG relied upon Burchfield's testimony that Weekley employees do not save deleted emails to their hard drives, and that Burchfield had "no earthly idea . . . whether [the deleted emails are] something a forensic specialist could go in and retrieve."

From this testimony, the trial court could have concluded that HFG made a showing that Weekley did not search for relevant deleted emails that HFG requested. But it does not follow that a search of the Employees' hard drives would likely reveal deleted emails or, if it would, that they would be reasonably capable of recovery. HFG's conclusory statements that the deleted emails it seeks "must exist" and that deleted emails are in some cases recoverable is not enough to justify the highly intrusive method of discovery the trial court ordered, which afforded the forensic experts "complete access to all data stored on [the Employees'] computers." The missing step is a demonstration that the particularities of Weekley's electronic information storage methodology will allow retrieval of emails that have been deleted or overwritten, and what that retrieval will entail. A complicating factor is the some two-and-a-half years that passed between the time any responsive emails would have been created and the time HFG requested them. Under these circumstances, it

is impossible to determine whether the benefit of the forensic examination the trial court ordered outweighs the burden that such an invasive method of discovery imposed. *Compare Honza*, 242 S.W.3d at 583 n.8.

5. This case differs from *Honza*

We understand the trial court's predicament, as state law in this area is not clearly defined and the parties' discovery postures shed more heat than light upon the situation. That being the case, the trial court apparently followed the protocol set forth in the only Texas case to address a similar situation. *See Honza*, 242 S.W.3d 578. In *Honza*, A & W Development, L.L.C. assigned to Wesley F. Honza and Robert A. Honza the right to purchase a tract of land under a real estate contract. *Id.* at 579. Under the terms of the assignment, A & W retained the right to purchase a portion of the assigned tract for construction of a street. *Id.* According to A & W, an earlier version of the assignment made no mention of a purchase price upon exercise of the right because the consideration negotiated for the partial assignment included what the Honzas should receive for the street. *Id.* When A & W decided to exercise its right, the Honzas demanded that A & W pay additional consideration. *Id.* at 580. A & W sued the Honzas seeking declaratory relief and alleging various theories of recovery. In the course of discovery, the Honzas produced two drafts of the partial assignment in electronic form. *Id.* at 580, 583. However, they did not produce or otherwise make available metadata[9] associated with those documents. *Id.* at 580. The first trial resulted in a mistrial, after which A & W moved to gain access to the Honzas hard drives to obtain the metadata necessary

[9] According to the federal rules advisory committee, metadata is "[i]nformation describing the history, tracking, or management of an electronic file." FED. R. CIV. P. 26(f) notes of the advisory committee to the 2006 amendments.

to identify the points in time when the partial assignment draft was modified. *Id.* The trial court granted A & W's motion, crafting a protocol similar to the one ordered in this case. The court of appeals affirmed the trial court's order, *id.* at 579, and we denied mandamus relief.

Despite the undeniable similarities between the *Honza* order and the one presented here, there are several important distinctions concerning the contexts in which the two orders were granted. First, in *Honza*, A & W sought metadata associated with two documents that had already been shown to exist; indeed, the Honzas produced those documents in electronic form in response to discovery requests propounded before the first trial. *Id.* at 580, 583. Because the Honzas were required to preserve that evidence once it had been requested, there was a reasonable likelihood that a search of the Honzas' computers would reveal the information A & W sought. In this case, on the other hand, the potential for successful recovery of the Employees' deleted emails over a two-and-a-half-year period is much less clear.

Moreover, in *Honza* there was a direct relationship between the hard drives sought and A & W's claims. As the court of appeals noted, identification of the points in time when the partial assignment draft was modified directly concerned "the issue of whether [the Honzas] altered the partial assignment after the parties concluded their agreement but before the document was presented for execution." *Id.* at 580. In contrast, although the deleted emails HFG seeks in this case might reveal circumstantial evidence that the representations Weekley made in the Estoppel Certificate were misleading, there is no claim that the Estoppel Certificate itself was tampered with. While we recognize that a more tenuous link between the electronic storage device and the claim itself is not dispositive, it is a factor trial courts should consider.

Finally, in *Honza* there was extensive testimony from A & W's expert about his experience and qualifications before access to the Honzas' computers was ordered. *Id.* at 583 n.8. Although Weekley does not directly challenge the qualifications of HFG's forensic experts, nothing was presented to show that the experts were qualified to perform the search given the particularities of the specific storage devices at issue, or that the search methodology would likely allow retrieval of relevant deleted emails. Absent some indication that the experts are familiar with the particularities of the Employees' hard drives, that they are qualified to search those hard drives, and that the proposed methodology for searching those hard drives is reasonably likely to yield the information sought, *Honza* does not support the trial court's order. We conclude that by ordering forensic examination of Weekley's hard drives without such information, the trial court abused its discretion. *See In re CSX Corp.*, 124 S.W.3d at 152; *In re Am. Optical Corp.*, 988 S.W.2d 711, 714 (Tex. 1998).

Because the trial court abused its discretion by granting HFG's motion without the requisite showing, we need not reach Weekley's alternative arguments that the search terms the trial court ordered are overly broad, or that the trial court's order improperly requires Weekley to create the equivalent of a "privilege log" as to irrelevant documents that the search might produce. However, because trial courts should be mindful of protecting sensitive information and utilize the least intrusive means necessary to facilitate discovery of electronic information, the trial court should consider these arguments on remand.

D. Summary of Rule 196.4 Procedure

A fundamental tenet of our discovery rules is cooperation between parties and their counsel, and the expectation that agreements will be made as reasonably necessary for efficient disposition

of the case. TEX. R. CIV. P. 191.2. Accordingly, prior to promulgating requests for electronic information, parties and their attorneys should share relevant information concerning electronic systems and storage methodologies so that agreements regarding protocols may be reached or, if not, trial courts have the information necessary to craft discovery orders that are not unduly intrusive or overly burdensome. The critical importance of learning about relevant systems early in the litigation process is heavily emphasized in the federal rules. Due to the "volume and dynamic nature of electronically stored information," failure to become familiar with relevant systems early on can greatly complicate preservation issues, increase uncertainty in the discovery process, and raise the risk of disputes. FED. R. CIV. P. 26(f) notes of the advisory committee to the 2006 amendments.

With these overriding principles in mind, we summarize the proper procedure under Rule 196.4:

- the party seeking to discover electronic information must make a specific request for that information and specify the form of production. TEX. R. CIV. P. 196.4.

- The responding party must then produce any electronic information that is "responsive to the request and . . . reasonably available to the responding party in its ordinary course of business." *Id.*

- If "the responding party cannot — through reasonable efforts — retrieve the data or information requested or produce it in the form requested," the responding party must object on those grounds. *Id.*

- The parties should make reasonable efforts to resolve the dispute without court intervention. TEX. R. CIV. P. 191.2.

- If the parties are unable to resolve the dispute, either party may request a hearing on the objection, TEX. R. CIV. P. 193.4(a), at which the responding party must demonstrate that the requested information is not reasonably available because of undue burden or cost, TEX. R. CIV. P. 192.4(b).

— If the trial court determines the requested information is not reasonably available, the court may nevertheless order production upon a showing by the requesting party that the benefits of production outweigh the burdens imposed, again subject to Rule 192.4's discovery limitations.

— If the benefits are shown to outweigh the burdens of production and the trial court orders production of information that is not reasonably available, sensitive information should be protected and the least intrusive means should be employed**.** TEX. R. CIV. P. 192.6(b). The requesting party must also pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information. TEX. R. CIV. P. 196.4.

— Finally, when determining the means by which the sources should be searched and information produced, direct access to another party's electronic storage devices is discouraged, and courts should be extremely cautious to guard against undue intrusion.

E. Is Mandamus Appropriate?

Mandamus relief is available when the trial court compels production beyond the permissible bounds of discovery. *See Am. Optical*, 988 S.W.2d at 715 (no adequate appellate remedy existed where the trial court ordered overly broad discovery). Intrusive discovery measures — such as ordering direct access to an opponent's electronic storage device — require, at a minimum, that the benefits of the discovery measure outweigh the burden imposed upon the discovered party. TEX. R. CIV. P. 196.4, 192.4. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004). "If an appellate court cannot remedy a trial court's discovery error, then an adequate appellate remedy does not exist." *In re Dana Corp.*, 138 S.W.3d 298, 301 (Tex. 2004).

In this case, HFG failed to make the good-cause showing necessary to justify the trial court's order. The harm Weekley will suffer from being required to relinquish control of the Employees' hard drives for forensic inspection, and the harm that might result from revealing private

conversations, trade secrets, and privileged or otherwise confidential communications, cannot be remedied on appeal. *See Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (noting that a party will not have an adequate remedy by appeal when a trial court's order "imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party") (citing *Sears, Roebuck & Co. v. Ramirez*, 824 S.W.2d 558 (Tex. 1992)); *Gen. Motors Corp. v. Lawrence*, 651 S.W.2d 732, 733 (Tex. 1983). Accordingly, Weekley is entitled to mandamus relief.

III. Conclusion

We conditionally grant the writ of mandamus and order the trial court to vacate its Order. We are confident the trial court will comply, and our writ will issue only if it does not. We note that HFG is not precluded from seeking to rectify the deficiencies we have identified.

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Harriet O'Neill
Justice

OPINION DELIVERED: August 28, 2009