Opinions of the Supreme Court of Texas

Fiscal Year 2010

(September 1, 2009 – August 31, 2010)

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FISCAL YEAR 2010 OPINIONS

(SEPTEMBER 1, 2009 – AUGUST 31, 2010)

IN THE SUPREME COURT OF TEXAS

NO. 04-0607

IN RE THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

~ Consolidated for oral argument with ~

NO. 04-0608

IN RE FROST NATIONAL BANK, FORMER EXECUTOR OF THE ESTATE OF ELENA SUESS KENEDY, DECEASED; FROST NATIONAL BANK AND PABLO SUESS, TRUSTEES OF THE JOHN G. KENEDY, JR. CHARITABLE TRUST; AND THE MISSIONARY OBLATE FATHERS OF TEXAS, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued September 29, 2005

JUSTICE GREEN delivered the opinion of the Court.

JUSTICE O'NEILL and JUSTICE GUZMAN did not participate in the decision.

In these original proceedings, we consider whether the probate court abused its discretion by entering orders allowing the body of John G. Kenedy, Jr., to be exhumed for DNA testing to establish whether Ann M. Fernandez is Kenedy's non-marital child. We hold that it did, and we conditionally grant the writ of mandamus.

The relevant facts are set out in detail in *Frost National Bank v. Fernandez*, ___ S.W.3d ___ (Tex. 2010). These mandamus cases arise out of probate court proceedings in which Fernandez seeks to establish herself as an heir to the estates of Kenedy and his sister, Sarita Kenedy East. In the probate court, Fernandez filed bill of review contests to estate administration proceedings and applications for declaration of heirship, which remain pending. She also filed three bills of review in the district courts seeking to set aside decades-old judgments. *See id.* at ___. Just as she argues in her district court bill of review cases, Fernandez argues in the probate court that Kenedy's will did not dispose of his real property, so she is entitled to recover her intestate share as an heir to that property. She also argues that, as an heir, she is entitled to a distribution from East's estate.

Fernandez filed a motion to exhume Kenedy's body for DNA testing pursuant to section 711.004 of the Texas Health and Safety Code. At that time, section 711.004(c) provided that if consent of certain persons cannot be obtained, "the remains may be removed by permission of the county court of the county in which the cemetery is located," so long as certain notice requirements

are satisfied. TEX. HEALTH & SAFETY CODE § 711.004(c) (Vernon 2003) (amended in 2009 to instead require permission of a district court in the county in which the cemetery is located). In a letter accompanying his exhumation order, the probate court judge, Guy Herman, explained that although he believed section 711.004 did not require a finding of necessity or compelling reason, he nevertheless believed Fernadez's paternity allegation constituted a necessary or compelling reason for exhumation. Judge Herman declined to rule on pending motions for summary judgment, believing that the threshold question of Fernandez's standing had to be answered in the positive before subject-matter jurisdiction would attach.

The John G. and Marie Stella Kenedy Memorial Foundation and the John G. Kenedy, Jr. Charitable Trust[1] sought mandamus relief from Judge Herman's exhumation order. The court of appeals denied relief, and the Foundation and Trust then each filed a petition for writ of mandamus and motion for temporary relief in this Court. We granted the motions for temporary relief and stayed the probate court's exhumation orders, but later abated these mandamus cases pending appeals of the related district court cases in which summary judgments and anti-suit injunctions were granted against Fernandez. The abatement was lifted after the court of appeals issued its opinions and judgments reversing the district court's summary judgment and anti-suit injunctions. *See* 51 Tex. Sup. Ct. J. 1407 (Sept. 26, 2008).

In a related case, we reinstated the district court's summary judgment that Fernandez take nothing in her bill of review seeking to set aside a decades-old judgment declaring that Kenedy died

[1] Although there are multiple relators in cause 04-0608, we refer to those relators collectively as the Trust.

testate and with no surviving children. *Frost Nat'l Bank*, ___ S.W.3d at ___; *see also The John G. & Marie Stella Kenedy Mem'l Found. v. Fernandez*, ___ S.W.3d ___ (Tex. 2010) (following *Frost National Bank* regarding East's estate). Because Fernandez's claims in the district court were direct attacks on an earlier judgment, and recognizing that the Texas Probate Code did not vest the probate court with jurisdiction when there was no pending estate or intestacy, we concluded that the district court had jurisdiction to render its judgment. *Frost Nat'l Bank*, ___ S.W.3d at ___. We also held that the discovery rule does not apply to bills of review in which non-marital children seek to set aside probate judgments, such that Fernandez's bill of review was barred by the statute of limitations. *Id.* at ___. Therefore, the original final judgments rendered by the district court are binding on Fernandez and preclude her from recovering as a Kenedy heir. *Id.* at ___; *see Ladehoff v. Ladehoff*, 436 S.W.2d 334, 336 (Tex. 1968) (holding that a judgment admitting a will to probate is "binding upon the whole world and specifically upon persons who have rights or interest in the subject matter, and this is so whether those persons were or were not personally served").

A writ of mandamus will issue when a trial court clearly abuses its discretion and there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004). Mandamus is proper if a trial court issues an order that exceeds its jurisdictional authority. *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000).

As we held in *Frost National Bank* and *Kenedy Memorial Foundation*, Fernandez's bill of review claims in the district court are barred by limitations, and the original judgments regarding Kenedy's will and East's will are binding. *Frost Nat'l Bank*, ___ S.W.3d at ___; *Kenedy Mem'l Found.*, ___ S.W.3d at ___. Under those final judgments, Fernandez cannot establish intestacy as

a basis for the probate court's jurisdiction. *See* TEX. PROB. CODE § 48(a) (permitting suit for declaration of heirship "[w]hen a person dies intestate"). Nor can the probate court assert jurisdiction based on matters incident to an estate when there is no open or pending probate matter to which Fernandez's heirship claim would be incident. *See Frost Nat'l Bank*, ___ S.W.3d at ___ (citing *Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581, 585 (Tex. 1993) ("A court empowered with probate jurisdiction may only exercise its probate jurisdiction over matters incident to an estate when a probate matter proceeding related to such matters is already pending in that court.")); *Schwartz v. Jefferson*, 520 S.W.2d 881, 889 (Tex. 1975) ("The mere filing of a bill of review does not affect the finality of the judgment which is sought to be set aside."); *see also* TEX. PROB. CODE §§ 5(f), 5A. Although the merits of the probate court bills of review and applications for declaration of heirship are not yet before us, we can conceive of no alternative means by which Fernandez might successfully attack the final district court judgment which declared that Kenedy died without heirs and that any interest in property passed to his wife under the will. There being no final judgment to attack by bill of review in probate court, no possibility of intestacy under the binding final judgments, and no pending probate proceeding—the only possible bases by which Fernandez could establish jurisdiction in the probate court—the court lacked jurisdiction to enter any order other than to dismiss. *See State v. Morales*, 869 S.W.2d 941, 949 (Tex. 1994) ("When a court lacks jurisdiction, its only legitimate choice is to dismiss."). As a result, we conclude that the probate court's exhumation order was void. *See In re Dep't of Family & Protective Servs.*, 273 S.W.3d 637, 641 (Tex. 2009) (observing that orders made without jurisdiction are void). Because its order was void, the probate court's order constituted an abuse of discretion, and mandamus relief

is appropriate without a showing that the relators lack an adequate appellate remedy. *See Sw. Bell Tel. Co.*, 35 S.W.3d at 605.

Even assuming, as Fernandez argues, that section 711.004 of the Texas Health and Safety Code could vest the probate court with jurisdiction over exhumation matters, we hold that in this case, allowing exhumation of Kenedy's body when Fernandez is barred from recovery, regardless of whether she is actually Kenedy's biological child, is an abuse of discretion. Being barred from claiming a property interest in the Kenedy or East estates, which was the basis for her claims in the probate court, Fernandez has no justiciable interest in the exhumation or genetic testing of Kenedy's body and thus lacks standing to pursue exhumation under section 711.004.[2] *See Yett v. Cook*, 281 S.W. 837, 841 (Tex. 1926) ("It is a rule of universal acceptation that to entitle any person to maintain an action in court it must be shown that he has a justiciable interest in the subject matter in litigation, either in his own right or in a representative capacity."); *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001) ("If a case becomes moot, the parties lose standing to maintain their claims."). And because of her lack of standing, the probate court lacks jurisdiction to act, even if section 711.004 might

[2] Because we hold that Fernandez lacked standing in this case, we do not need to decide whether section 711.004 vests the probate court with jurisdiction to resolve disputes regarding exhumation rights. *But see Atkins v. Davis*, 352 S.W.2d 801, 802 (Tex. Civ. App.—Fort Worth 1961, no writ) (holding that only the district court has jurisdiction to determine controversies concerning the right to remove human remains). We note that section 711.004 has been amended, effective September 1, 2009, to now require exhumation permission from a district court, and not a county court. TEX. HEALTH & SAFETY CODE § 711.004(c) (Vernon Supp. 2009). The parties argue about whether that change should be applied retroactively, but we do not need to reach that question. Additionally, we need not decide whether, as Fernandez contends, Texas Probate Code section 53A, effective September 1, 2007, allows a statutory probate court to order an exhumation as long as the notice provisions of section 711.004 are satisfied. *See* TEX. PROB. CODE § 53A (Vernon Supp. 2009) (providing that, on good cause shown, a probate court may order genetic testing of a deceased individual and, if necessary, order removal of remains as provided by section 711.004). Finally, we need not decide whether, as the probate court believed, a showing of necessity or compelling reason for exhumation is no longer necessary under section 711.004.

confer jurisdiction in another case. *See DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008) ("A court has no jurisdiction over a claim made by a plaintiff without standing to assert it."). We have recognized that mandamus relief is appropriate to "spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *In re Prudential*, 148 S.W.3d at 136. Here, where Fernandez has no viable claim for an inheritance recovery and thus has no standing to seek exhumation for genetic testing, and where no other basis for exhumation has been shown, we conclude it was an abuse of discretion to order the exhumation of Kenedy's body, which has been buried and left undisturbed for more than 60 years.

For these reasons, we conditionally grant the writ of mandamus and order the probate court to vacate its orders relating to exhumation and to dismiss these cases. *See In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998) (directing the trial court to vacate a void order); *Morales*, 869 S.W.2d at 949. The writ will issue only if the court does not do so.

_____
Paul W. Green
Justice

OPINION DELIVERED: April 16, 2010

IN THE SUPREME COURT OF TEXAS

NO. 05-0748

SOUTHWESTERN BELL TELEPHONE COMPANY,
PETITIONER,

v.

MARKETING ON HOLD INC., D/B/A SOUTHWEST TARIFF ANALYST,
RESPONDENT

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

Argued March 22, 2007

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

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

JUSTICE GUZMAN did not participate in the decision.

In this interlocutory appeal of a trial court's class certification order, the class representative obtained assignments of claims that the defendant telephone company improperly charged some of its business customers certain municipal fees. The court of appeals affirmed the statewide class certification. 170 S.W.3d 814, 829. We conclude that the assignments are valid and provide standing, that the class representative's claims are typical of the other class members' claims, and

that common questions of law or fact predominate. However, because the putative class representative failed to establish that it adequately represents the class, we reverse the judgment of the court of appeals and decertify the class.

I. Factual and Procedural Background

Southwestern Bell Telephone Company (Southwestern Bell) provides telephone service packages to its business customers.[1] To compensate municipalities for maintaining public rights-of-way for telephone services, municipalities assess an annual fee against Southwestern Bell under various "Specified Annual Payment," or "SAP" ordinances. *See, e.g.*, Brownsville, Tex., Ordinance 95-1296, § 12 (July 18, 1995). The ordinances authorize Southwestern Bell to charge its customers a proportionate share of the fee, provided that Southwestern Bell does not profit from the charge. *Id.*

Marketing on Hold, d/b/a Southwestern Tariff Analyst (STA), provides auditing services of business telephone bills and assists its customers in seeking adjustments from telephone companies for improper billing practices. In the course of auditing several Southwestern Bell telephone bills for its customers, STA discovered that Southwestern Bell assessed municipal fees for services STA claims were exempted by the ordinances from 1991 to 1998. STA entered into assignment agreements with five of its customers[2] in consideration of ten dollars per assignment. The

[1] Southwestern Bell is now a wholly-owned subsidiary of AT&T, Inc. *See* AT&T, Inc. Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the Fiscal Year Ended December 31, 2008 (Form 10-K), File No. 1-8610, Exhibit 21 (filed Feb. 25, 2009) (describing the principal subsidiaries of AT&T, Inc.).

[2] The five customers are Russell & Smith Ford, Inc., United Services Automobile Association, Riverway Bank, Petrocon Engineering, and S&B Engineering.

assignments further provide that the customer-assignors would receive seventy percent and STA retain thirty percent of any recovery from Southwestern Bell that STA obtains. STA subsequently filed a class suit, as named plaintiff, against Southwestern Bell and sought to be designated the class representative for approximately 6,900 of Southwestern Bell business customers. STA asserted claims for breach of contract, unjust enrichment, breach of express warranty for services, and negligence per se for illegally charging municipal fees. STA neither subscribed to Southwestern Bell's telephone service packages at issue in the proposed class, nor paid any of the disputed fees at issue.

The trial court conducted a four-day certification hearing and issued a twenty-eight page order certifying the class. The class is defined as:

> All persons and entities or their assignees who made payment(s) to Southwestern Bell Telephone Company for charges which were characterized in Southwestern Bell's bill or statement as a "municipal charge" or "municipal surcharge" or "municipal fee," or similar designation (hereinafter collectively referred to as a "municipal charge"), at a time when the customer's service charge upon which such "municipal charge" was imposed, was provided in a municipality located in the State of Texas having a[n SAP] ordinance . . . .
> and all or part of the such so-called "municipal charge" . . . was based upon customer service charges made by SWBT for [services included in the SmartTrunk, Digital Loop, and Hotel/Motel subscription packages].[3]

The trial court found that the class satisfied the numerosity, commonality, typicality, and adequacy of representation requirements of rule 42(a) of the Texas Rules of Civil Procedure and that questions

[3] Each of these terms describe a service provided by Southwestern Bell. The Hotel/Motel service allows the hotel or motel to incur charges on a per-call basis, thus allowing guests to receive and make local telephone calls charged to the room. Digital Loop and Smart Trunk describe an interface that makes a single connection with the telephone company that then provides the customer with twenty-three channels for telephone communication.

of law or fact common to the class predominated over individual questions under then-rule 42(b)(4) (now rule 42(b)(3)). The trial court also found that STA had standing to proceed on behalf of the class and was a proper class representative as the owner of assigned claims.

Southwestern Bell appealed the trial court's interlocutory certification order, and the court of appeals affirmed. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3). Southwestern Bell subsequently petitioned this Court, complaining that the court of appeals erred in affirming the class certification order. Specifically, Southwestern Bell challenges: (1) STA's standing and its ability to represent the class adequately; (2) whether STA's claims are typical of the class; and (3) the predominance of common questions where several claims allegedly require individualized proof of reliance and the assessment of damages requires individualized review of customer bills and other records. We granted Southwestern Bell's petition and review the trial court's class certification under an abuse of discretion standard. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 691 (Tex. 2002).

II. Standing

Southwestern Bell argues that the assignments under which STA claims standing are void as a matter of law and public policy, and, therefore, STA has no standing to sue or ability to serve as the class representative. "[B]efore Rule 42's requirements are considered, a named plaintiff must first satisfy the threshold requirement of individual standing at the time suit is filed, without regard to the class claims." *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 710 (Tex. 2001).

"The requirement in this State that a plaintiff have standing to assert a claim derives from the Texas Constitution's separation of powers among the departments of government, which denies the

judiciary authority to decide issues in the abstract, and from the Open Courts provision, which provides court access only to a 'person for an injury done him.'" *DaimlerChrysler v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008) (quoting TEX. CONST. art. 1, § 13). We have held that this requirement applies equally to class actions; therefore, the class representative must be a member of the class and have individual standing to sue. *M.D. Anderson*, 52 S.W.3d at 710–11.

Southwestern Bell does not argue that the assignments were invalid due to the absence of the legal precepts necessary to create a binding contractual assignment—meeting of the minds and consideration. *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986). Instead, Southwestern Bell claims STA's assignments are contractually invalid as contrary to the SAP ordinances and as against public policy. We address those arguments in turn.

The municipal ordinances contain "anti-assignment" clauses that bar the assignment of "any right that accrues from the ordinance," including the claims asserted by STA in this case.[4] *See, e.g.*, Brownsville, Tex., Ordinance 95-1296, § 13 (July 18, 1995).[5] The clauses preclude Southwestern

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[4] The relevant text in the ordinance is as follows:

> SECTION 1 – PURPOSE
>
> Pursuant to the laws of the State of Texas, the CITY Charter and this Ordinance, the TELEPHONE COMPANY has the NON-EXCLUSIVE right and privilege to USE the public RIGHTS-OF-WAY in the CITY for the operation of a telecommunications system subject to the restrictions set forth herein . . .
>
> SECTION 13 – ASSIGNMENT OF ORDINANCE
>
> This Ordinance and any rights or privileges hereunder shall not be assignable to any other entity without the express consent of the CITY. Such consent shall be evidenced by an ordinance which shall fully recite the terms and conditions, if any, upon which such consent is given.

[5] The various municipal ordinances involved are not identical; however, the differences do not affect the analysis herein.

Bell from assigning to any other entity its "rights or privileges," defined in the ordinance as the "right and privilege to USE the public RIGHTS-OF-WAY." *Id.* §§ 13, 1. The plain language of the anti-assignment clauses preclude assignment of use of the rights-of-way, not assignment of claims for damages for improper charges. Moreover, the anti-assignment clauses bar only Southwestern Bell from assigning, not the customers of STA or of Southwestern Bell. The anti-assignment clauses do not prevent Southwestern Bell's customers from assigning claims for these overcharges.

Because STA holds contractually valid assignments, STA steps into the shoes of the claim-holders and is considered under the law to have suffered the same injury as the assignors and have the same ability to pursue the claims. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 572 (Tex. 2001); *see also Vt. Agency of Natural Res. v. United States ex rel Stevens*, 529 U.S. 765, 773 (2000).

Southwestern Bell also argues that the assignments should be invalidated on public policy grounds. Southwestern Bell contends that allowing an assignee to purchase the right to serve as the class representative will result in "entrepreneurial class actions," or the commercial marketing of class representation. Because this would undermine the purpose of the class action device, Southwestern Bell argues, the Court should hold that the assignments are void as a matter of public policy. We analyze this issue under our common law of assignability of claims.

The assignability of a cause of action is generally freely permitted, but assignments may be invalidated on public policy grounds. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 129 & n.11 (Tex. 2004) ("As a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy."); *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696,

707–19 (Tex. 1996) (listing cases invalidating assignments); RESTATEMENT (SECOND) OF CONTRACTS § 317(2)(b) (1981) ("A contractual right can be assigned unless . . . the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy."); *see also Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 103 (2d Cir. 2007) (holding that the assignees are not necessarily antagonistic solely because of their assignee status, which salvages claims that might otherwise be lost by transferring the claims "to someone better able or more willing to pursue the claim or to undertake the risk"). We have invalidated assignments that tend to increase or prolong litigation unnecessarily, tend to distort the litigation process, or are otherwise inconsistent with the purpose of a statutory cause of action. *See PPG Indus. v. JMB/Houston Ctrs. Ltd. P'ship*, 146 S.W.3d 79, 87 n.31 (Tex. 2004) (providing specific examples of types of assignments prohibited under Texas law); *see also id.* at 92 (holding that the assignment of a Texas Deceptive Trade Practices Act claim to a non-consumer was inconsistent with the statutory purpose); *Gandy*, 925 S.W.2d at 710–11 (prohibiting assignment of an alleged sexual abuser's right to recover under his homeowner's policy to the victim because it required the victim to collude with her abuser).[6]

STA already had a substantial financial interest in the claims against Southwestern Bell prior to the assignments. *Cf. Mallios v. Baker*, 11 S.W.3d 158, 170 (Tex. 2000) (assigning interest in

[6] *See also Elbaor v. Smith*, 845 S.W.2d 240, 247–48 (Tex. 1992) (prohibiting Mary Carter agreements because the settling defendant was incentivized to collude with the plaintiff against the remaining defendants); *Int'l Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932, 934 (Tex. 1988) (prohibiting assignment of the plaintiff's cause of action against one tortfeasor to another joint tortfeasor who had contributed to the plaintiff's injury); *Trevino v. Turcotte*, 564 S.W.2d 682, 690 (Tex. 1978) (prohibiting assignment of the right to challenge a will to those who had taken under the will); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317 (Tex. App.—San Antonio 1994, writ ref'd) (prohibiting assignment of legal malpractice claims because it "would cause a reversal of the positions taken by each set of lawyers and clients").

proceeds from legal malpractice claim to disinterested third party). Prior to the dispute in this case, STA had represented customers of Southwestern Bell for years in an attempt to recover alleged overcharges on their phone bills. STA and the five customer-assignors were bound by consulting contracts in which STA agreed to audit the customers' telephone bill in exchange for "fifty percent (50%) of all recovered overcharges, whether recovered through refunds or credits." STA purchased assignments of claims in this case after it convinced the trial court in another class suit that a proposed class settlement would vanquish claims against Southwestern Bell that had not been adjudicated.[7] The trial court excluded the claims at issue in this case from the settlement. By these assignments, STA purchased the customer-assignors' full "right or interest in the Claims" in this case in exchange for "a reduction of the pre-existing consulting fee percentage" from fifty to thirty percent.[8] Although the assignments also conveyed the "sole authority for decisions with regards to prosecuting or settling the Claims," the assignments did not convey class representation status, as

[7] STA and another consulting company hold assignments of claims in a related class action settlement brought in the 357th District Court of Cameron County, Texas. The claims in this case were carved out of another class action brought by Jose Mireles and Patricia Genuchi against Southwestern Bell for improper municipal fees paid by approximately five million Southwestern Bell business *and* residential customers in Texas. After a settlement (the *Mireles* settlement) was reached, STA intervened at the fairness hearing. STA dropped its objection once an agreement was reached that narrowed the scope of the *Mireles* settlement release apparently to exclude the claims of Southwestern Bell's business customers who paid municipal fees pursuant to the three types of telephone service packages at issue in this case.

[8] Specifically, the assignments convey the customer's "rights, remedies, interests, benefits, choses in action, defenses, claims, demands, lawsuits, debts, liens, collateral, damages, covenants, agreements, actions, cross-actions, counterclaims, third-party claims, and causes of action of any nature, against [Southwestern Bell]." The claims are based on "'municipal charges' . . . [that] were not authorized or imposed by the municipal ordinance or municipal franchise agreement relating to [Southwestern Bell's] use of public right-of-ways." STA agrees to pay the customer-assignors "70 percent of the net proceeds from any recovery on the Claims as part of the consideration for assigning to STA its remaining interest in the Claims." "Net proceeds from any recovery on the Claims" is defined as "any recovery (in good funds) received on the Claims less STA's costs of court, expenses, attorneys' fees, and any offsets, incurred in pursuing recovery on the Claims."

Southwestern Bell contends. Because STA had a pre-existing relationship with the assignors that was directly related to the subject of the claims, STA does not appear to be a "stranger/entrepreneur" whose actions disrupt the class suit vehicle and distort the judicial process. *Cf. id.* at 170 (Hecht, J., concurring) ("[A]n assignment of an interest in a legal malpractice claim is contrary to public policy if the assignee takes the interest *purely as an investment unrelated to any other transaction* and acquires not merely a financial interest in the outcome but a significant right of control over the prosecution of the claim.") (emphasis added).

Southwestern Bell argues that STA's representation distorts the litigation process and flouts the legitimate goals of the class action device because STA has suffered no common class injury and is using the class device as a covert means to generate a finder's fee for itself, rather than to compensate for an out-of-pocket loss. However, the valid assignment of claims to a party is not invalidated by the party's designation as the representative in a class suit. Nothing unique to the class action context or to this case dictates that we take the extraordinary step of invalidating otherwise contractually valid assignments on the asserted public policy grounds. *See Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 450 (Tex. 2007) (citing *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 432 (Tex. 2000) ("[O]ur procedural rules do not permit the form of the proceeding to determine whether substantive legal principles will control.")); Rules Enabling Act, 28 U.S.C. § 2072(b) (stating that the Federal Rules of Civil Procedure shall not "abridge, enlarge or modify" preexisting rights). But these issues go to STA's adequacy as the class representative, a matter we take up below, not the validity of the assignments it holds. The court in *Cordes* recognized this distinction, noting that the validity of the assignments in that case was "hardly the end of the matter," and that

other certification requirements, including adequacy, remained to be considered. *Cordes*, 502 F.3d at 103–04.

Certainly, class actions are not intended to serve as vehicles for commercial investment in desired large recoveries or as avenues for entrepreneurial business development. To the extent those concerns exist in a class suit, the courts of this state must scrutinize the circumstances on a case-by-case basis to determine if the arrangement undermines the tenets and purpose of the class action vehicle or otherwise violates public policy. *See Mallios*, 11 S.W.3d at 170 (Hecht, J., concurring) ("Only a person who takes so great a stake in a claim that he in essence owns it, or who, in effect, invests in a claim, obtaining at the same time significant rights to protect the investment, raises the problems involved in commercially marketing claims."); *PPG Indus.*, 146 S.W.3d at 87; *Gandy*, 925 S.W.2d at 707.

STA is a member of the class that the trial court certified. The certification order states that "[a]ll persons and entities or their assignees who made payment(s) to Southwestern Bell Telephone Company" for municipal charges are members of the class. In other words, STA is a valid class member—a point acknowledged by Southwestern Bell at oral argument when its counsel stated that "an assignee can pursue these claims and could even be a class member."

If we were to hold, as Southwestern Bell contends we should, that STA's assignments are void on public policy grounds, we would abrogate STA's individual standing to bring its claims as either a member of the putative class as defined by the trial court or in an individual lawsuit. STA's individual standing does not change based on whether it asserts that standing as a class member, in support of its bid to serve as the class representative, or as an individual litigant. The standing

requirements remain the same because each class member and the class representative is an individual claimant seeking a personal recovery. *M.D. Anderson*, 52 S.W.3d at 710.

Southwestern Bell's remaining arguments on standing concern STA's designation as class representative. However, whether the named plaintiff is a proper class representative is not part of the standing inquiry. *M.D. Anderson*, 52 S.W.3d at 710. Assignee-class representation undoubtedly raises concerns about the potential for misappropriation of the class action device, and, as discussed above, the potential for abuse implicates public policy concerns. However, to evaluate class representatives whose representation may either threaten or further the proper use of class actions and the rights of absent class members, we employ well-established legal mechanisms—the adequacy, predominance, and typicality requirements.

Accordingly, we decline to invalidate the assignments on public policy grounds. Having concluded that STA has standing, we turn to the merits of Southwestern Bell's petition—whether STA and the proposed class satisfy the requirements in Texas Rule of Civil Procedure 42.

III. Rule 42

> All class actions must satisfy four requirements:
> (1) numerosity—the class is so numerous that joinder of all members is impracticable; (2) commonality—there are questions of law or fact common to the class; (3) typicality—the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) adequacy of representation—the representative parties will fairly and adequately protect the interests of the class.

Daccach, 217 S.W.3d at 438 (citing TEX. R. CIV. P. 42(a)); *Bernal*, 22 S.W.3d at 433. These protections are not only procedural safeguards but are based in the Due Process clauses of the United States and Texas Constitutions to ensure that plaintiffs, whose interests are represented by another,

have notice and an opportunity to be heard in the proceedings and that the class representative adequately represents their interests. *Daccach*, 217 S.W.3d at 455–58 (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45, 61 S. Ct. 115, 85 L. Ed. 22 (1940)). Southwestern Bell claims that STA fails rule 42's typicality and adequacy requirements, but does not challenge numerosity or commonality.

A class action must also satisfy at least one of the requirements in rule 42(b). Here, STA claims the class action satisfies rule 42(b)(3), which requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and that class treatment is "superior to other available methods for the fair and efficient adjudication of the controversy." *Daccach*, 217 S.W.3d at 438–39 (citing TEX. R. CIV. P. 42(b)(3)). "Rule 42 contains a list of non-exhaustive factors to aid a court in determining if (b)(3) certification is appropriate: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action." *Id.* at 439 (citing TEX. R. CIV. P. 42(b)(3)).

A. Typicality

For a proper class certification, rule 42 requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." TEX. R. CIV. P. 42(a)(3). "A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (internal quotations omitted)

(interpreting FED. R. CIV. P. 23). Southwestern Bell argues that STA's claims are atypical because STA never paid the disputed charges and, therefore, was never a member of the class and never suffered a class injury. Southwestern Bell also argues that STA has destroyed typicality by burdening the class with questions regarding its status as an assignee and the validity of its assignments.

We have not previously had an opportunity to address the typicality of an assignee-class representative's claims. Other courts considering this issue have focused on the legal theories behind the claims asserted, not the characteristics of the assignee, unless a defense unique to the assignee will "skew the focus of the litigation and create a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 304-05 (E.D. Mich. 2001) (internal quotation marks and citations omitted); *see also Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986); *Koos v. First Nat'l Bank of Peoria*, 496 F.2d 1162, 1164–65 (7th Cir. 1974).

Emphasizing STA's individual characteristics and its status as an assignee, Southwestern Bell downplays the literal language of rule 42(a) which focuses on the "*claims or defenses*" of the class representative. TEX. R. CIV. P. 42(a)(3) (emphasis added). By virtue of its valid assignments, STA seeks a refund of the overcharges based on the same legal theories and conduct as the class; therefore, STA's *claims* are typical of the class. Further, an assignee under Texas common law stands in the shoes of his assignor. *Jackson v. Thweatt*, 883 S.W.2d 171, 174 (Tex. 1994) (citing *FDIC v. Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993)). Because STA is the assignee of the customer-assignors, STA steps into the customers' shoes and may assert a claim for the injury shared by the

assignor and all members of the class. By definition, STA's claims against Southwestern Bell are the same as the class members. Additionally, because the Court has resolved the validity of STA's assignments both as a matter of law and public policy, it will not be an issue at trial. Therefore, Southwestern Bell's argument that this issue will skew the focus of the litigation is unavailing. *See In re Cardizem*, 200 F.R.D. at 304–05. We therefore conclude that STA has satisfied the typicality requirement.

B. Predominance

Predominance guards against certifying class actions that could overwhelm or confuse a jury or compromise a party's defense. *Schein*, 102 S.W.3d at 690; *Bernal*, 22 S.W.3d at 434. Accordingly, "[c]ertification is not appropriate unless it is determinable from the outset that the individual issues can be considered in a manageable, time-efficient and fair manner." *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) (citing *Schein*, 102 S.W.3d at 688; *Bernal*, 22 S.W.3d at 435). Predominance requires that common questions of law or fact will predominate over questions affecting only individual members. *Schein*, 102 S.W.3d at 694; *Bernal*, 22 S.W.3d at 433. "The test for predominance is not whether common issues outnumber uncommon issues but . . . whether common or individual issues will be the object of most of the efforts of the litigants and the court." *Bernal*, 22 S.W.3d at 434 (internal quotations omitted); *see also Stonebridge*, 236 S.W.3d at 205.

Southwestern Bell argues individualized proof of reliance and review of customer bills and other records to assess damages precludes a finding of predominance. We disagree.

1. Liability

Southwestern Bell argues that reliance is an element of the class claims for breach of express warranty and unjust enrichment, and thus individualized proof of *each* customer's reliance on the bills in question will be the focus of the litigation.

STA responds that a showing of particularized reliance is not required to establish breach of express warranty or unjust enrichment, but even if it is, class-wide proof of reliance is available in this case because Southwestern Bell employs a standard format in its telephone bills, including a line item for municipal fees. STA cites the allegations in the class petition that "[a] Class member cannot independently verify, or independently determine, the customer service charges on which the 'municipal charge' is being applied and the rate applied to such customer service charges." STA argues that class members were subjected to a uniform misrepresentation in the bills—that the amount of the municipal fee was legally authorized—and that, by paying their bills, class members relied on that misrepresentation. Whether Southwestern Bell was authorized to charge municipal fees on the services in question and whether class members relied on that representation, STA contends, are thus susceptible to class-wide proof. *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1258–59 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005) (reasoning that where the defendant's alleged misconduct is standardized, circumstantial evidence can be used to show class-wide reliance). STA also argues that the potential individualized inquiries identified by Southwestern Bell are hypothetical and speculative. We agree.

Texas courts have been reluctant to certify a class when proof of reliance is required as an element of a claim. *See Schein*, 102 S.W.3d at 694 (declining to certify a class when five of the plaintiffs' claims—fraud, breach of express warranty, negligent misrepresentation, promissory

estoppel, and DTPA laundry list violations—required proof of reliance) (citing *Perrone v. GMAC*., 232 F.3d 433, 440 (5th Cir. 2000)); *Fid. & Guar. Life Ins. Co. v. Pina*, 165 S.W.3d 416, 423 (Tex. App.—Corpus Christi 2005, no pet.) (DTPA); *GMC v. Garza*, 179 S.W.3d 76, 82 (Tex. App.—San Antonio 2005, no pet.) (breach of express warranty). Breach of express warranty requires proof of some form of reliance. *See Schein*, 102 S.W.3d at 686 (citing *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997)) (stating that "reliance is also not only relevant to, but an element of proof of, plaintiffs' claims of breach of express warranty"); *PPG*, 146 S.W.3d at 99. Whether proof of reliance is required for unjust enrichment depends on the nature of the allegations. *Heldenfels Bros., Inc. v. Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992) ("A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage.").

Assuming STA alleges a fraud-based theory of unjust enrichment, the determinative inquiry under both unjust enrichment and breach of express warranty is whether individual inquiries regarding reliance predominate. When we have concluded that individual inquiries would predominate, we have consistently relied on evidence of individual variation. In *Stonebridge*, for example, consumers alleged that they were subject to a uniform and misleading telemarketing scheme to sell insurance under a "money had and received" theory. *Stonebridge*, 236 S.W.3d at 204. The class claimed they were never informed that their credit cards or bank accounts would be charged for premiums without any further contact with them when the trial period ended. *Id.* We held that the defendant was entitled to inquire whether individual class members understood they would be charged without further notice, consented to the charges after they were made, or wanted

the coverage irrespective of how premiums were charged. *Id.* at 206–07. In so holding, we pointed to evidence that some customers understood they were being charged for premiums by the defendant and wanted the insurance. *Id.* at 206. Because the class representatives failed to prove that these individual inquiries could be managed fairly and efficiently, we held that the predominance requirement was not satisfied. *Id.* at 206–07; *see also Schein*, 102 S.W.3d at 694 (holding that class-wide proof of reliance was not supported by the record because there was evidence purchasers relied on recommendations from colleagues and others rather than any by the defendant).

When evidence existed that individual class members' experiences reasonably could have varied, we have likewise refused to certify the class. We held in *Best Buy Co. v. Barrera* that the class claim to recover a restocking fee, based on the equitable "money had and received" theory, turned on individual issues that would predominate at trial. 248 S.W.3d 160, 163 (Tex. 2007). The class representative was given a receipt which contained a statement notifying her that "[a] 15% restocking fee will be charged on returns or exchanges of any opened [merchandise]." *Id.* at 161-62. This same notice was posted in the store. *Id.* at 162. Although the class claim involved common issues, such as whether the restocking fee was uniformly calculated and applied when customers returned items, we held that the defendant was entitled to inquire whether individual class members were aware of the restocking fee and voluntarily agreed to it as they made purchases. *Id.* at 163; *see also Snyder v. Magaña*, 142 S.W.3d 295, 301–02 (Tex. 2004) (holding that, when the defendant offered its written policy setting forth several reasons why an employee's commission could be rejected, whether an employer improperly denied promised commissions was an individual issue that would predominate at trial).

Conversely, in this case, Southwestern Bell employs a standard format in its telephone bills, including a line item for municipal fees. The municipal charge is uniformly calculated and applied. After rigorous analysis, the trial court found that the alleged misrepresentation on each bill—an amount due and owing for a municipal charge—"is uniform to all members of the class . . . ." The trial court also found that "evidence of reliance can be demonstrated from the records of [Southwestern Bell] by showing that the members of the putative class paid the bill after it was presented." Again, we review the certification under an abuse of discretion standard. *Schein*, 102 S.W.3d at 691.

The class has met its burden of establishing class-wide proof of reliance because the plaintiffs had no choice but to rely on the misrepresentation. In paying the amount of the bill, Southwestern Bell's customers must have paid the total amount due, including the municipal fee. If they had paid a different amount, such as one that did not include the amount of the fee, Southwestern Bell certainly would have taken action, such as cancelling services. *See, e.g.*, *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 667-68 (9th Cir. 2004) (recognizing that reliance can be shown where it provides the "common sense" or "logical explanation" for the behavior of plaintiffs and the members of the class, in which case reliance could be established class-wide); *Garner v. Healy*, 184 F.R.D. 598, 603–04 (N.D. Ill. 1999) (holding that reliance could be resolved on a class-wide basis because the alleged fraud was perpetrated in a uniform manner when a company sold "car wax," which in fact contained no wax). To defeat certification requires more than mere allegations that individual issues will predominate.

Southwestern Bell's argument that some of its customers *may* have called customer service to obtain an adjustment, failed to pay the bill entirely, or otherwise acted inconsistently with a showing of reliance is mere hypothesis and does not defeat class-wide proof of reliance. Class-wide proof of reliance is possible when class-wide evidence of reliance exists. *Schein*, 102 S.W.3d at 694. In this case, class-wide evidence exists in the form of customer bills upon which customers must have relied to determine the initial amount due and owing. Although some of the customers' reactions to the bills may have differed, reliance was consistent throughout the class.

This case is different from, for example, *Fidelity & Guaranty Life Insurance Co. v. Pina*, in which the plaintiffs sued alleging a misrepresentation that the high interest rate on an annuity would continue past the first year, when in fact it did not. 165 S.W.3d 416, 419 (Tex. App.—Corpus Christi 2005, no pet.). In that case, the plaintiffs alleged that they had relied on the statement in the annuity agreement as to the interest rate; however, the testimony of the plaintiffs varied as to whether they would have purchased the annuity had they known that the high interest rate would not continue past the first year. *Id.* at 424. In contrast, in this case, the customers had already used the services and were required to pay the amount due on the bill. Whereas many factors may have influenced the plaintiffs' decisions in *Pina*, the customers in this case had no decision to make. They were required to pay the amount due and owing on the bill to continue telephone service.

Accordingly, we hold that the trial court did not abuse its discretion in finding that individual issues of liability for the breach of warranty and unjust enrichment claims will not predominate over common issues at trial. *Schein*, 102 S.W.3d at 694; *Bernal*, 22 S.W.3d at 438.

2. Damages

Even though the class claims are susceptible to class-wide proof of reliance and thus liability, it will still be necessary to determine the refund or credit owed to each customer. Although individualized damage calculations do not necessarily defeat predominance, where the focus of the litigation will involve individually assessing the amount of the refund and determining who is entitled to any such refund, a finding of predominance of class issues is precluded. *Schein*, 102 S.W.3d at 694–95. The trial court found that a computer program could be constructed to review the bills and payments and perform the requisite mathematical calculations to determine the damages owed to each class member. The court of appeals affirmed the trial court's finding. 170 S.W.3d at 828–29. We review the trial court's decision under an abuse of discretion standard. *Schein*, 102 S.W.3d at 690–91; *Bernal*, 22 S.W.3d at 435, 439.

The use of a computer program and database to calculate class-wide damages in appropriate cases has been approved by several courts. *See, e.g., Klay*, 382 F.3d at 1260; *Gunnells v. Healthplan Svcs., Inc.*, 348 F.3d 417, 429 (4th Cir. 2003); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40-41 (1st Cir. 2003); *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1112 (5th Cir. 1978). Southwestern Bell makes several challenges to the proposed computer program and damage model. Southwestern Bell first argues that an accurate calculation of damages for each individual class member cannot be made in a timely and efficient manner. There was conflicting expert testimony on this issue. Southwestern Bell's expert testified that the construction of a computerized database would cost approximately $2.3 million and take almost three years to complete. Conversely, STA's expert testified that historical customer records maintained in Southwestern Bell's computer database and optical

microfiche records can be efficiently and economically retrieved. He testified that it would take approximately 600 hours and cost $50,000 to calculate damages. Based on that assessment, STA argues that the damages calculation would not predominate over other class-wide issues at trial.

Southwestern Bell also argues that the proposed computer program fails to address critical problems of calculating damages, including missing data, the possibility that "reallocated" municipal charges will increase or decrease individual damage awards, billing adjustments, changes in area code or municipality, and changed or discontinued services. Again, STA's expert refuted each of Southwestern Bell's expert's claims regarding the difficulty in calculating damages.

The testimony at the certification hearing shows that STA's expert had experience in evaluating allegations of overbilling and calculating refunds, while Southwestern Bell's expert did not. Having reviewed their testimony and giving due deference to the trial court's decision, we conclude the trial court did not abuse its discretion in giving STA's expert's testimony more weight in the face of conflicting evidence. *See Schein*, 102 S.W.3d at 691 ("A trial court has discretion to rule on class certification issues, and some of its determinations—like those based on its assessment of the credibility of witnesses, for example—must be given the benefit of the doubt.").

Finally, Southwestern Bell argues that the computer program cannot accurately assign damages to particular class members in a timely and efficient manner. Southwestern Bell's records are identified by telephone number, not customer name. The records do not reflect changes in ownership, whether charges were subdivided, or whether someone else paid the bill on the customer's behalf. Because the class is defined as those customers who made *payments* to

Southwestern Bell, Southwestern Bell contends that each class member must be investigated to determine if she actually paid each of the bills at issue for the 96-month period.

The class definition—customers who made payments to Southwestern Bell—is materially indistinguishable from the customer responsible for payment. The statute makes clear that a customer, defined as the person "responsible for the payment of charges," shall receive a refund in the case of overbilling. 16 TEX. ADMIN. CODE § 26.27(a)(3)(B). Whether the telephone charges were ultimately subdivided by the customer and passed on to its tenants, guests, or employees is irrelevant—the bill was submitted to the customer, and the customer was responsible for its payments. In addition, proof of ownership and payment may be efficiently determined through proof-of-claim forms or some other vehicle. *Schein*, 102 S.W.3d at 690. We therefore conclude that the trial court did not abuse its discretion in finding that proof of damages can be managed in a timely, efficient, and fair manner. *Bernal*, 22 S.W.3d at 436.

With respect to notice, the trial court stated that because "the records of [Southwestern Bell] may not be sufficient to identify who may have owned some billing telephone numbers. . . notice to some putative class members will be more difficult to accomplish than others." The trial court also stated that it would "inquire into additional technical means of identifying and notifying unidentified class members, such as a search of the records of the Secretary of State's Office, both during the initial notice phase of the lawsuit and during damage distribution, if any." Evidence at the certification hearing establishes that at least twenty-five percent of the class members are current Southwestern Bell customers, and Southwestern Bell produced a list of putative class members, identifying approximately 2,200, or thirty percent, of the putative class members by name.

Therefore, the trial court did not abuse its discretion in concluding that the individual class members will not be too difficult to identify.

Because we conclude that neither individual liability nor damage issues will consume the focus of the litigation, we hold that the trial court did not abuse its discretion in finding that the class meets the predominance requirement. *Schein*, 102 S.W.3d at 694; *Bernal*, 22 S.W.3d at 438.

C. Adequacy

In addition to proving that the putative class representative holds typical claims, and that the class claims predominate in the class, the putative class representative must prove that it will adequately represent the class. An assignee's interests are not "necessarily antagonistic" solely because it is an assignee, but the perils of permitting an assignee to represent the class raise important concerns under rule 42. *Cordes*, 502 F.3d at 102. We believe courts should scrutinize carefully the motivating interests and incentives of parties that agree at an apparent financial loss to obtain the right to serve as the class representative.[9] Rule 42's adequacy requirement raises these considerations, which include but are not limited to: (1) the assignee's connection to the classwide injury; (2) the benefits the assignee receives under the assignments; and (3) the assignee's motivation in asserting claims on behalf of the assignor(s). These considerations, in addition to other concerns that may be raised by the facts of each case, aim to ensure that the assignee's interests are aligned with the interests of the unnamed class members.

[9] In this case, STA stood to gain fifty percent of any refund or credit it obtained on behalf of its five clients prior to the assignment pursuant to its preexisting auditing contracts. Under the assignments, STA stands to gain only thirty percent.

With these considerations in mind, we now turn to Southwestern Bell's claim that STA cannot adequately represent the class. We agree that STA's interests conflict with those of the absent class members. STA is not an injured claimant seeking relief to make itself whole, but voluntarily assumed the classwide injury in order to serve as the class representative. Unlike the class, STA has a materially lesser interest in making itself and the class whole because it was never personally aggrieved by Southwestern Bell's alleged overcharging, and its maximum recovery is less than half the value of any individual claim for damages. *Cf. In re Cardizem*, 200 F.R.D. at 304–05 (holding that an assignee-class representative was adequate where it obtained an assignment from its wholesaler and a direct purchaser of the drug at issue in order to sue a drug manufacturer for its allegedly unlawful delay of a generic version into the market). For example, because STA never paid the alleged overcharges at issue and can retain at best only thirty-percent of any recovery, STA's incentive in settling quickly in order to minimize litigation expenses differs from class members who have overpaid and may be willing to hold out for a settlement that approximates their actual damages.[10] For the same reason, STA's motivation may encourage pursuit of theories of relief that are more efficient for it, but yield less recovery for absentee class members.

The undisputed evidence also shows that STA solicited these assignments from its customers to become the class representative. Prior to the dispute in this case, STA and the five customer-assignors were bound by consulting contracts in which STA agreed to audit the customer's telephone bill in exchange for "fifty percent (50%) of all recovered overcharges, in the form of either refunds

[10] STA was a Southwestern Bell customer and a member of a prior class action against Southwestern Bell for alleged overcharging, but it is undisputed that STA did not personally pay the fees ascribed to the telephone services at issue in this case.

or credits." After discovering the alleged overcharges, STA solicited assignments of five customers' "right or interest in the Claims" in this case and the "sole authority for decisions with regards to prosecuting or settling the Claims" in exchange for, to use STA's characterization, "a reduction of the pre-existing consulting fee percentage" from fifty to thirty percent. STA already had a substantial financial interest in the claims against Southwestern Bell prior to the assignments. The only objective benefit that STA obtained was standing to sue on behalf of the five assigned claimants, and the resultant ability to serve as the class representative and to control the litigation of some 6,900 claims against Southwestern Bell. STA stands in somewhat different shoes from other class members by virtue of its possible recovery pursuant to consulting contracts with other customers who paid the alleged overcharges but have not assigned their claims to STA. STA's motives, different interests, and potentially conflicting interest created by the benefits under the five assignments and consulting contracts distinguish it from the thousands of other class members.[11]

While the sacrificial servant role exists in many segments of our society, it is not often found in class action litigation. Class representation vests a great deal of power in the class representative. *Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690, 697 (Tex. 2008). The class representative decides, among other matters, which claims to pursue and which claims to forgo, and the remedies and strategies to pursue in supervising class counsel. *Id.*; *Daccach*, 217 S.W.3d at 447–48. In this

[11] Linda S. Mullenix, professor at the University of Texas School of Law and prolific author on federal and state class actions, testified at the certification hearing that she "had never seen anything like this before . . . ." She opined that the multitude of different incentives of STA presents a scenario in which "class counsel will be either litigating, negotiating, or bargaining the rights of one group [of class members] against another."

case, class representation not only affords STA the ability to control the outcome for its five assigned claims, but also the claims of the entire class.

STA's lack of any claim of its own makes it unique among the members of the class. Its only knowledge of the claims it holds must be obtained from its assignors. The individuals identified in the record as acting for STA with respect to the class were the president of Marketing on Hold and an STA employee with limited corporate authority. Both indicated that they would rely heavily on STA's counsel to conduct the litigation. While we recognize that class counsel's control over class litigation is often greater than it is in non-class litigation, the class action rule contemplates that the class representative is "not simply lending [its] name [] to a suit controlled entirely by the class attorney." 7A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1766 (3d ed. 2005). In this case, STA's interest in the litigation by assignment removes it and its counsel one step further from the class members, enhancing the risk of conflicts.

In this case, STA has failed to adequately show that in pursuing its claims, STA will advance the interests of the class. *Schein*, 102 S.W.3d at 691–92 (holding the proponent of certification bears the burden of proof on certification issues). We therefore hold that STA has not established that it can adequately represent the class.[12]

[12] Southwestern Bell also argues that STA's interests directly conflict with the class, due to STA's preference for cash remedies, its lack of an assignment from a Hotel/Motel subscriber, and the possibility that some customers' damages may be reduced or eliminated by reallocation of municipal fees, and challenges whether STA will zealously represent the class and supervise class counsel. Because we have concluded that STA is not an adequate representative on other grounds, we need not reach Southwestern Bell's additional arguments.

IV. Conclusion

It is well-settled that a valid assignee of a claim has standing to be a member of a class action related to that claim. The assignee is not disqualified from serving as a class representative so long as it is not a stranger seeking entrepreneurship in class actions, and it does not distort the litigation process. In this instance, STA, the assignee, had an existing business relationship with class members, is a class member itself and obtained valid assignments from class members. As with any class representative, STA also must satisfy the requirements of Rule 42 of the Texas Rules of Civil Procedure. Although STA satisfied the typicality and predominance requirements to be a class representative (numerosity and commonality were not challenged), it failed to establish that it is an adequate class representative. Accordingly, we reverse the judgment of the court of appeals, decertify the class, and remand to the trial court for further proceedings consistent with this opinion.

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Dale Wainwright
Justice

OPINION DELIVERED: February 19, 2010

IN THE SUPREME COURT OF TEXAS

NO. 05-0748

SOUTHWESTERN BELL TELEPHONE COMPANY,
PETITIONER,

v.

MARKETING ON HOLD INC., D/B/A SOUTHWEST TARIFF ANALYST,
RESPONDENT

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

Argued March 22, 2007

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

The Court concludes that Marketing on Hold, doing business as Southwest Tariff Analyst (STA), holds valid assignments of claims typical of the class, has standing to assert its claims as a class member, is neither a stranger to the litigation nor a class-action entrepreneur, and will not disrupt the class-suit vehicle or distort the judicial process. Yet the Court decides STA is not an adequate class representative based on the potential for hypothetical conflicts that have no basis in the record. The Court states that it is not deciding whether an assignee can ever be an adequate class representative, but if STA doesn't qualify it is hard to imagine who would. The assignors were established STA business customers who relied on STA's superior knowledge about Southwestern Bell's billing procedures, information retrieval systems, and the tariffs that govern this highly

regulated industry, and no antagonism or conflict exists that would affect STA's adequacy to represent the class. In my view, STA's unique expertise gives it an ability superior to that of any other class member to pursue this litigation as class representative and supervise the activities of class counsel, as the trial court found. Because the Court concludes otherwise, I respectfully dissent.

Southwestern Bell is assessed fees under various municipal ordinances in order to compensate the cities enacting them for administering public rights-of-way. The company is allowed to pass the fees through to its telephone subscribers, but it is prohibited from making a profit from the charge. *See, e.g.*, Brownsville, Tex., Ordinance 95-1296, § 12 (July 18, 1995). STA provides auditing services of business telephone bills and assists its customers in seeking refunds from telephone companies for improper billing practices, in exchange for a percentage of the amount its customers recover. In the course of auditing Southwestern Bell bills for its customers, STA discovered that the company had improperly passed through municipal charges for certain services relating to SmartTrunk, Digital Loop and Hotel/Motel services. Each of these trademarks describe a service provided by Southwestern Bell to its business customers.[1]

STA had a number of customers who subscribed to some of these Southwestern Bell services.[2] STA and those customers were class members in another class action, *Mireles v. Southwestern Bell Telephone Company*, in the 357th District Court of Cameron County, which

[1] The Hotel/Motel service allows the hotel or motel to incur charges on a per-call basis, thus allowing guests to receive and make local telephone calls charged to the room. Digital Loop and Smart Trunk describe an interface that makes a single connection with the telephone company that then provides the customer with twenty-three channels for telephone communication.

[2] The customers are United Services Automobile Association (USAA), S & B Engineers, Inc./S & B Engineers and Constructors, Ltd., Petrocon Engineering, Inc., Riverway Bank, and Russell & Smith Ford, Inc.

included most of Southwestern Bell's residential and business customers in Texas. When a pending *cy pres* settlement in *Mireles* threatened to release the claims of its business customers and others similarly situated with no compensation, STA informed its customers, who decided to assign their claims to STA. STA then carved those claims out of the class settlement, preserving Southwestern Bell's business customers' claims relating to SmartTrunk, Digital Loop and Hotel-Motel municipal charges, which are the subject of this class-action suit.

After a four-day certification hearing the trial court determined that the class satisfied the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 42(a) of the Texas Rules of Civil Procedure, and that questions of law and fact common to the class predominated over individual questions under Rule 42(b)(4). TEX. R. CIV. P. 42(b)(4) (now Rule 42(b)(3)). The trial court also held that STA had standing to proceed on behalf of the class and is a proper class representative as the owner of its customers' assigned claims. According to the trial court's findings, there was nothing improper about the methods by which STA acquired the assignments, STA has been in the business of auditing Southwestern Bell's and other utilities' bills for years, STA has knowledge and expertise about Southwestern Bell's billing procedures and information retrieval systems which are not common knowledge or widely known to putative class members, and STA's knowledge and expertise give it a superior ability to pursue this litigation and supervise the activities of class counsel. The trial court also found that STA's interests are aligned with, and not antagonistic to, the putative class members. The court of appeals affirmed the trial court's certification order. 170 S.W.3d 814, 825. It rejected Southwestern Bell's portent of the order opening the floodgates to entrepreneurial abuse in light of the trial court's findings that STA's

assignments came from pre-existing customers, those customers had been members of the *Mireles* class action from which this suit derived, and STA did not improperly solicit the assignments. *Id.* at 825. The court of appeals, too, rejected Southwestern Bell's claims that STA's interests conflict with or are antagonistic to other class members. *Id.* at 826-27. The Court today, however, concludes that STA's interests conflict with those of the putative class such that it cannot be an adequate class representative. The potential conflicts the Court hypothesizes, however, are more imagined than real, and in any event are insufficiently compelling to disqualify STA from representing the class.

According to the Court, STA must have a lesser interest in making itself and the class whole because it was "never personally aggrieved by Southwestern Bell's alleged overcharging and its maximum recovery is less than half the value of any individual claim for damages."[3] But neither of these circumstances creates a conflict. By the assignments, which the Court acknowledges are entirely valid, STA stands in the shoes of its customers, whose claims arise from the same overbillings that give rise to the other class members' claims. Nor does STA's smaller financial interest in the litigation affect its ability to adequately represent the class. As other courts have noted, the amount of a plaintiff's financial interest in the suit is not determinative of its ability to represent the class adequately. *See*, *e.g.*, *In re Cardizem*, 200 F.R.D. 297, 306 (E.D. Mich. 2001); *In re S. Cent. States Bakery Prods.*, 86 F.R.D. 407, 418 (M.D. La. 1980). The Court theorizes that since STA never paid the overcharges itself, it might have a greater incentive to settle more quickly than other class members who paid the charges and might want more. However, any incentive STA

[3] The customers assigned 100% of their claims to STA, but as part of the consideration for the assignment STA agreed to pay the assignors 70% of any net proceeds recovered and retain 30% for itself.

might have to minimize litigation expenses by settling early appears to be no different from that any other class member would have, and STA's incentive to maximize recovery appears to be no different either. Though the Court posits that STA might ultimately pursue theories of relief more efficient for itself at the expense of absentee class members, it does not speculate what those theories might be and none have been asserted. Such speculative conflicts are far too tenuous to render STA inadequate. The Court apparently believes the fact that STA was not directly injured by Southwestern Bell's conduct and merely holds an economic interest in any recovery means that STA has a different set of priorities than other class members. But in most, if not all, commercial class actions like this one the members of the class are motivated by economic considerations. Here, STA represents five class members, and thus, if anything, is more cognizant of a greater number of economic interests than the typical class representative would be. The evidence demonstrates that the claims assigned to STA range from small to large, and supports the trial court's finding that STA has an interest in asserting the rights of all putative class members.

Southwestern Bell contends STA's thirty-percent interest in recovered funds will make it more likely to disregard a settlement paid for in coupons or credits. In support, Southwestern Bell points to an STA employee's testimony at the certification hearing that he was uncertain as to whether a coupon settlement would be proper in this case.[4] Coupon settlements, however, have not always been favored in our class-action jurisprudence. *See*, *e.g., General Motors Corp. v. Bloyed*,

[4] That employee testified as follows:

Q: "And a coupon settlement would be proper in this case, as to what STA should receive for 30 percent interest?"
A: "I'm not certain."

916 S.W.2d 949, 956 (Tex. 1996). A general expression of uncertainty on the hypothetical propriety of a future coupon settlement does not diminish STA's adequacy to represent the class, especially when non-cash remedies were contemplated in the assignments. STA's assignments allow it to collect its percentage from all recovered overcharges, whether recovered through refunds or credits. Clearly non-cash remedies have not been ruled out, and the testimony of STA's employee does not indicate otherwise.

Southwestern Bell points to the fact that STA does not hold an assignment from a customer who subscribed to Hotel/Motel services and thus has no incentive to pursue such claims. However, it is highly unlikely that any potential class representative would have a claim based on all three types of subscription packages. The salient point is that the Hotel/Motel claims arise from the same unauthorized course of conduct as the other class claims, and are brought under the same statutory scheme with the same legal theories. Southwestern Bell has not articulated how the interests or claims of Smart Trunk and Digital Loop customers differ from or conflict with those of Hotel/Motel customers. *See Cardizem*, 200 F.R.D. at 306. As the trial court found, and the court of appeals agreed, 170 S.W.3d 814, 827, there is no evidence of any conflict between the Hotel/Motel customers and other members of the class. Southwestern Bell also contends its right to reallocate charges creates additional potential for conflict. Southwestern Bell argues that while it will make a refund to customers it overcharged, it has the right to reapportion the fee to customers who it essentially undercharged. According to Southwestern Bell, STA will have to make strategic

decisions knowing some class members are affected differently by reallocation.[5] Of course, this complaint is not unique to STA and would apply equally to any other purported class representative. In response, STA challenges whether this hypothetical reallocation could occur at all since Southwestern Bell may only "backbill" a customer for the six months prior to when the underbilling is discovered, and that period has passed. *See* 16 TEX. ADMIN. CODE § 26.27(a)(3)(C)(i). But even assuming some reallocation would occur, STA presented expert testimony that any reallocation would at most cause a minor reduction in the total amount due to a class member, and that it is highly unlikely any class member would actually have an increase in fees.[6] The expert also pointed to evidence that Southwestern Bell collected substantially more from its customers than it paid to the municipalities, making it unlikely an increase of fees would result from reapportionment, particularly if Southwestern Bell's overcollection exceeds the amount sought by the class. A potential for conflict might exist if it were shown that reallocation would result in a significantly reduced damages award for some customers and not others. But Southwestern Bell has at most shown that in the case of a hypothetical reallocation some customers might have their damages reduced by a negligible amount compared to other customers, which is not enough to disqualify STA as an adequate class representative.

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[5] Southwestern Bell's expert offered the following hypothetical example: if the municipal fee is $9 million and Southwestern Bell had $100 million in revenues, then Southwestern Bell would charge its customers a 9% municipal charge to recoup the $9 million fee. A customer with a $100,000 bill would have had a $9,000 municipal charge without reallocation. If, however, only $90 million in revenue was appropriately subject to these charges, Southwestern Bell would then have to charge its customers a 10% municipal charge to recoup the $9 million fee. Under reallocation, if only $99,000 was taxable, then that customer would have to pay a $9,900 municipal charge.

[6] For example, for USAA, a large customer-assignor, damages with reallocation would be $2,560.67 and damages without reallocation would be $2,563.74. For Ridgeway Bank, a small customer-assignor, damages with reallocation would be $99.66 and damages without reallocation would be $102.59.

Southwestern Bell also challenges whether STA and its representatives have the qualifications, background, and interest to represent the class and supervise class counsel, pointing to the testimony of an STA employee, Mike Shelton, that "we're here at the disposal of the lawyers." TEX. R. CIV. P. 42(a)(4). However, quoted in full, Shelton's statement demonstrates that he is aware of his duty "[t]o vigorously represent the class, to put their needs above ours, to – as we're doing today, we're here at the disposal of the lawyers, at the disposal of the Court to vigorously pursue this case and protect the class rights." Southwestern Bell claims another employee, Mark Wilder, lacks familiarity with the surrounding facts and legal theories. However, Wilder possesses knowledge and expertise regarding the billing procedures at issue in this case, which are not common knowledge nor widely known to members of the putative class. The evidence supports the trial court's determination that STA is an appropriate class representative, and the testimony of its employees does as well.

In sum, the speculative conflicts the Court and Southwestern Bell hypothesize between STA and the other class members are too tenuous to render it an inadequate class representative. Considering the absence of any realistic potential for conflict or antagonism between STA and the class, together with STA's demonstrated superior expertise in the subject matter of the litigation, I would hold that STA has satisfied the adequacy requirement and affirm certification of the class. Because the Court concludes otherwise, I respectfully dissent.

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Harriet O'Neill
Justice

OPINION DELIVERED: February 19, 2010

IN THE SUPREME COURT OF TEXAS

NO. 06-0023

MISSOURI PACIFIC RAILROAD COMPANY D/B/A
UNION PACIFIC RAILROAD COMPANY, PETITIONER,

v.

PATRICIA LIMMER, BILLYE JOYCE SMITH,
AND BOBBY JEAN NOTHNAGEL, RESPONDENTS

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

Argued November 13, 2007

JUSTICE HECHT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE WILLETT joined.

JUSTICE O'NEILL and JUSTICE GUZMAN did not participate in the decision.

In this wrongful death action arising out of a truck-train collision, the plaintiffs claim that crossbucks — the familiar black-and-white, X-shaped signs that read "RAILROAD CROSSING"[1] — provided inadequate warning for the railroad crossing and that the railroad was negligent in failing to remove a gravel pile and vegetation that restricted drivers' view of approaching trains. The railroad contends that federal law preempts these claims. When railroad crossing improvements are

[1] U.S. DEP'T OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, at Table 2A-4 (2003) (Use of Sign Shapes), *available at* http://mutcd.fhwa.dot.gov/pdfs/2003r1r2/mutcd2003r1r2complet.pdf [hereinafter MANUAL].

federally funded, federal regulations specify what warning devices must be used,[2] and the United States Supreme Court has held that section 20106 of the Federal Railroad Safety Act of 1970[3] expressly preempts state tort law actions challenging the adequacy of those devices.[4] The trial court concluded that federal regulations do not apply in this case, and the court of appeals affirmed.[5] We disagree and accordingly reverse the judgment of the court of appeals and render judgment that the plaintiffs take nothing.

I

A

In late 1990, Billy Howard Limmer and his wife Patricia bought a home in Thorndale, a small central Texas farming community (1 sq. mi., 1990 pop. 1,092), where they intended to live after Limmer retired in March 1994. They attended Thorndale High School, married, and moved away to work, but often returned to visit family in the area.

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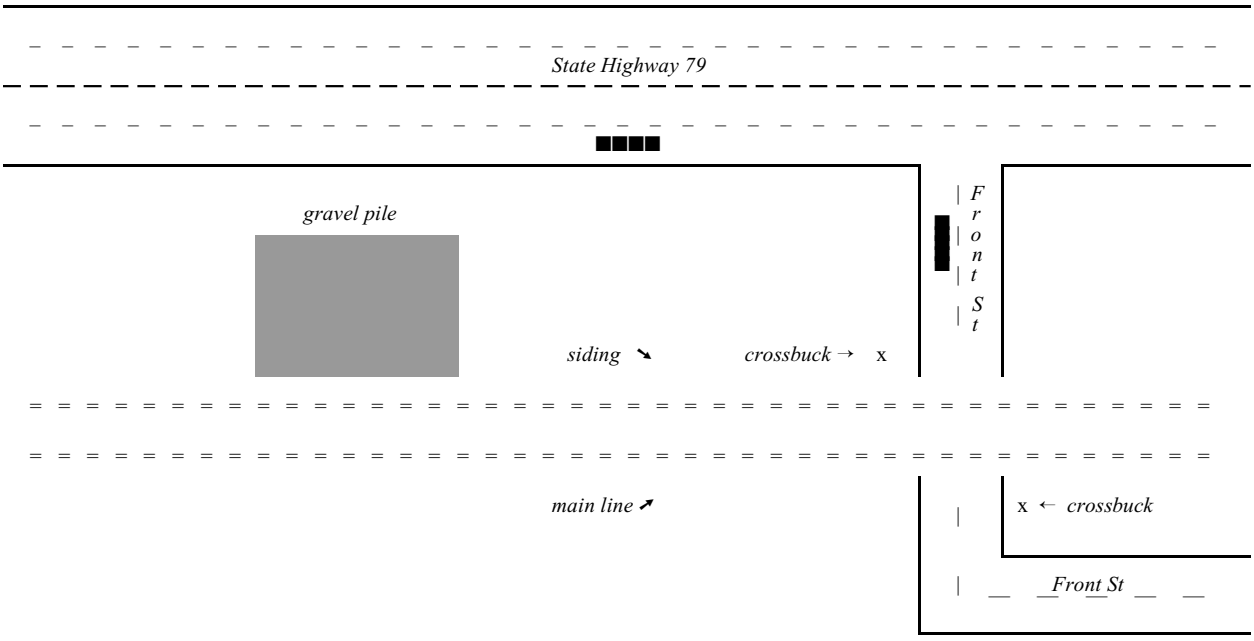
[2] 23 C.F.R. § 646.214(b)(3)-(4).

[3] Pub. L. No. 91-458, § 205, 84 Stat. 971, 972 (1970), recodified as amended at 49 U.S.C. § 20106 (2006). A 2007 amendment, "clarifying railroad preemption", retroactive only to 2002, does not apply here. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53 § 1528 ("Railroad Preemption Clarification"), 121 Stat. 265, 453 (applicable to "all pending State law causes of action arising from events or activities occurring on or after January 18, 2002"); see *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1214-216 (10th Cir. 2008).

[4] *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 358 (2000) (the Federal Railroad Safety Act of 1970, 84 Stat. 971, as amended, 49 U.S.C. § 20101 et seq., in conjunction with the Federal Highway Administration's regulations addressing adequacy of warning devices installed with federal funds, 23 C.F.R. §§ 646.214(b)(3) and (4) (1999), preempts state tort actions concerning a railroad's failure to maintain adequate crossing warning devices when federal funds have participated in the devices' installation); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 671 (1993) (holding that, under the FRSA and federal regulations, only excessive speed claims were preempted; claims arguably involving *Manual* standards were not "covered" by federal regulations, and claims based on the railroad crossing were not preempted, given the failure to establish participating federal funds).

[5] 180 S.W.3d 803 (Tex. App.–Houston [14th Dist.] 2005).

The Union Pacific Railroad runs through the middle of Thorndale east and west, parallel to and just south of state highway 79. On average, some two dozen trains pass through Thorndale every day. The tracks cross several streets, including Front Street, which runs south from the highway, then turns east and continues along the south side of the tracks. The following schematic illustrates the site:



At the Front Street crossing,[6] near the highway, there are two sets of standard gauge tracks (*i.e.*, 4' 8-1/2" wide) about 10' apart. The tracks farthest from the highway are the main line, on which trains can travel up to 60 mph. The tracks nearer the highway are for a siding.[7] The crossing is very rough and bumpy, and vehicles must take it very slowly. A crossbuck stands 64' — three or four car-lengths — from the highway, 14' before the siding. A second crossbuck is located on the

[6] Texas Department of Transportation Crossing No. 446 546V.

[7] A siding is an "auxiliary track for meeting or passing trains." 49 C.F.R. § 236.802a.

other side of the main line, facing traffic coming from the opposite direction. There are no other warning devices. Trains sound their horns to signal their approach. In April 1994, a pile of gravel as big as a house — some 14' high and 100' long — lay alongside the siding about 160' west of the crossing. The gravel pile restricted a driver's view westward, as did vegetation growing in the railroad right-of-way, but a driver could still see more than 200' down the tracks to the west.

Just after 5:00 p.m. on April 26, 1994, Limmer drove his pickup south on a town street to highway 79, turned left going east, then turned right a block or two later off the highway onto Front Street. Eyewitnesses heard the horn of an eastbound train approaching at 40-50 mph and watched as Limmer drove very slowly down Front Street, across the siding, and into its path. Limmer was killed instantly.

B

Patricia Limmer and her two daughters sued the Union Pacific. We refer to the parties as the Limmers and the Railroad. As an affirmative defense, the Railroad asserted that the Limmers' claims were expressly preempted[8] by the Federal Railroad Safety Act of 1970 (FRSA).[9] Congress enacted FRSA "to promote safety in all areas of railroad operations and to reduce railroad-related accidents and injuries to persons".[10] FRSA calls for "[l]aws, regulations, and orders related to

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[8] U.S. CONST. art. VI, cl. 2 ("The 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."); *Altria Group, Inc. v. Good*, 555 U.S. ___, ___ (2008) ("[W]e have long recognized that state laws that conflict with federal law are without effect." (internal quotation marks and citation omitted)); *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001) ("A federal law may expressly preempt state law.").

[9] Pub. L. No. 91-458, 84 Stat. 971, codified as amended at 49 U.S.C. §§ 20101 *et seq.* (2006 & Supp. 2008).

[10] Pub. L. No. 91-458 § 101, 84 Stat. 971.

railroad safety [to] be nationally uniform to the extent practicable."[11] To that end, FRSA authorizes the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety"[12] and provides in section 20106 that a "State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement . . . ."[13] In two cases, *CSX Transportation, Inc. v. Easterwood*[14] and *Norfolk Southern Railway v. Shanklin*,[15] the United States Supreme Court has held that under section 20106, federal regulations "covering the subject matter" of a railroad safety requirement of state law preempt state law, including common law tort liability.[16] The accident in *Shanklin* was very similar to the one in this case: the deceased drove his truck into the path of an oncoming train at a crossing marked only by crossbucks.[17]

The Highway Safety Act of 1973 (HSA) grants federal funding to states to "eliminat[e] . . . hazards of railroad-highway crossings".[18] In return, HSA requires each state to "conduct and systematically maintain a survey of all highways and identify those railroad crossings which may

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[11] *Id*. § 20106(a)(1).

[12] *Id*. § 20103(a).

[13] *Id*. § 20106(a)(2). Subsection (a)(2) continues with an exception regarding essentially local safety hazards that is inapplicable here.

[14] 507 U.S. 658 (1993).

[15] 529 U.S. 344 (2000).

[16] *Shanklin*, 529 U.S. at 357-358; *Easterwood*, 507 U.S. at 670-671.

[17] *Shanklin*, 529 U.S. at 350.

[18] Pub. L. No. 93-87, §§ 201, 203, 87 Stat. 282, 282-283 (see note following 23 U.S.C. § 130); *Shanklin*, 529 U.S. at 348; *Easterwood*, 507 U.S. at 662-663.

require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose."[19] Under the authority of both FRSA and HSA, the Secretary of Transportation, through the Federal Highway Administration (FHWA),[20] has promulgated numerous regulations, including several addressing the installation of warning devices at railroad crossings.

The regulations at 23 C.F.R. § 646.214(b)(3)&(4) govern the design of grade crossing improvements for federally funded railroad-highway projects. We will refer to them as the "Grade Crossing Design" regulations. Subsection (b)(3) requires adequate warning devices that include automatic gates with flashing light signals if any of six enumerated conditions is present.[21] Where none is present, subsection (b)(4) states that "the type of warning device to be installed, whether the

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[19] Pub. L. No. 93-87, § 203, 87 Stat. 282, 282-283 (codified as amended at 23 U.S.C § 130(d)).

[20] 49 C.F.R. § 1.48(b)(1).

[21] Subsection (b)(3) states:

"(3)(I) Adequate warning devices, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

"(A) Multiple main line railroad tracks.

"(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

"(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

"(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

"(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

"(F) A diagnostic team recommends them.

"(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable."

determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of the FHWA." According to the Supreme Court, when subsections (b)(3) and (b)(4) apply, the Secretary "has determined the devices to be installed and the means by which railroads are to participate in their selection."[22] These regulations therefore "cover the subject matter of state law which, like the tort law . . . , seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings",[23] and thus preempt common law tort liability for a claim that a warning device installed at a railroad crossing was inadequate.[24]

The Limmers do not contend that any of the six conditions described in subsection (b)(3) was present at the Front Street crossing. Thus, subsection (b)(4) applies to any warning device installed there using federal funds.[25] The Railroad offered evidence of two federally funded programs to improve railroad crossings in Texas. The purpose of the first, implemented between 1977 and 1981, was to install or upgrade crossbucks at certain crossings using metal, reflectorized signs. The

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[22] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 671 (1993); *see also Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 357 (2000) ("When the FHWA approves a crossing improvement project and the State installs the warning devices using federal funds, §§ 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject.").

[23] *Easterwood*, 507 U.S. at 671.

[24] *Shanklin*, 529 U.S. at 357-358 ("Sections 646.214(b)(3) and (4) 'cover the subject matter' of the adequacy of warning devices installed with the participation of federal funds. As a result, the FRSA pre-empts [a] state tort claim that the advance warning signs and reflectorized crossbucks installed at [a] crossing were inadequate."); *Easterwood*, 507 U.S. at 670-671 ("In short, for projects in which federal funds participate in the installation of warning devices, the Secretary [of Transportation] has determined [in 29 C.F.R. § 646.214(b)(3)-(4)] the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.").

[25] *Shanklin*, 529 U.S. at 353-354 (subsections (b)(3) and (b)(4) "apply to 'any project where Federal-aid funds participate in the installation of the devices'" (quoting 23 C.F.R. § 646.214(b)(3)(i) (1999))); *Easterwood*, 507 U.S. at 670-672.

Railroad participated in the program, but it had more than 3,100 crossings in Texas at the time, and the Limmers contend that the evidence falls short of establishing that the crossbucks at the Front Street crossing were installed as part of the program. The second program, authorized by the Legislature in 1989,[26] involved attaching retroreflective tape to the pole and back of the blades of every crossbuck in Texas. Retroreflective material reflects light back in the direction of its source. Thus, when a vehicle's lights shine on an object marked with retroreflective material, the light is reflected back toward the vehicle, causing the object to appear brighter to the driver. The Limmers do not dispute that federal funds helped pay for the tape on the crossbucks at the Front Street crossing,[27] but they contend that the improvement did not amount to the installation of a warning device within the meaning of the federal regulations.

C

The jury found Limmer and the Railroad both negligent in causing the collision and apportioned responsibility 15% to Limmer and 85% to the Railroad. The jury found the Railroad negligent in two respects: in failing to provide additional warning devices — automatic signals, a flag man, or a stop sign — at an extra-hazardous crossing; and in answer to a separate question, in failing to eliminate the sight restriction caused by the gravel pile or vegetation. The jury awarded compensatory damages totaling $6 million. The preemption defense was tried, without objection, to the bench, and the evidence was offered outside the presence of the jury. The trial court rejected the defense without making any findings of fact and rendered judgment on the verdict.

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[26] Act of May 17, 1989, 71st Leg., R.S., ch. 269, 1989 Tex. Gen. Laws 1212.

[27] At oral argument, counsel for the Limmers was asked: "Could I be sure that you do agree that federal funds were spent on the installing the tape?" To which counsel responded: "We do, your Honor."

On appeal, the Railroad argued that it had established its preemption defense, and that a failure to eliminate sight restrictions at the crossing was not an independent basis for liability.[28] The Railroad acknowledges that it had the burden to prove preemption, that the trial court presumably resolved all factual disputes against preemption,[29] and that it must therefore demonstrate that preemption has been established as a matter of law.[30] At first, the court of appeals reversed and rendered judgment for the Railroad, holding that preemption had been established, but on rehearing, it reversed and remanded for a new trial.[31]

Whether the crossbucks at the Front Street crossing were installed using federal funds was a factual matter, and while there may have been some evidence that the installation was federally funded, the court concluded that the documentary evidence was inconclusive and that there were reasons why the trial court could have decided not to credit the testimony of the witnesses who testified in support of the Railroad's position.[32] Thus, the court held, the Railroad had not established that basis for preemption as a matter of law. Whether the federally funded application

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[28] 180 S.W.3d 803, 806-807 (Tex. App.–Houston [14th Dist.] 2005).

[29] *Pharo v. Chambers County*, 922 S.W.2d 945, 948 (Tex. 1996) ("Because the trial court did not render findings of fact or conclusions of law, we must assume that it made all findings in support of its judgment . . . .").

[30] *Dow Chemical Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) ("When a party attacks the legal sufficiency of an adverse finding on an issue on which she has the burden of proof, she must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue.").

[31] 180 S.W.3d at 829.

[32] *Id.* at 811-817.

of the retroreflective tape to the crossbucks constituted the installation of a warning device under federal law was a legal issue, and the court held it did not.[33]

Finally, the court held that a railroad's negligent failure to eliminate sight restrictions at a crossing is not an independent basis for liability for causing a collision but is merely a consideration in determining whether the railroad was negligent in warning of the crossing.[34] Thus, the trial court erred in submitting a separate jury question regarding sight restrictions.[35] Finding itself in doubt whether the erroneously submitted question improperly influenced the jury, the court concluded that a new trial was required.[36]

The Limmers and the Railroad petitioned for review. We granted both petitions.[37]

II

The 1989 project, one of the two projects on which the Railroad rests its preemption defense, was developed by FHWA and authorized in Texas by statute requiring what was then the State Department of Highways and Public Transportation to "develop guidelines and specifications for the installation and maintenance of retroreflectorized material at all public grade crossings not protected by active warning devices."[38] The statute broadly defined a "warning device"as "an active warning

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[33] *Id.* at 817-821.

[34] *Id*. at 821-828.

[35] *Id.* at 828.

[36] *Id.*

[37] 50 Tex. Sup. Ct. J. 801 (June 1, 2007).

[38] Act of May 17, 1989, 71st Leg., R.S., ch. 269, § 2, 1989 Tex. Gen. Laws 1212, 1213, previously codified as TEX. REV. CIV. STAT. ANN. art. 6370b, § 2, recodified by Act of May 1, 1995, 74th Leg., R.S., ch. 165, 1995 Tex. Gen. Laws 1025, 1460, now TEX. TRANSP. CODE § 471.004(a) (substituting the phrase "reflecting material" for

device, crossbuck, or other traffic control sign, the purpose of which is to alert motorists of a grade crossing",[39] and more specifically defined an "active warning device" as "a bell, flashing light, gate, wigwag, or other automatically activated warning device."[40] The statute also defined "retroflectorized material" as "material that reflects light so that the paths of the reflected light rays are parallel to those of the incident rays."[41] The statute provided that "retroreflectorized material shall be affixed to the backs of crossbucks and their support posts in a manner that retroreflects light from vehicle headlights to focus attention to the presence of a nonsignalized crossing"[42] — that is, "a crossing not protected by active warning devices".[43] One FHWA official described the agency's research with "[r]etroreflective material installed on the backs of crossbucks and their support posts" as follows:

> These devices were located on the far side of the crossing from approaching traffic so as to retroreflect light from the vehicle headlights through the moving gaps in the train. The resulting flickering light attracts the driver's attention to the presence of a moving train at the crossing. [The] devices were visible at 200-300 feet in advance of the crossing through the gaps between train cars and wheels.[44]

"retroflectorized material"). The references in notes 39-43 and 61-62 are to these enactments.

[39] *Id*. § 471.004(f)(7) (formerly art. 6370b, § 1(8)).

[40] *Id*. § 471.004(f)(1) (formerly art. 6370b, § 1(1)).

[41] *Id. § 471.004*(f)(5) (formerly art. 6370b, § 1(6)) (defining "reflecting material").

[42] *Id*. § 471.004(a) (formerly art. 6370b, § 2) (substituting the phrase "unsignaled crossing" for "nonsignalized crossing" and "reflecting material" for "retroreflectorized material").

[43] *Id*. § 471.004(f)(6) (formerly art. 6370b, § 1(4) (defining "unsignaled crossing").

[44] Letter from Mr. Greg Scherz, Safety & Traffic Operations Coordinator, FHWA, to Mr. R. E. Stotzer, Jr., State Engineer-Director, State Dep't of Highways and Public Transportation (Jan. 17, 1989).

Texas received more than $1.3 million in federal funds for the project,[45] some of which were used to apply retroreflectorized tape to the poles and backs of the blades of the crossbucks at the Front Street crossing. The Railroad contends that this was an installation of a warning device within the meaning of subsection (b)(4) of the Grade Crossing Design regulations, preempting the Limmers' claims that the warning signs at the crossing were inadequate.

Federal regulations distinguish between active and passive warning devices at railroad crossings, referring to both as traffic control devices.[46] Passive warning devices, the only kind involved in this case, are defined as "those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train."[47] Other than this brief, non-exclusive list of examples — "signs, markings, and other devices" — the federal regulations do not define traffic control devices. But FHWA's *Manual on Uniform Traffic Control Devices*, incorporated into its regulations,[48] defines them as "all signs, signals, markings, and other devices used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, pedestrian facility, or bikeway by authority of a public agency having jurisdiction."[49] And "traffic markings"

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[45] Letter from Mr. Frank M. Mayer, Div. Administrator, FHWA, to Mr. Arnold W. Oliver, State Engineer-Director, State Dep't of Highways and Public Transportation (Jan. 15, 1991) (stating that "[t]he amount of Federal funds obligated for this project is $1,371,384").

[46] 23 C.F.R. § 646.204 (2008).

[47] *Id.*

[48] 23 C.F.R. § 655.601(a) (2008); *see also* 23 C.F.R. § 646.214(b)(1) ("All traffic control devices proposed shall comply with the latest edition of the [MANUAL] . . ."); 23 C.F.R. § 655.602 ("The terms used herein are defined in accordance with definitions and usages contained in the [*Manual*] and 23 U.S.C. 101(a)."); *Easterwood*, 507 U.S. at 666.

[49] MANUAL, *supra* note 1, at I-1.

are defined in FHWA's *Railroad-Highway Grade Crossing Handbook* as "[a]ll lines, patterns, words, colors, or other devices, except signs, set into the surface of, applied upon, or attached to the pavement or curbing or to the objects within or adjacent to the roadway, officially placed for the purpose of regulating, warning, or guiding traffic."[50]

Retroreflective tape attached to a crossbuck is certainly a marking used to warn traffic of railroad crossings. The point of the 1989 program was that the addition of retroreflective tape to crossbucks would provide traffic with an additional, different warning of railroad crossings, making them more visible to motorists. The retroreflective tape on the crossbucks in this case was "placed . . . adjacent to a street . . . by authority of a public agency having jurisdiction". It was thus a warning device within the meaning of subsection (b)(4) of the federal regulations.

The Limmers argue that retroreflective tape cannot be a traffic control device because it merely reflects light and does not, as their expert, K. W. Heathington, put it, "tell[] motorists to stop, to look, to observe, to turn right or to not turn right, or anything of that nature". They point out that retroreflective tape is nowhere mentioned as a traffic control device in the FHWA's *Manual*. But the *Manual* contemplates that most signs and warning devices will be retroreflective; it also mentions strips for crossbucks in several sections.[51] Markings are specifically mentioned in the

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[50] FEDERAL HIGHWAY ADMINISTRATION, RAILROAD-HIGHWAY GRADE CROSSING HANDBOOK 254 (2d ed., September 1986), *available at* http://www.fhwa.dot.gov/tfhrc/safety/pubs/86215/86215.pdf; *see also* Railroad-Highway Grade Crossing HANDBOOK (rev. 2d ed. August 2007), *available at* http://safety.fhwa.dot.gov/xings/com_roaduser/07010/. Both versions of the Handbook contain similar warnings at their opening pages, cautioning that although the Handbook is disseminated under the sponsorship of the Department of Transportation, the Government assumes no liability for use of its contents, its contents do not necessarily constitute official policy, and this "report does not constitute a standard, specification, or regulation."

[51] MANUAL, *supra* note 1, in ch. 8B.01, "Signs and Markings," § 8B.03, fig. 8B-1, at 8B-1, 8B-4; *see also* § 2a.21, at 2A-14, 2A-15 (standards for retroreflective strips on sign supports); ch. 5F ("Traffic Control for Highway-Rail Grade Crossings"), § 5F.02, at 5F-1; ch. 10C, § 10C.01, fig. 10C-1, at 10C-1, 10C-2 (both also concerning use of

federal regulations as traffic control devices. More importantly, the use of retroreflective strips on crossbuck posts and blade-backs is designed to reflect light back at motorists, to attract attention and provide an enhanced warning, which was the purpose of the 1989 program.

The Supreme Court's decision in *Easterwood* illustrates well the difference between a device that warns and one that does not. There, gates were to be installed at five adjacent crossings as part of a single project.[52] Motion-detection circuitry was installed at all five crossings and gates were installed at four of them, but the plan for gates at the fifth crossing was abandoned, and that is where the accident occurred.[53] The Supreme Court easily rejected the argument that the circuitry alone was a warning device, even though it was installed as part of a project to provide warnings at other crossings.[54] Unlike the circuitry in *Easterwood*, the retroreflective tape at the Front Street crossing actually provided motorists warning of the crossing.

The Limmers rely on a letter that their expert, Heathington, obtained from Shelley Rowe, director of FHWA's Office of Transportation Operations, shortly before trial. Heathington had written a brief letter to Rowe on June 27, 2000, enclosing two photographs of the Front Street crossing and stating, "[i]n my opinion, the tape which is used in this fashion is not a traffic control device as defined by the [*Manual*]."[55] Heathington concluded: "I am hoping that you being from

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retroreflective strips on the back of the supports and blades of crossbucks).

[52] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 671-672 (1993).

[53] *Id.*

[54] *Id.*

[55] Letter from K. W. Heathington to Shelley J. Rowe, Director, Office of Transportation Operations, FHWA (Aug. 2, 2000).

FHWA can confirm this conclusion about the use of the tape."[56] Rowe's brief letter in reply, dated August 2, 2000, stated merely, "[r]etroreflective tape is not considered a traffic control device and, therefore, its use around a traffic sign post does not conflict with the standards in the [*Manual*]."[57]

The Limmers do not argue that Rowe's letter is entitled to deference, only that it provides support for Heathington's opinions. In deciding what effect to give Rowe's letter, we are guided by the United States Supreme Court's observations in *Skidmore v. Swift & Co.*[58] in a similar context. Regarding the views of the Administrator of the Wage and Hour Division of the U.S. Department of Labor, the Court wrote:

> We consider that the rulings, interpretations and opinions of the Administrator under [the Fair Labor Standards Act], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[59]

We have nothing to indicate that Rowe's consideration of Heathington's request was thorough. The letter contains no reasoning and no reference to authority of any kind. The conclusory opinion is accompanied by an opaque and unexplained reference to there being no conflict with the *Manual*. The letter is also in some tension with another FHWA official's letter in 1989, encouraging

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[56] *Id.*

[57] Letter from Shelley J. Rowe, Director, Office of Transportation Operations, FHWA, to K. W. Heathington (Aug. 2, 2000).

[58] 323 U.S. 134 (1944).

[59] *Id.* at 140.

participation in the retroreflective tape program, repeatedly referring to the tape as a "device" and describing its use as a warning signal. In sum, we are unable to ascribe any persuasive value to Rowe's letter.[60]

The Limmers argue that the 1989 Texas statute suggests that "retroreflectorized material" is not a warning device by defining the two terms separately.[61] The statute gives no indication that it was interpreting the meaning of the terms under federal law. But even if it did, we think the statute suggests just the opposite by providing that "[t]he cost of initial installation of retroreflectorized material shall be paid from money appropriated . . . for the purpose of maintaining grade crossing warning devices."[62]

Finally, the Limmers argue that the application of retroreflective tape to the crossbucks at the Front Street crossing was only an enhancement or maintenance of the existing signs, not an installation. We see no reason why enhancement or maintenance of an existing sign to meet FHWA requirements is anything less than approval of "the type of warning device to be installed" within the meaning of subsection (b) of the Grade Crossing Design regulations. Even if enhancement or

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[60] The parties also cite three orders of federal district courts, all in Texas, which consider the preemptive effect of the 1989 program. One granted summary judgment dismissing the case, *McDaniel v. S. Pac. Transp.*, 932 F. Supp. 163 (N.D. Tex. 1995); the other two denied summary judgment in unpublished orders, *Lesly v. Union Pac. R.R. Co.*, No. H-03-0772, 2004 U.S. Dist. LEXIS 23018 (S.D. Tex. June 25, 2004); *Enriquez v. Union Pac. R.R. Co.*, No. 5:03-CV-174, 2004 U.S. Dist. LEXIS 28989 (E.D. Tex. Dec. 30, 2004) (holding that, in the same sense that the pole of a crossbuck sign is not a passive warning device, the tape, without more, is not a passive warning device under 49 C.F.R. § 646.204, and that, under *Shanklin*, it was irrelevant whether the tape met *Manual* standards). None provides persuasive authority for our decision today.

[61] TEX. TRANSP. CODE §§ 471.004(f)(5) & (7) (formerly art. 6370b, §§ 1(6) & (8)) (defining "reflecting material").

[62] *Id*. § 471.004(b) (formerly art. 6370b, § 3).

maintenance were not "approval", the retroreflective tape was itself a warning device, and its addition to the existing crossbucks an installation.

Accordingly, we conclude as a matter of law that the application of retroreflective tape to the crossbucks at the Front Street crossing was an installation of a federally funded and approved warning device. The Limmers acknowledge that if the 1989 program was covered by subsection (b)(4) of the Grade Crossing Design regulations, their inadequate warning claims were preempted by section 20106 of FRSA. We therefore need not consider the Railroad's other basis for preemption, that federal funding of the 1976 program was conclusively established.

III

The Limmers contend that the Railroad had a duty to keep the crossing free of obstructions restricting sight of approaching trains, and that breach of that duty was negligence for which the Railroad is liable, irrespective of the adequacy of the warning at the crossing. More than a century ago, we held that there is no such duty; rather, the presence of sight-restricting obstructions is but a consideration in determining whether the operation of the train was negligent.

In 1897, in *Missouri, Kansas & Texas Railway Co. of Texas v. Rogers*, the plaintiff had just begun to drive his wagon over a railroad street crossing when suddenly he saw that boxcars were being pushed toward him, and he leapt from the wagon to get out of the way, thereby injuring himself.[63] He alleged that, in attempting to cross the tracks, his view had been obstructed by a coal house, an ice house, and a beer house, which the railroad should not have allowed to be built on its

[63] 40 S.W. 956, 957 (Tex. 1897).

right-of-way, and by a boxcar, which should not have been left standing on a siding.[64] The jury, having been instructed that the railroad had a "duty . . . to use ordinary care . . . to avoid such obstructions on its right of way and side tracks . . . as would prevent persons crossing . . . to discover the approach of trains", found for the plaintiff, and the trial court rendered judgment on the verdict.[65] We reversed and remanded the case for a new trial with this explanation:

> The charge of the court assumes that it was the duty of the railroad company, as a matter of law, to prevent the obstruction of the view of its track at the place indicated, and that the failure to perform that duty was negligence per se, for which the plaintiff was entitled to recover, without regard to the care with which the train was operated at the time. It was error in the court to so charge the jury. Whether the obstruction was placed upon the right of way by the company itself for its own use, or permitted by it to be placed there by another to be used in connection with the business of the road, is unimportant. There is no law which declares it to be the duty of a railroad company to keep its right of way free from obstruction, and therefore the failure to do so cannot be declared as a matter of law to be negligence. . . . [T]hose obstructions, with the other surrounding circumstances, were proper to be considered upon the question of the degree of care and vigilance which the defendant was bound to exercise in the running and management of its train, and in giving warning of its approach. It cannot be an independent ground of recovery. . . . The fact that the view of the track was obstructed would not give a right of action if the railroad company exercised such care in the operation of its train as a prudent person, under similar circumstances, having due regard for the safety of those traveling upon the highway over that road, would have exercised. It might be that the ringing of a bell, or the blowing of a whistle, or both, would not be such care as would be required at that place. A prudent man might have felt it his duty to station some person there to give warning of the approach of a train to those who were about to cross the track. But the question to be submitted to the jury was whether or not, under the surrounding conditions and circumstances at that place, the defendant exercised such care as a prudent person would have exercised under like conditions.[66]

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[64] *Id.*

[65] *Id.*

[66] *Id.* at 957-958 (internal quotation marks omitted).

In 1898, in *International & Great Northern Railway Co. v. Knight*, a wagon driver was killed in a railroad crossing collision.[67] The plaintiff alleged that the railroad was at fault both in failing to signal the train's approach and in allowing various structures to be placed along the tracks, obstructing the view.[68] The trial court instructed the jury that they could find the railroad negligent on either ground and rendered judgment on a verdict for the plaintiff.[69] As in *Rogers*, we reversed and remanded the case for a new trial, holding that the jury had been improperly instructed.[70] Again we explained:

> In [*Rogers*], we held that it is not negligence for a railroad to put on its right of way obstructions to the view of one approaching a crossing, whether the obstructions be placed there by the railroad for its own use, or by another, by the railroad's permission, to be used in connection with the business of the road; but it is merely a matter to be considered on the question whether there was negligence in the operation of a train at the crossing. It is obvious in the present case that the obstructions which were placed near the track of the defendant company were the ordinary structures used by the company in receiving and discharging its freight. When near a crossing, such structures necessarily obstruct the view of those using the highway, in passing over the track. From the very nature of the case, at every depot of a railway company the view of approaching trains must in some measure be shut off by the buildings which are requisite to the transaction of its business; and hence the erection and maintenance of such buildings cannot, on account of their obstructing the view of the track, be deemed negligence either in law or in fact.[71]

The Limmers argue that five cases decided before *Rogers* and *Knight* support a duty to clear railroad crossings of sight-restricting obstructions. One of the cases holds that a railroad has a duty

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[67] 45 S.W. 556 (Tex. 1898).

[68] *Id.*

[69] *Id.* at 557.

[70] *Id.* at 558.

[71] *Id.* at 557.

to its own employees to clear its tracks and right-of-way of obstructions that could derail the train and injure them.[72] Another extends the same duty to passengers.[73] Neither discusses a railroad's duty to highway traffic to remove obstructions that restrict sight. The other three cases[74] were cited in *Rogers* as authority for our holding in that case.[75] Granted, those cases could have been read to create some uncertainty on the subject,[76] but *Rogers* removed that uncertainty.

The Limmers contend that, even if nineteenth century case law was to the contrary, public policy now favors imposing on railroads an independent duty to prevent sight obstructions at crossings. They point to state[77] and federal[78] regulations requiring railroads to keep right-of-ways

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[72] *Texas & St. Louis Ry. Co. v. Vallie*, 60 Tex. 481(1883) (holding that a railroad was negligent in allowing a tree to fall across its tracks, derailing a train, and injuring its employee).

[73] *Eames v. Tex. & New Orleans Ry. Co.*, 63 Tex. 660 (1885) (holding that a railroad was negligent in failing to clear vegetation from its right-of-way, from which a cow emerged in front of a train, derailing it and injuring a passenger).

[74] *Galveston, Houston & San Antonio Ry. Co. v. Michalke*, 38 S.W. 31 (Tex. 1896); *Receivers Houston & Tex. City Ry. Co. v. Stewart*, 17 S.W. 33 (Tex. 1891); *Dillingham v. Parker*, 16 S.W. 335 (Tex. 1891).

[75] *Rogers*, 40 S.W. at 958.

[76] In *Dillingham*, we held that the trial court misstated the law in instructing the jury that "[i]t is the duty of those operating railway locomotives and cars to use reasonable care not to permit the view of the track to become obstructed with cars standing on the side tracks, so that persons passing along a public road or street cannot conveniently see and hear a passing engine or train, as they approach the crossing of the track". 16 S.W. at 335-336. But we added that "[i]t was for the jury to say, under proper instructions, whether *the particular acts* were negligent or not." *Id*. at 336. In *Stewart*, we said: "The [railroad], under the law, ha[s] the right to use [its] road in the exercise of its legitimate business, but the enjoyment of this privilege does not authorize [it] to exercise this right in a negligent manner. It cannot be said, as a matter of law, that the legitimate use of the side tracks of a railroad, in storing its cars or switching its trains, is or is not negligence. Whether or not it be negligence would depend upon the manner of use and the circumstances attending it." 17 S.W. at 33. And in *Michalke*, we said: "[W]e do not question the right of a railway company, as a general rule, to erect the structures necessary for the prosecution of its business, and to leave standing cars upon its side tracks, near a street or road crossing. But we think that the circumstances of a case may be such that, as a matter of fact, it may be negligence to do so." 38 S.W. at 31.

[77] 43 TEX. ADMIN. CODE § 7.37(b)-(d) (2009) ("(b) Standing equipment. No railroad shall cause or allow trains, railway cars, or equipment to stand less than 250 feet from the centerline of any unprotected public grade crossing unless a closer distance cannot be avoided. (c) Vegetation. At unprotected public grade crossings, each railroad shall control vegetation on its right-of-way (except for the roadbed and areas immediately adjacent to the roadbed) for a distance of

clear. But thorough regulations do not invite an additional cause of action for negligence; they suggest one is unnecessary. The Association of American Railroads, as amicus curiae, cites data indicating that the regulation of railroad crossings has, from 1980 to 2004, coincided with a 71% decrease in collisions and a 56% decrease in collision fatalities.[79] Public policy does not require us to disturb a positive regulatory scheme.

We reaffirm that a railroad's duty is not to clear its right-of-way of things that may obstruct sight at a crossing; a railroad's duty is to give adequate warning of approaching trains, given whatever obstructions or other conditions exist. The Limmers do not contend that the obstructions at the Front Street crossing made even active warnings, like automatic gates or a flagman, inadequate. On the contrary, they contend that the presence of the obstructions made the warning

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250 feet each way from the centerline of the crossings, so that vegetation does not block the vehicular highway traffic's view of approaching trains. The 250 feet shall be measured from the point where the centerline of the railroad crosses the centerline of the public road. Where the right-of-way is fenced, this subsection shall be deemed complied with if vegetation is controlled up to two feet from the fence. (d) Permanent structures. At unprotected public grade crossings, each railroad shall keep its right-of-way clear of unnecessary permanent obstructions, such as billboards and signs that are not authorized by the railroad and that are not required for the safe operation of the railroad, for a distance of 250 feet each way from the crossing so that the obstructions do not block the vehicular highway traffic's view of approaching trains. Billboards and signs that are legally permitted by the state or a political subdivision are not unnecessary permanent obstructions, so long as they do not block the vehicular highway traffic's view of approaching trains. Permanent buildings, such as warehouses and equipment facilities, which existed prior to June 26, 1986, are exempt from the requirements of this subsection. The 250 feet shall be measured from the point where the centerline of the railroad crosses the centerline of the public road.").

[78] 49 C.F.R. § 213.37 ("Vegetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not — (a) Become a fire hazard to track-carrying structures; (b) Obstruct visibility of railroad signs and signals: (1) Along the right-of-way, and (2) At highway-rail crossings; (This paragraph (b)(2) is applicable September 21, 1999.) (c) Interfere with railroad employees performing normal trackside duties; (d) Prevent proper functioning of signal and communication lines; or (e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.").

[79] Brief of Ass'n of American Railroads as Amicus Curiae at 4-5, *Missouri Pac. R.R. v. Limmer*, No. 06-0023 (Tex. May 3, 2006) (citing Federal Railroad Administration, Highway/Rail Crossing Accident/Incident Bulletin, 1980-1996).

afforded by the crossbucks inadequate. Thus, the Limmers' sight-restriction claim is simply a restatement of its claim that the warning at the crossing was inadequate. As such, it is preempted.

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Accordingly, the judgment of the court of appeals is reversed and judgment is rendered that the Limmers take nothing.

Nathan L. Hecht
Justice

Opinion delivered: October 23, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-0975

GRANT THORNTON LLP, PETITIONER,

v.

PROSPECT HIGH INCOME FUND, ML CBO IV (CAYMAN), LTD., PAMCO CAYMAN, LTD., AND PAM CAPITAL FUNDING, L.P., RESPONDENTS

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

Argued December 9, 2008

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

JUSTICE GUZMAN and JUSTICE LEHRMANN did not participate in the decision.

Certified accountants audit companies for many purposes, not least of which is to provide corporate directors with an objective assessment of their companies' performance. Audits are also prepared to give information to a specific investor who the auditor knows will rely on its contents. We must decide whether the law imposes an obligation on the auditor to provide an accurate accounting not to the corporation or known investor, but to anyone who reads and relies on it. We conclude that it does not. Likewise, we hold that the particular investors involved in this case could not have justifiably relied on the audit reports as to purchases made after they knew the corporation was at risk of financial ruin, and they may not substitute their escrow agent's reliance for their own

without also being bound by its knowledge. Finally, we reject the investors' "holder" claims—claims not that they bought or sold securities based on the auditor's reports, but that they held them when they otherwise would not have—in the absence of a direct communication with the auditors. For these reasons, we reverse in part the court of appeals' judgment and render judgment that the investors take nothing.

I. Background[1]

Respondents, Prospect High Income Fund (Prospect), ML CBO IV (Cayman), Ltd., Pamco Cayman, Ltd., and Pam Capital Funding, L.P. (collectively, "the Funds"), are bond and hedge funds. Over a five-year period, the Funds bought bonds from Epic Resorts, LLC (Epic), a vacation timeshare operator, at prices ranging from par value to 21% of par value. Epic is not a party to this case.

In 1998, Epic registered its bonds with the Securities and Exchange Commission (SEC) and sold them on the open market. The bonds, secured by Epic's assets, were high yield, below investment grade securities.[2] They were governed by an Indenture, and an escrow and disbursement agreement with United States Trust Company of New York ("U.S. Trust"). The Indenture required Epic to pay the bondholders semi-annual (June and December) interest payments of $8.45 million

[1] A timeline of transactions is appended.

[2] High yield, below investment grade bonds are sometimes referred to as "junk bonds." 6A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2649.20 (perm. ed., rev. vol. 2005) (footnotes omitted) (noting that often junk bonds refer to "subordinated debentures of corporations that do not have a very high credit rating and are required to pay above market interest rates for loans"); 5 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION (3d ed. 2001) (footnotes omitted) (defining junk bonds as "[h]igh yield, high risk, unrated or low rated bonds issued privately (largely to institutional investors eager for high returns) by a tender offeror to finance an offer, or by management or third parties to finance a 'leveraged buyout'").

until the bonds matured in 2005. The Indenture also mandated that Epic file with the SEC audited financial statements, an annual report, and an independent auditor's report. Epic also had to obtain a "negative assurance" statement[3] from its auditor, confirming Epic's compliance with the Indenture.

The Indenture named U.S. Trust as trustee for the bonds, and the escrow and disbursement agreement named U.S. Trust as escrow agent. Epic agreed to open an escrow account with U.S. Trust, from the bond proceeds, at an initial amount of $16.9 million. At all times thereafter, for the bondholders' security, Epic was required to maintain in the account "funds sufficient to make the next required interest payment"—$8.45 million. Failure to maintain this minimum escrow balance for more than sixty days after receiving notice from U.S. Trust constituted an event of default under the Indenture. The account was to have been established in U.S. Trust's name, and required that "all funds accepted by [U.S. Trust] pursuant to this Agreement shall be held for [U.S. Trust] for the benefit of [U.S. Trust] and the holders of the Notes."

Shortly after Epic issued the bonds, Prospect—one of the four Funds here—made three bond purchases. Epic made the requisite interest payments to its bondholders in June and December 1999. Subsequently, in March 2000, Epic retained Grant Thornton, LLP to audit its 1999 financial statements and to review its statements for the first three quarters of 2000. Grant Thornton discovered that Epic had opened a U.S. Trust cash management account, instead of the stipulated

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[3] The Indenture defined the negative assurance statement as:

> a written statement of (x) the Issuer's independent public accountants (who shall be a firm of established national reputation) that in making the examination necessary for certification of such financial statements nothing has come to their attention which would lead them to believe that a Default or an Event of Default has occurred or, if any such Default or Event of Default has occurred, specifying the nature and period of existence thereof . . . .

escrow account, and that the balance fell short of the required minimum. Despite these discrepancies, Grant Thornton issued a report in April 2000 that confirmed Epic's continued compliance with the escrow requirement.[4] The financial statement showed $12,004,000 cash in escrow, and Note F stated that "[t]he Company maintains [$8.45 million] at all times in escrow to cover the next required interest payment." According to Grant Thornton's partner-in-charge, Epic told Grant Thornton that U.S. Trust allowed Epic to use more than one account (the U.S. Trust account plus a PNC account) to meet its responsibilities under the Indenture and Escrow agreement; that the combined balance of those accounts was never less than $12 million; that U.S. Trust had never objected to the absence of funds in the U.S. Trust account; and that Epic periodically transferred funds to U.S. Trust to make the interest payment.

In early 2000, Highland Capital Management assumed the management of Prospect's portfolio. Highland has more than $1 billion in assets under management, with below investment grade bonds comprising about 90% of its portfolio. Davis Deadman, Highland's senior portfolio manager, was responsible for the Funds' investments in Epic and made all purchasing decisions for them. In December 2000, Cayman (another one of the Funds) bought Epic bonds, and Epic timely made its December interest payment. Around that time, Epic's primary lender, Prudential (which loaned Epic $2 million per week against its receivables), told Epic that it would not be renewing its

[4] The "Report of Independent Certified Public Accountants" issued by Grant Thornton included the following:

> In our opinion, the financial statements referred to above present fairly, in all material respects, the consolidated financial position of Epic Resorts, LLC as of December 31, 1999, and the results of its operations and its cash flows for the year ended December 31, 1999, in conformity with auditing standards generally accepted in the United States.

credit arrangement. According to Epic's president, the credit relationship with Prudential was critical to Epic's existence and its ability to satisfy its obligations to bondholders, and Prudential's failure to renew the loan would "devastat[e]" Epic. Deadman learned (early in the first quarter of 2001) of Prudential's non-renewal but continued to buy bonds anyway, significantly increasing the Funds' holdings of Epic debt.

On April 17, 2001, Grant Thornton issued its 2000 report, which again showed over $12 million cash in escrow, and again confirmed that "[t]he Company maintains [$8.45 million] at all times in escrow to cover the next required interest payment." On June 15, 2001, Epic missed its scheduled interest payment to the bondholders. Epic's president testified that, although Epic could have made the payment, Prudential's failure to renew the credit arrangement required Epic to use the money to fund operations. Four days later, the Funds purchased more bonds and then took action to protect their investments. Because Epic's missed interest payment constituted an event of default under the Indenture, the Funds forced Epic into bankruptcy in July 2001. The Funds then sued Grant Thornton, alleging, among other things,[5] that the auditor's reports misrepresented the escrow account's status.[6] Nevertheless, the Funds—under Highlands' management—continued to buy Epic bonds in February 2002, in April 2002, and again in April 2003.[7]

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[5] The Funds also complained that Grant Thornton failed to properly account for pending debt maturities, verify related party transactions, and provide a going concern limitation on either of the audits it performed.

[6] The Funds also sued Prudential Securities, Inc., Prudential Securities Credit Corp., LLC , and U.S. Trust. Those claims have been settled.

[7] Counsel representing the Funds explained during oral argument that the Funds continued to buy bonds after the default in order to "reach a threshold of control for the bankruptcy" so that they could maximize their value in bankruptcy proceedings, as well as to obtain "litigation rights."

The Funds alleged that Grant Thornton committed fraud, negligent misrepresentation, negligence, third-party-beneficiary breach of contract, conspiracy to commit fraud, and aiding and abetting fraud. They sought damages equal to the full face value of all the bonds they purchased, plus five years of interest payments (2001-2005). The trial court granted Grant Thornton's motion for summary judgment on all claims. The court of appeals affirmed the trial court's judgment on claims related to post-suit transactions, as well as on the breach of contract and negligence claims, but reversed on the negligent misrepresentation, fraud, conspiracy, and aiding and abetting claims. 203 S.W.3d 602 at 621-22.

On rehearing, we granted Grant Thornton's petition for review,[8] 51 Tex. Sup. Ct. J. 1186 (Aug. 29, 2008), which asserts (1) that there is no evidence of a causal connection between Grant Thornton's alleged misrepresentation and the Funds' alleged injury; (2) that there is no evidence of actual and justifiable reliance; and (3) that liability for fraudulent misrepresentation runs only to those whom the auditor knows and intends to influence at the time the report is issued—all of which Grant Thornton contends were absent in this case.[9]

The Funds allege several bases for their claims: that Grant Thornton's misrepresentations: (1) led them to purchase additional bonds; (2) dissuaded them from investigating whether the minimum balance was being maintained in the escrow account, which prevented them from forcing

[8] The Funds have not challenged the court of appeals' judgment on the post-suit transactions, breach of contract, and negligence claims.

[9] The Texas Society of Certified Public Accountants (TSCPA), American Institute of Certified Public Accountants (AICPA), and Texans for Lawsuit Reform submitted briefs of amici curiae in support of Grant Thornton's motion for rehearing; TSCPA and AICPA submitted additional briefs in support of Grant Thornton upon our grant of the motion for rehearing.

Epic into bankruptcy sooner; and (3) induced them to refrain from selling bonds (so-called "holder claims").

II. Bond purchases

We turn first to the Funds' complaints that they would not have purchased Epic bonds had Grant Thornton disclosed the escrow irregularities.

A. Scope of liability

One of the Funds, Cayman, bought bonds after Grant Thornton issued its 1999 audit report and before the Funds learned that Prudential would not renew Epic's credit facility. But Grant Thornton argues that Cayman, a potential investor, was not within its scope of liability when the audit report was published. To address this claim, we first examine the evolution of auditor liability law.

1. Negligent misrepresentation

a. Auditor liability to third parties: an overview

For over seventy years, state courts have debated the contours of liability when an auditor's negligent misrepresentation injures a third party. *See generally,* Jay M. Feinman, *Liability of Accountants for Negligent Auditing: Doctrine, Policy, and Ideology*, 31 FLA. ST. U.L. REV. 17 (2003); Jodi B. Scherl, Comment, *Evolution of Auditor Liability to Noncontractual Third Parties: Balancing the Equities and Weighing the Consequences*, 44 AM. U.L. REV. 255 (1994). For the first half of the twentieth century, the seminal case on auditor liability was Justice Cardozo's New York Court of Appeals opinion, *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441 (N.Y. 1931). In *Ultramares*, the court discussed what it termed "the assault upon the citadel of privity."

Ultramares, 174 N.E. at 445. The court refused to extend negligence's foreseeability principle to economic losses caused by an auditor's lapse, absent a bond "so close as to approach that of privity." *Id*. at 446. The court coined a phrase that would echo through succeeding opinions nationwide: "If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Id*. at 444.

Over the ensuing decades, however, courts began to stray from *Ultramares* and expand auditors' scope of liability. These cases fall along a spectrum, with *Ultramares* on one end (requiring privity, or near-privity), and a handful of cases on the other (holding that mere foreseeability suffices to establish liability). The leading case in the latter camp is from New Jersey, *H. Rosenblum, Inc. v. Adler*, 461 A.2d 138 (N.J. 1983). Likening a negligent audit to a defective product, the court held that "the reasonably foreseeable consequences of the negligent act define the duty and should be actionable." *Rosenblum*, 461 A.2d at 145. Few states have adopted this approach, and *Rosenblum* itself was superseded by a 1994 statute replacing it with a near-privity standard, N.J. STAT. ANN. § 2A:53A-25. *See, e.g.*, *Touche Ross & Co. v. Commercial Union Ins. Co.*, 514 So. 2d 315, 322 (Miss. 1987); *Citizens State Bank v. Timm, Schmidt & Co*., 335 N.W.2d 361, 366 (Wis. 1983).

New York and other states have drifted only cautiously from *Ultramares*'s strict standard, adopting a near-privity predicate to auditor liability. The leading case behind this model is *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110 (N.Y. 1985). *Credit Alliance* applied a three-part inquiry to determine whether an auditor and a third party have sufficient privity to

implicate liability, namely: "a particular purpose for the accountants' report, a known relying party, and some conduct on the part of the accountants linking them to that party." *Id*. at 119. In applying this test, the court held that even though the auditor was aware that the third party would receive the report, it was not liable because there was "no allegation that [the auditor] had any direct dealings with plaintiffs, had specifically agreed . . . to prepare the report for plaintiffs' use or according to plaintiffs' requirements, or had specifically agreed . . . to provide plaintiffs with a copy or actually did so." *Id*. The high courts in Maryland, Montana, and Idaho have explicitly adopted *Credit Alliance*'s reasoning. *See Idaho Bank & Trust Co. v. First Bancorp of Idaho*, 772 P.2d 720, 722 (Idaho 1989); *Walpert, Smullian & Blumenthal, P.A. v. Katz*, 762 A.2d 582, 607 (Md. 2000); *Thayer v. Hicks*, 793 P.2d 784, 789 (Mont. 1990).

The American Law Institute's 1977 Restatement (Second) of Torts included a section on "Information Negligently Supplied for the Guidance of Others." RESTATEMENT (SECOND) OF TORTS § 552. Section 552 offers a middle-ground approach to third-party auditor liability, providing that:

> [o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. . . . [T]he liability stated . . . is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Id.

Of the various approaches taken by states, most have embraced the Restatement's formulation. *See* Feinman, 31 FLA. ST. U.L. REV. at 41 n.165. Although the Restatement has been criticized,[10] it provides a window through which direct victims of auditor negligence can demand accountability without unleashing potentially unlimited auditor liability. The most thorough exponent of the Restatement's construct can be found in a 1992 case from the Supreme Court of California, *Bily v. Arthur Young & Co.*, 834 P.2d 745 (Cal. 1992). After surveying the waterfront of auditor liability to third persons, the *Bily* court concluded that the Restatement approach:

> is most consistent with the elements and policy foundations of the tort of negligent misrepresentation. The rule expressed there attempts to define a narrow and circumscribed class of persons to whom or for whom representations are made. In this way, it recognizes commercial realities by avoiding both unlimited and uncertain liability for economic losses in cases of professional mistake and exoneration of the auditor in situations where it clearly intended to undertake the responsibility of influencing particular business transactions involving third persons.

Id. at 769.

For nearly two decades, we have similarly embraced the Restatement approach. *See McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999); *see also Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991). In *McCamish*, we

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[10] The Supreme Court of California, in *Bily v. Arthur Young & Co.*, noted Dean William L. Prosser's (Reporter for the Restatement) apologetic remark regarding the uncertainty inherent in the Restatement's language:

> The problem is to find language which will eliminate liability to the very large class of persons whom almost any negligently given information may foreseeably reach and influence, and limit the liability, not to a particular plaintiff defined in advance, but to the comparatively small group whom the defendant expects and intends to influence. Neither the Reporter, nor, it is believed, the Advisers nor the Council, is entirely satisfied with the language of Subsection (2); and if anyone can do better, it will be most welcome.

Bily v. Arthur Young & Co., 834 P.2d 745, 759 (Cal. 1992) (citing RESTATEMENT (SECOND) OF TORTS § 552 (Tentative Draft No. 11, 1965)).

examined whether the absence of an attorney-client relationship precluded a third party from suing an attorney for negligent misrepresentation under Restatement section 552. *McCamish*, 991 S.W.2d at 788. We held that, under certain circumstances, section 552 causes of action can be brought by third parties against attorneys, just as they have been legitimately brought against auditors, accountants, and other professionals. *Id*. at 791.

We explained that "a section 552 cause of action is available only when information is transferred by an attorney to a *known* party for a *known* purpose." *Id*. at 794 (emphasis added). Under section 552, a "known party" is one who falls in a limited class of potential claimants, "'for whose benefit and guidance [one] intends to supply the information or knows that the recipient intends to supply it.'" *Id*. (quoting RESTATEMENT (SECOND) OF TORTS § 552(2)(a)). This formulation limits liability to situations in which the professional who provides the information is "aware of the nonclient and intends that the nonclient rely on the information." *Id*. Unless a plaintiff falls within this scope of liability, a defendant cannot be found liable for negligent misrepresentation.

McCamish has served as a guidepost for our courts of appeals in analyzing the tort of negligent misrepresentation,[11] in contrast to earlier decisions applying a broader standard.[12] We reaffirm today that *McCamish* represents Texas law under section 552 of the Restatement.

b. Was Cayman within a limited class?

Cayman bought bonds in December 2000, allegedly in reliance on the 1999 audit report, issued in April 2000. Grant Thornton contends that Cayman, which had never before purchased Epic bonds, was indistinguishable from any other unknown potential investor, and thus outside Grant Thornton's "scope of liability." Cayman counters that it falls within a limited class because few investors actually purchase high yield debt like the bonds at issue here. We find Cayman's argument unpersuasive. Epic's bonds were sold on the open market: that only certain investors bought them does not make those investors a "limited group." As the United States Court of Appeals for the Fifth Circuit has explained, "to interpret the 'limited group' requirement as including all potential investors would render that requirement meaningless." *Scottish Heritable Trust, PLC v. Peat*

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[11] *See, e.g.*, *Ervin v. Mann Frankfort Stein & Lipp CPAs, LLP*, 234 S.W.3d 172, 177 (Tex. App.—San Antonio 2007, no pet.) (restating the rule in *McCamish*: "In other words, standing exists when the professional has knowledge of the identity of the party to whom the information is provided and actual knowledge of the purpose for which the information is being supplied."); *Abrams Ctr. Nat'l Bank v. Farmer, Fuqua & Huff, P.C.*, 225 S.W.3d 171, 177 (Tex. App.—El Paso 2005, no pet.) ("Following *McCamish*, the Dallas Court of Appeals recognized the Restatement's requirement of actual knowledge."); *Tara Capital Partners I, L.P. v. Deloitte & Touche, L.L.P.*, No. 05-03-00746-CV, 2004 Tex. App. LEXIS 4577, at *6 (Tex. App.—Dallas May 20, 2004, pet. denied); *see also Compass Bank v. King, Griffin & Adamson P.C.*, 388 F.3d 504, 505 (5th Cir. 2004) ("[W]e are persuaded that the Restatement's actual knowledge standard applies to accountants in Texas.").

[12] *See Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408, 413 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (imposing liability if an auditor knows or "should know" that such statements will be relied upon).

Marwick Main & Co., 81 F.3d 606, 613 (5th Cir. 1996) (applying Texas law).[13] Like the Fifth Circuit, "we do not suggest that a potential purchaser can never be a member of a 'limited group,'" but the facts here do not support such a determination. *See Scottish Heritable Trust*, 81 F.3d at 614 (noting that potential investor with "no previous connection to either the corporation or the accountant" was not within such a group). Cayman had no prior connection to Epic or Grant Thornton, and predicating scope of liability on Grant Thornton's general knowledge that investors may purchase Epic bonds would "eviscerate the Restatement rule in favor of a de facto foreseeability approach—an approach [we] have refused to embrace." *See id.*

The court of appeals in this case held that a fact issue precluded summary judgment on the limited class issue because "appellants already owned Epic bonds" and "were not merely members of a large universe of potential investors." 203 S.W.3d at 615-16 (noting that authorities suggest that existing investors may fall within limited class). While this may have been true as to some of the Funds, it was not the case for Cayman, which did not buy bonds until December 2000. Because Cayman was not within a "limited group" when it bought bonds in December 2000, it was outside Grant Thornton's scope of liability. *See McCamish*, 991 S.W.2d at 794.

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[13] *See also In re ML-Lee Acquisition Fund II*, L.P. 848 F. Supp. 527, 556 (D. Del. 1994) (dismissing negligent misrepresentation claim because plaintiffs alleged inducement based only on publicly disseminated documents); *In re Crazy Eddie Sec. Litig.*, 812 F. Supp. 338, 360 (E.D.N.Y. 1993) (applying Texas law and noting "the court cannot find a single decision by any court extending an accountant's duty of care to as-yet unidentified future open-market buyers of publicly-traded securities, even when that duty is limited to the rarified class of buyers with sufficient resources to acquire control of entire companies. This court believes that the Texas Supreme Court is unlikely to adopt a rule so universally avoided by sister states.") (citation omitted); *see also First Nat'l Bank of Commerce v. Monco Agency, Inc.*, 911 F.2d 1053, 1062 (5th Cir. 1990) (holding that, under Restatement approach, actual knowledge was required; "[a]nything less . . . would extend liability to the bounds of 'reasonable foreseeability'" and affirming summary judgment for accountants on that basis).

2. Fraud—scope of liability

Although similar in their essential elements, fraud is more difficult to prove than negligent misrepresentation "due to the added element of intent to deceive." *Richter, S.A. v. Bank of America Nat'l Trust & Sav. Ass'n*, 939 F.2d 1176, 1185 (5th Cir. 1991) (applying Texas law); *see also Perenco Nig. Ltd. v. Ashland Inc.*, 242 F.3d 299, 306 (5th Cir. 2001) (applying Texas law).

In *Ernst & Young v. Pacific Mutual*, we confirmed the intent standard for fraud under section 531 of the Restatement (Second) of Torts,[14] as a party's "reason to expect" that its representations will affect other parties' conduct. *Ernst & Young, L.L.P. v. Pacific Mutual Life Ins. Co.*, 51 S.W.3d 573, 575 (Tex. 2001). In that case, Pacific Mutual bought notes issued by InterFirst. *Id*. Pacific Mutual later sued Ernst & Young, an accounting firm, for releasing audit reports that allegedly misrepresented the financial strength of a company that merged with InterFirst. *Id*. Seeking to prove that Ernst & Young knew that third-party investors would rely on the audit reports, Pacific Mutual produced affidavits stating that "it is a commonly known and accepted practice in the financial industry for investors . . . to rely on representations" like those made by Ernst & Young. *Id* at 576. The court of appeals held that these affidavits alone presented a fact issue as to whether the auditor had "reason to expect" that institutional investors would rely on its representations. *Id*. at 577.

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[14] 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 intends or has reason to expect their conduct to be influenced.

RESTATEMENT (SECOND) OF TORTS § 531.

We rejected that view, holding that "the 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." *Id*. at 580. We observed that the evidence referred to "what is commonly 'known' or 'expected' in the investment community," but we noted that "even an obvious risk that a third person will rely on a representation is not enough to impose liability. General industry practice or knowledge may establish a basis for foreseeability to show negligence, but it is not probative of fraudulent intent." *Id*. at 581 (citation omitted). We held that the trial court properly granted summary judgment to the accounting firm, which had no relationship with the investors and no special reason to expect the investors' reliance on the audit report. *Id*. at 583.

In this case, the court of appeals held that there was a "fact issue regarding whether Grant Thornton had reason to expect that it was especially likely that [the Funds] would receive and rely upon Epic's audited financial statements." 203 S.W.3d at 612. The court based its determination on the Indenture's reference to Epic securityholders. *Id*. (noting that "the Indenture provides Epic 'shall file with the Commission and shall furnish to the Trustee and each Securityholder . . . copies of the quarterly and annual reports and of the information, documents, and other reports . . .'"). Even if this provision suggested that Grant Thornton may have been aware of *existing* bondholders as a limited class, a question we need not reach, it does not meet the requisite standard as to prospective purchasers, like Cayman, who claim to have relied on the 1999 audit report. Cayman's claim is like the one we rejected in *Pacific Mutual*, and it fails for the same reasons.

B. Reliance

In 2001, several of the Funds—both existing and prospective bondholders—bought Epic bonds. The parties hotly dispute whether existing bondholders are within Grant Thornton's scope of liability. We need not resolve that disagreement, however, as we conclude that there was no evidence that those Funds justifiably relied on the audit reports or the negative assurance statement.

1. The Funds could not have justifiably relied on the audit reports after learning of Prudential's failure to renew Epic's credit facility.

Both fraud and negligent misrepresentation require that the plaintiff show actual and justifiable reliance. *Pacific Mutual*, 51 S.W.3d at 577; *Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991). In measuring justifiability, we must inquire whether, "given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud[,] it is extremely unlikely that there is actual reliance on the plaintiff's part."[15] *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1026 (5th Cir. 1990) (applying Texas law). Moreover, "a person may not justifiably rely on a representation if 'there are "red flags" indicating such reliance is unwarranted.'" *Lewis v. Bank of Am. NA*, 343 F.3d 540, 546 (5th Cir. 2003) (holding that plaintiff's decision to enter into transaction without undertaking additional investigation into tax consequences was not justifiable, given his access to professional accountants, the amount of

[15] There is authority suggesting that fraud and negligent misrepresentation claims require different thresholds of justifiability, with it being more difficult to prove in the negligent misrepresentation context. *See, e.g.*, *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1026 n.5 (5th Cir. 1990) (noting that when "an intentional tort like fraud is not at issue, courts more readily equate unjustifiable reliance in a negligent misrepresentation context with contributory negligence"). Assuming without deciding that a different standard applies, the Funds' lack of justifiable reliance for their fraud claim necessarily bars their negligent misrepresentation claim as well. *See id.* (noting that "a finding of unjustifiable reliance on fraudulent conduct for common law fraud purposes precludes a negligent misrepresentation claim based on the same conduct").

money involved, and the ambiguous nature of the pertinent representation) (quoting *In re Mercer*, 246 F.3d 391, 418 (5th Cir. 2001)).

Accordingly, we must examine the timing of the relevant purchases. Obviously, bonds purchased before Epic hired Grant Thornton in March 2000 could not have been bought in reliance on the audit reports.[16] With respect to bonds purchased (by Pam Capital, Pamco, Prospect, and Cayman) after Deadman learned that Prudential would not renew Epic's credit arrangement, however, we agree with Grant Thornton that such reliance was unjustifiable. Deadman, an experienced bond investor with a bachelor's degree in finance and a masters in business administration, testified that Prudential's $2 million-per-week credit facility "really was the lifeblood of the company." Without it, "the company would have to shut down or replace it." Nonetheless, knowing that Epic had lost its primary source of funding, the Funds continued to buy bonds in April, May, and June—even after Epic failed to make its scheduled June 15 interest payment.[17] Deadman purchased these bonds at prices ranging from 23.5% to 30.25% of par value—prices that, Deadman admitted, reflected a substantial risk that the bonds would not be redeemed for face value. If these Funds relied on the 1999 or 2000 audit reports in making the 2001 purchases, that reliance would not have been justifiable in light of the Funds' knowledge that Prudential had cut off Epic's "lifeblood."

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[16] Those Funds assert holder claims, discussed more fully below.

[17] Two additional funds (Highland Crusader and PCMG) continued buying bonds even after forcing Epic into bankruptcy and suing Grant Thornton for auditing deficiencies. Those purchases, however, are not at issue here. The court of appeals' affirmed the trial court's summary judgment as to those transactions, and the Funds have not challenged that decision. 203 S.W.3d at 614 (holding that the Funds' reliance was not justifiable because "Deadman was undeterred from buying Epic bonds, at fire sale prices, despite having full knowledge of the problems with the audits").

2. There is no evidence the Funds relied on the 1999 negative assurance statement.

Nor is there evidence that the Funds relied on the 1999 negative assurance statement. The statement verified that "in making the examination necessary for certification of such financial statements nothing has come to [Grant Thornton's] attention which would lead [it] to believe that the Issuers have violated any provisions of Article 4, 5 or 6 of this Indenture insofar as they relate to accounting matters or, if any such violation has occurred, specifying the nature and period of existence thereof, it being understood that such accountants shall not be liable to any Person for any failure to obtain knowledge of any such violation . . . ." Grant Thornton provided the statement to Epic in April 2000, but the statement was not part of Epic's public filing.

It is undisputed that the Funds never received or reviewed the statement. Nevertheless, the Funds contend that because U.S. Trust, their escrow agent and trustee, received and relied upon that statement, then the Funds, in effect, relied on the statement by proxy. Grant Thornton contends that, until the court of appeals' decision in this case, Texas courts have never recognized such a "vicarious reliance" theory. Regardless, Grant Thornton argues, if U.S. Trust's reliance is to be imputed to the Funds, so too should U.S. Trust's knowledge of the escrow account irregularities. We agree with Grant Thornton.

Although an agent's knowledge is generally imputed to its principal, the court of appeals declined to do so because U.S. Trust was an escrow agent and owed fiduciary duties to both the Funds and to Epic. Accordingly, the court held that Grant Thornton had not proved as a matter of law that imputation of U.S. Trust's knowledge was appropriate. 203 S.W.3d at 617 (noting that

"Grant Thornton's authorities all involve agents operating for a single principal"). But when, as here, there is a dual agent, operating with the consent and knowledge of both principals, the agent's knowledge is imputed to its principals.[18]

Sirojni Dindial, U.S. Trust's officer in charge of the Epic account, testified that she was unaware of the escrow agreement and did not know that it appointed U.S. Trust as the escrow agent. The court of appeals held that this created a fact issue regarding U.S. Trust's knowledge of its role as escrow agent. *Id*. at 618. We disagree. U.S. Trust was a party to the escrow agreement: that a U.S. Trust employee was unaware of its existence does not create a fact issue as to the company's knowledge of its contract. *Duncan v. Robertson*, 105 S.W.2d 214, 216 (Tex. 1937) (holding that "'in the absence of fraud or imposition, a party to a contract, which has been voluntarily signed and executed by him, with full opportunity for information as to its contents, cannot avoid it on the

[18] *See, e.g.*, *Bradford v. McElroy*, 746 S.W.2d 294, 296 (Tex. App.—Austin 1988, no writ); *United States Fidelity & Guar. Co. v. San Diego State Bank*, 155 S.W.2d 411, 413 (Tex. Civ. App.—El Paso 1941, writ ref'd w.o.m.) (noting that, principals who share a "common agent," acting with their knowledge and consent, will be charged with the agent's knowledge, in the absence of fraud); *see also Harydzak v. New Horizon, LLC*, 406 B.R. 499, 514 (Bankr. S.D. Tex. 2009) (holding that escrow agent's knowledge could be imputed to its principals); *Manley v. Ticor Title Ins. Co.*, 816 P.2d 225, 230 (Ariz. 1991) ("The knowledge of a dual agent is normally imputed to both principals."); *Triple a Management Co. v. Frisone*, 81 Cal. Rptr. 2d 669, 678 (Cal. Ct. App. 1999) (observing that "'[a]s a dual agent for both parties, the knowledge of the escrow agent regarding matters within the same escrow is imputed to both parties to the escrow'" (quoting 3 MILLER & STAR, CAL. REAL ESTATE §§ 8.56, 8.61 (2d ed. 1989))); *Carlton v. Moultrie Banking Co.*, 152 S.E. 215, 219-20 (Ga. 1930) (holding that the knowledge of a dual agent is imputable to both principals); *Messall v. Merlands Club, Inc.*, 194 A.2d 793, 797 (Md. 1963) (observing that "a depositary can be an agent for both parties to an escrow agreement" and "the knowledge of an agent acquired in the course of its agency is imputable to its principals"); *Thomas v. Jarecki*, 191 N.W. 669, 670 (Neb. 1922) (holding that knowledge of a dual agent is imputed to and binds the principal to whom such notice or knowledge would be imputed if the agent represented him alone); *Newsom v. Watson*, 177 P.2d 109, 111 (Ok. 1946) ("'Where a principal knows that his agent is also acting for the party adversely interested in the transaction, and yet consents to let him act as his agent, the principal is estopped from denying notice and knowledge which the agent has during the negotiation.'" (quoting 3 C.J.S. AGENCY § 271)); *American Nat'l Bank of Powell v. Foodbasket*, 497 P.2d 546, 547-48 (Wyo. 1972).

ground of his own negligence or omission to read it'" (quoting *Indem. Ins. Co. v. Macatee & Sons*, 101 S.W.2d 553, 557 (Tex. 1937))).

Finally, the court of appeals held that there was a fact issue regarding whether U.S. Trust was acting adversely to the Funds, precluding imputation of its knowledge to the Funds. 203 S.W.3d at 618 (noting that "an agent's knowledge is not imputed to its principal if the agent has an adverse interest in not revealing it"). Grant Thornton argues that there is no evidence that U.S. Trust's interests were adverse to the Funds' interests at all, much less that U.S. Trust was concerned only for itself. *See Goldstein v. Union Nat'l Bank*, 213 S.W. 584, 590-91 (Tex. 1919) (holding that rule of imputation applies unless "the agent's interests are so incompatible with the interests of his principal as practically to destroy the agency or to render it reasonably probable" that agent will not act on his acquired knowledge nor disclose it to his principal). But even assuming the adverse interest exception applied, the Funds would not be able to claim U.S. Trust's reliance as their own while simultaneously asserting that its knowledge should not bind them. *See id.* at 591 (noting that "'when a principal has consummated a transaction in whole or in part through an agent, it is contrary to equity and good conscience that he should be permitted to avail himself of the benefits of his agent's participation without becoming responsible as well for his agent's knowledge as for his agent's act'")(quoting *Irvine v. Grady*, 19 S.W. 1028, 1029 (Tex. 1892)). As one court has observed, in such situations:

> [T]he principal is impaled on the horns of a dilemma. If he disclaims the agent's act as unauthorized, he has no grounds to retain the fruits thereof; on the other hand, if he retains the fruits of the agent's act, after knowledge of the facts, he must in fairness be charged with the agent's knowledge.

Great American Indemnity Co. v. First Nat. Bank of Holdenville, 100 F.2d 763, 765 (10th Cir. 1938); *see also* 2 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 1826, at 1412 (2d ed. 1914) ("[W]here the agent is the sole representative of the corporation, the corporation can not [sic] claim anything except through him and that therefore if it claims through him, after notice of the facts, it must accept his agency with its attendant notice.").

The Funds do not allege—nor is there any evidence—that Grant Thornton colluded with U.S. Trust to defraud the Funds, such that the general rule of imputation would not apply. *See Ft. Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex. 1969); *see also FDIC v. Shrader & York*, 991 F.2d 216, 225 (5th Cir. 1993). In fact, they argue quite the opposite: they repeatedly refer to U.S. Trust as "a representative of the Funds," and they assert that "U.S. Trust was relying on Grant Thornton to determine whether . . . the Indenture had been violated." The Funds submitted testimony from U.S. Trust representatives, who stated that "[U.S. Trust] relied on Epic's independent public accountants for this certification . . . . Had these accountants indicated that something had 'come to their attention which would lead them to believe that the issuers have violated any provisions of Articles 4, 5, or 6 of the Indenture,' [U.S. Trust] would have taken whatever steps may have been required under the Indenture."

Because the Funds may not substitute U.S. Trust's reliance for their own without also inheriting its knowledge, its claims based on the 1999 negative assurance statement fail. *See Irvine*, 19 S.W. at 1030 (observing that "it is inequitable for the principal to avail himself of the agent's acts without being held to know what the agent knows").

III. Holder claims

Finally, we turn to the Funds' "holder claims," in which they contend not that Grant Thornton's misrepresentations induced them to *take* action, but rather that they induced them to *refrain* from doing so: the Funds allege that, but for Grant Thornton's representations, they would have sold their bonds sooner, when doing so would have been more profitable, or they would have forced Epic into bankruptcy sooner, when it had more assets to liquidate. The Funds urge the Court to consider the propriety of such claims, citing a Texas appellate decision, later withdrawn, *Shirvanian v. DeFrates*, No. 14-02-00447-CV, 2004 Tex. App. LEXIS 182, at *53-*59 (Tex. App.—Houston [14th Dist.] Jan. 8, 2004) (holding that forbearance from selling stock, in reliance on direct communications made for the purpose of preventing plaintiffs from selling their stock, could form the basis of a cause of action for fraud under Texas law), *opinion withdrawn and substituted by Shirvanian v. DeFrates*, 161 S.W.3d 102 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). We have never before considered the issue.

In a "holder" claim, the plaintiff alleges not that the defendant wrongfully induced the plaintiff to purchase or sell stock, but that the defendant wrongfully induced the plaintiff to continue holding his stock. As a result, the plaintiff seeks damages for the diminished value of the stock, or the value of a forfeited opportunity, allegedly caused by the defendant's misrepresentations. *Newby v. Enron Corp.* (*In re Enron Corp. Sec., Derivative & "ERISA" Litig.*), 490 F. Supp. 2d 784, 787 n.4 (S.D. Tex. 2007); *Small v. Fritz Cos., Inc.*, 65 P.3d 1255, 1262-63 (Cal. 2003). The U.S. Supreme Court has refused to recognize holder claims under federal securities law, primarily due to their speculative nature and difficulties in proof. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734-735 (1975). The Court observed that "a putative plaintiff, who neither purchases nor

sells securities but sues instead for intangible economic injury such as loss of a noncontractual opportunity to buy or sell, is more likely to be seeking a largely conjectural and speculative recovery . . . ." *Id*. As the Court explained:

> The manner in which the defendant's violation caused the plaintiff to fail to act could be as a result of the reading of a prospectus, as respondent claims here, but it could just as easily come as a result of a claimed reading of information contained in the financial pages of a local newspaper. Plaintiff's proof would not be that he purchased or sold stock, a fact which would be capable of documentary verification in most situations, but instead that he decided *not* to purchase or sell stock. Plaintiff's entire testimony could be dependent upon uncorroborated oral evidence of many of the crucial elements of his claim, and still be sufficient to go to the jury. The jury would not even have the benefit of weighing the plaintiff's version against the defendant's version, since the elements to which the plaintiff would testify would be in many cases totally unknown and unknowable to the defendant. The very real risk in permitting those in respondent's position to sue under Rule 10b-5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him.

Blue Chip Stamps, 421 U.S. at 746. The Supreme Court concluded that holder claims were impermissible in federal Rule 10b-5 actions, recognizing that its holding might be viewed as "an arbitrary restriction which unreasonably prevents some deserving plaintiffs from recovering damages which have in fact been caused by violations of Rule 10b-5." *Id*. at 738. That disadvantage, however, was "attenuated to the extent that remedies are available to nonpurchasers and nonsellers under state law."[19] *Id*. at 739 n.9.

[19] We note that state law holder class actions are now preempted by the Securities Litigation Uniform Standards Act of 1998. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 87-88 (2006). Individual holder claims, however, remain state law actions. *See In re Countrywide Corp. S'holders Litig*., No. 34-64-VCN, 2009 Del. Ch. LEXIS 44, at *20 n.26 (Del. Ch. Mar. 31, 2009).

And yet, a number of courts have rejected such claims. *See Crocker v. FDIC*, 826 F.2d 347, 351 (5th Cir. 1987) (finding that an alleged "lost profit opportunity" under Mississippi law was "too speculative to state any injury . . . apart from a diminution in the value of [] stock"; claim could not, therefore, be brought as a nonderivative claim); *Newby*, 490 F. Supp. 2d at 803 (guessing that this Court would not recognize holder claims or, if it did, would do so only if heightened pleading standards were satisfied); *WM High Yield Fund v. O'Hanlon*, No. 04-3423, 2005 U.S. Dist. LEXIS 33569, at *41-*42 (E.D. Pa. Apr. 29, 2005) (predicting that the Pennsylvania Supreme Court would not recognize holder claims); *Arnlund v. Deloitte & Touche LLP*, 199 F. Supp. 2d 461, 489-90 (E.D. Va. 2002); *Chanoff v. U.S. Surgical Corp*., 857 F. Supp. 1011, 1019 (D. Conn. 1994) (holding that state law claims for damages based on failure to sell or hedge stock are "too speculative to be actionable"), *aff'd*, 31 F.3d 66 (2d Cir. 1994); *Dloogatch v. Brincat*, 920 N.E.2d 1161, 1168-69 (Ill. Ct. App. 2009) (dismissing holder claim because plaintiffs failed to plead reliance with sufficient specificity and did not show that they suffered a compensable loss); *cf. Holmes v. Grubman*, 691 S.E.2d 196, 199 (Ga. 2010) ("In many of the decisions on which Appellees rely, holder claims were not categorically rejected, but the plaintiffs failed to allege or prove that they specifically desired to sell their stock at a certain time, or causation was not sufficiently alleged or proved.").

Conversely, courts in several states (including California,[20] Massachusetts,[21] New Jersey,[22] and New York[23]) have recognized holder claims. Those decisions generally observe that fraud does not cease being so when it induces a party to refrain from acting. *See, e.g.*, *Gutman v. Howard Sav. Bank*, 748 F. Supp. 254, 264 (D.N.J. 1990) ("Lies which deceive and injure do not become innocent merely because the deceived continue to do something rather than begin to do something else."). Because "[i]nducement is the substance of reliance[,] the form of reliance—action or inaction—is not critical to the actionability of fraud." *Id*. The Restatement (Second) of Torts is in accord. RESTATEMENT (SECOND) OF TORTS § 525 ("One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act *or to refrain from action* in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.") (emphasis added); *see also id.* §§ 531, 551. Most recently, the Georgia Supreme Court, on certified question from the Second Circuit Court of Appeals, held that holder claims were cognizable under Georgia law. *Holmes*, 691 S.E.2d at 200.

But even those courts that have recognized holder claims in some form generally have demanded that plaintiffs meet heightened pleading and proof standards. *See id.* (holding that "although we have determined that holder claims should be recognized under Georgia law, we further conclude that the limitations imposed in other jurisdictions are appropriate"); *see also Newby*

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[20] *Small v. Fritz Cos*., 65 P.3d 1255, 1264 (Cal. 2003).

[21] *David v. Belmont*, 197 N.E. 83, 85 (Mass. 1935).

[22] *Gutman v. Howard Sav. Bank*, 748 F. Supp. 254, 264 (D.N.J. 1990).

[23] *The Cont'l Ins. Co. v. Mercadante*, 225 N.Y.S. 488, 491 (N.Y. App. Div. 1927).

v. Enron Corp. (*In re Enron Corp. Sec., Derivative & "ERISA" Litig.*), No. MDL-1446, 2007 U.S. Dist. LEXIS 17374 at *45-*46 (S.D. Tex. Mar. 12, 2007); *Rogers v. Cisco Sys*., 268 F. Supp. 2d 1305, 1314 (N.D. Fla. 2003) (guessing that Florida courts would recognize holder claims but would require "the specificity in allegations of reliance recently recognized by the Supreme Court of California's [*Small v. Fritz*] decision"). Some require more exacting allegations and evidence of reliance,[24] while others require a showing that parties held onto securities as a result of information they received through some direct communication with the defendants.[25]

The sole reported Texas case to permit a holder claim involved just such facts. *See Shirvanian*, 2004 Tex. App. LEXIS 182. In that case, the plaintiffs, after having expressed an intent to sell their majority stock, received numerous in-person and over-the-phone reassurances from defendants that the company was experiencing no problems, and was in fact on the verge of profit. *Id.* at *5-*9. Both the president and chief financial officer of the company insisted that it would be

[24] *See Rogers*, 268 F. Supp. 2d at 1314 (dismissing holder claims under Florida law because plaintiffs failed to allege how many shares they would have sold and when they would have sold them); *Small*, 65 P.3d at 1265 (requiring holder plaintiffs to allege specific reliance, "for example, that if the plaintiff had read a truthful account of the corporation's financial status the plaintiff would have sold the stock, how many shares the plaintiff would have sold, and when the sale would have taken place" and requiring allegations of "actions, as distinguished from unspoken and unrecorded thoughts and decisions").

[25] *See Gutman*, 748 F. Supp. at 266 (allowing holder claim to proceed because claim involved "direct dealings with defendants in which the latter made certain of the representations complained of"); *N.Y. City Employees' Ret. Sys. v. Ebbers* (*In re WorldCom, Inc. Sec. Litig.*), 382 F. Supp. 2d 549, 559-60 (S.D.N.Y. 2005) (predicting that New York would recognize a holder claim where plaintiff pleads specific direct communication with defendant to show actual reliance); *Goldin v. Salomon Smith Barney, Inc.*, 994 So. 2d 517, 520 (Fla. Ct. App. 2008) (noting the "great weight of authority concluding that with holder claims, the direct communication requirement is a logically necessary sub-element of justifiable reliance under New York law"); *Holmes v. Grubman*, 691 S.E.2d 196, 199 (Ga. 2010) (requiring direct communication and observing that "'[t]he Supreme Court considered the typical fraud context to be one in which the parties knew each other and the alleged misrepresentations occurred through direct communication'" (quoting *Gutman*, 748 F. Supp. at 265)); *see also In re Parmalat Sec. Litig.*, 477 F. Supp. 2d 602, 611 (S.D.N.Y. 2007) (noting that email, "a direct communication made in response to the [plaintiffs'] inquiry," showed justifiable reliance for holder claim).

unwise for plaintiffs to sell their stock, and, in reliance on their statements, the plaintiffs refrained from doing so. *Id*. Immediately thereafter, the company issued several press releases reporting that it had not met its projected earnings, and the stock price plummeted. *Id*. at *11.

The court held that plaintiffs' "claims [were] qualitatively different than those in cases . . . where the basis for the fraud claims are financial statements, annual reports, SEC filings or similar public communications. In those cases, in the absence of direct misrepresentations, plaintiffs often are not able to establish the requisite elements of their fraud claim."[26] *Id*. at *29. This holding is consistent with decisions in other jurisdictions that have permitted holder claims only upon proof of direct communication. *See, e.g.*, *New York City Employees' Ret. Sys. v. Ebbers* (*In re WorldCom, Inc. Sec. Litig*.), 382 F. Supp. 2d 549, 559 (S.D.N.Y. 2005) (holding that "there must be a sufficiently direct communication from the defendant to the plaintiff to support a claim that the fraud induced inaction"); *Gutman*, 748 F. Supp. at 266 (holding that a holder claim may proceed where "plaintiffs allege that misrepresentations were directed at them to their injury").

In line with *Shirvanian*, a federal district court sitting in Texas refused to acknowledge holder claims in which there were no "allegations of any direct or personal communication" between plaintiffs and defendants. *Newby*, 2007 U.S. Dist. LEXIS 17374 at *53. In *Newby*, institutional investors sued JPMorgan Chase for allegedly misrepresenting Enron's financial strength in analyst reports that were reiterated in financial news outlets, and for conspiring with Enron to produce

[26] The court of appeals later withdrew this opinion, substituting another holding that, because the plaintiffs' only injury was the decline in share value, the claims were derivative and could be asserted only on the corporation's behalf. *Shirvanian v. DeFrates*, 161 S.W.3d 102, 110 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (applying Delaware law). Grant Thornton does not make such a claim here, and we express no opinion on the subject.

fraudulent financial statements. *Id*. at *4. Predicting "that [this Court] would limit, if not totally exclude, holder claims under Texas common law fraud," the court rejected the investors' claims:

> Plaintiffs' Second Amended Complaint clearly indicates that the sources of information on which Plaintiffs relied were Enron's SEC financial statements, which JPMorgan's transactions allegedly "helped make false," and which were issued to the public at large, as well as on analyst reports, financial information services and news, all disseminated to the public at large, but not on any direct or specifically targeted contact between Plaintiffs and JPMorgan. Plaintiffs also claim they relied on "information created by Defendant and disseminated through various media outlets to Plaintiffs and other investors," again a public misrepresentation, not a direct communication. Furthermore none of these sources of information has been pleaded with specificity. Without particularity in the pleading of the misrepresentations or of actual and justifiable reliance based on direct communication, the Pandora's box of vexatious and meritless suits feared by the *Blue Chip Stamps* Court in affirming the Birnbaum rule would be realized in Texas state courts under common law fraud.

Id. at *51-*52.

We agree with those courts that have concluded that holder claims, to the extent they are viable, must involve a direct communication between the plaintiff and the defendant. Those claims are less like holder claims and more like the "ordinary case of deceit" described by the U.S. Supreme Court. *Blue Chip Stamps*, 421 U.S. at 744 (noting that "a misrepresentation which leads to a refusal to purchase or to sell is actionable in just the same way as a misrepresentation which leads to the consummation of a purchase or sale"). But this is not such a case.

It is undisputed that the Funds had no direct communications with Grant Thornton. Rather, the alleged misrepresentations were in publicly available documents. In fact, Deadman testified that his review of the audit reports and financial statements would have been via an online source

available to any member of the public.[27] We need not decide today whether a holder claim involving more specific and direct communications is actionable under Texas law because this is not such a claim; we merely decline to permit such a claim in the absence of any direct communication. We hold, therefore, that Grant Thornton was entitled to judgment as a matter of law on the Funds' holder claims.

IV. Conspiracy and aiding and abetting[28]

The Funds argue that, even if Grant Thornton itself did not commit fraud, it conspired with Epic in defrauding the Funds. Similarly, the Funds' aiding and abetting claim is based on Grant Thornton's alleged assistance to Epic in "making false statements . . . regarding the escrow account and the financial condition of Epic Resorts." Both claims are premised on misrepresentations, but the only misrepresentations the Funds have identified are those in the audit reports, financial statements, and negative assurance statement. Because the fraud claim based on those misrepresentations fails, the conspiracy and aiding and abetting claims dependent on that fraud fail as well. *See Pacific Mutual*, 51 S.W.3d at 583 (holding that because fraud claim against auditor failed, this "necessarily dispose[d] of [conspiracy and aiding and abetting] claims," which were "premised on [the auditor's] alleged fraud").

V. Conclusion

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[27] To the extent the Funds argue that the 1999 negative assurance statement was a direct representation to U.S. Trust, the Funds' representative, that claim fails for the reasons outlined above. *See* II.B.2, *supra*.

[28] As in *Pacific Mutual*, "[b]ecause of our disposition, we do not consider whether Texas law recognizes a cause of action for 'aiding and abetting' fraud separate and apart from a conspiracy claim." *Pacific Mutual*, 51 S.W.3d at 583 n.7.

Cayman was outside Grant Thornton's scope of liability as to the December 2000 bond purchase, and there is no evidence of justifiable reliance by any of the Funds as to purchases in 2001 or as to the 1999 negative assurance statement. The Funds' holder claims fail in the absence of a direct communication. No evidence supports the Funds' conspiracy and aiding and abetting claims. We reverse in part the court of appeals' judgment and render judgment that the Funds take nothing. TEX R. APP. P. 60.2(c).

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Wallace B. Jefferson
Chief Justice

Opinion Delivered: July 2, 2010

The Funds' Purchases of Epic Bonds

Date	Purchaser	Face Amount	Purchase Price as Percent of "Par" Value	Total Purchase Price
12/10/98	Prospect	1,000,000	100	1,000,000
08/09/99	Prospect	1,000,000	87	870,000
11/19/99	Prospect	1,000,000	78	780,000
12/15/99	**Epic makes scheduled semi-annual interest payment of $8.45 million.**			
04/14/00	**Epic's 1999 10-K (including Grant Thornton 1999 Audit Report) filed. Grant Thornton provides negative-assurance statement to Epic.**			
6/15/00	**Epic makes scheduled semi-annual interest payment of $8.45 million.**			
12/13/00	Cayman	410,000	25	102,500
12/15/00	**Epic makes scheduled semi-annual interest payment of $8.45 million.**			
Early Q1/01	**Deadman learns that Prudential will not renew Epic's credit arrangement.**			
03/02/01	Pam Capital	6,000,000	28	1,680,000
03/05/01	Pam Capital	3,000,000	30.25	907,500
03/05/01	Pam Capital	3,000,000	30	900,000
03/05/01	PAMCO	2,000,000	30	600,000
03/13/01	PAMCO	10,000,000	26.75	2,675,000
03/13/01	Cayman	5,390,000	27.5	1,482,250
03/20/01	Cayman	3,430,000	28.125	964,687
03/20/01	PAMCO	4,000,000	28.125	1,125,000
03/20/01	Pam Capital	4,000,000	28.125	1,125,000
04/17/01	**Epic's 2000 10-K (including Grant Thornton 2000 Audit Report) filed.**			
04/26/01	Prospect	1,000,000	23.5	235,000
04/26/01	Cayman	7,000,000	23.5	1,645,000
05/21/01	Pam Capital	4,000,000	23.75	950,000
06/15/01	**Epic does not make scheduled semi-annual interest payment.**			
06/19/01	Pam Capital	10,537,000	38.25	4,030,402
06/20/01	Pam Capital	1,000,000	40.5	405,000
07/19/01	**The Funds force Epic into bankruptcy.**			
02/22/02	**The Funds sue Grant Thornton.**			
02/26/02	Highland Crusader*	5,000,000	21	1,050,000
04/02/02	Highland Crusader*	17,000,000	26	4,420,000
04/24/02	PCMG*	4,000,000	26	1,040,000
04/04/03	PCMG*	5,000,000	26	1,300,000

* Highland Crusader Fund, Ltd. And PCMG Trading Partners, VII, L.P. were also funds managed by Deadman. The court of appeals affirmed summary judgment as to their claims, a decision not challenged in this Court.

IN THE SUPREME COURT OF TEXAS

NO. 06-1018

D.R. HORTON-TEXAS, LTD., PETITIONER,

v.

MARKEL INTERNATIONAL INSURANCE COMPANY, LTD., RESPONDENT

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

Argued September 8, 2009

JUSTICE WAINWRIGHT delivered the opinion of the Court.

JUSTICE GUZMAN did not participate in this decision.

In this dispute, a general contractor, as an additional insured on its subcontractor's commercial general liability (CGL) insurance policy, seeks a defense and coverage from the CGL insurer for alleged construction defects. The insurer claims that it has no duty, under the eight-corners doctrine, to provide a defense because the homeowners' petition in the underlying liability action did not implicate the insured, the subcontractor that performed the allegedly defective work. Further, because it has no duty to provide a defense, it claims it has no duty to indemnify the general contractor as well. We hold that the duty to indemnify is not dependent on the duty to defend and that an insurer may have a duty to indemnify its insured even if the duty to defend never arises. In determining coverage, a matter dependent on the facts and circumstances of the alleged injury-

causing event, parties may introduce evidence during coverage litigation to establish or refute the duty to indemnify. We accordingly reverse the court of appeals' judgment in part and affirm in part and remand to the trial court for proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

James and Cicely Holmes purchased a house built by D.R. Horton-Texas Ltd. The Holmeses claim that, soon after moving in, they discovered that mold had infested their home, and they sued D.R. Horton for remedial costs. They alleged that latent defects in the chimney, roof, vent pipes, windows, window frames, and flashing around the roof and chimney allowed water to enter the house, eventually causing mold damage. Their petition only identified D.R. Horton as responsible for the defects and negligent attempts to repair them. D.R. Horton claims that one of its subcontractors, Rosendo Ramirez, performed masonry work on the home as well as some of the repairs contributing to the alleged defects. He was neither sued in the lawsuit nor implicated by the pleadings.

Ramirez obtained a CGL policy from Markel International Insurance Company, Ltd. that named D.R. Horton as an additional insured entitled to coverage for claims against it arising from Ramirez's work. After the Holmeses sued D.R. Horton, D.R. Horton sought coverage from Markel. Markel refused to defend D.R. Horton because the underlying plaintiffs' petition did not plead facts indicating that Ramirez's work was defective and, therefore, did not invoke coverage under Ramirez's CGL policy for D.R. Horton. D.R. Horton obtained counsel at its own expense for the Holmeses' lawsuit and settled with the Holmeses during voir dire.

D.R. Horton sued Markel for reimbursement of defense costs and the settlement payment.[1] Markel moved for summary judgment, arguing it had no duty to defend D.R. Horton in the underlying litigation because the Holmeses' petition did not contain allegations triggering coverage. D.R. Horton responded to the motion by arguing that, although the eight-corners doctrine may limit Markel's duty to defend and indemnify D.R. Horton, the Holmeses' pleadings should be liberally construed in favor of a defense and coverage. It attached evidence to its response including affidavits, inspection reports, Ramirez's contract with D.R. Horton, Ramirez's insurance contracts and policies, depositions from the Holmeses' case, and mold investigation reports. Markel objected to some of the evidence D.R. Horton offered. The trial court overruled Markel's objections to the evidence, but granted summary judgment in Markel's favor on both grounds. The court of appeals affirmed the trial court's ruling that Markel did not owe D.R. Horton a duty to defend or indemnify it against the claims brought by the Holmeses. It further explained that the eight-corners doctrine precluded D.R. Horton's claim that Markel owed it a duty to defend because there were no allegations on the face of the Holmeses' petition that implicated Ramirez's work. The court of appeals reasoned that because Markel had no duty to defend, it also had no duty to indemnify D.R. Horton. *See* ___ S.W.3d ___ (citing *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997)). D.R. Horton appeals to this Court, challenging the court of appeals' judgment on Markel's duty to defend and duty to indemnify it against the Holmeses' lawsuit.

[1] D.R. Horton also sued Sphere Drake Insurance, Ltd., seeking coverage for the Holmeses' claims, but Sphere Drake is not a party to this appeal.

II. PRESERVATION

D.R. Horton argues that the court of appeals erred by not recognizing an exception to the eight-corners doctrine, also known as the complaint allegation rule, to allow parties to introduce extrinsic evidence relating to coverage-only facts in the duty to defend analysis. Markel argues that D.R. Horton waived this issue, and we agree.

We do not decide D.R. Horton's argument for this Court to recognize an exception to the eight-corners doctrine because it did not raise this argument in the trial court or in the court of appeals until its second motion for rehearing, after our opinion issued in *Guideone Elite Insurance Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006).

In summary judgment practice, "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c); *see also* TEX. R. APP. P. 33(a)(1) (requiring that the record show that a claim was raised in the trial court in order to present it for appellate review); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993) (explaining that summary judgment motions and responses, or answers to those motions, must stand or fall on the grounds expressly presented to the trial court). A non-movant must present its objections to a summary judgment motion expressly by written answer or other written response to the motion in the trial court or that objection is waived. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677–79 (Tex. 1979); *see also James v. Brown*, 637 S.W.2d 914, 917 (Tex. 1982).

D.R. Horton, in its response to Markel's summary judgment motion, argued that the eight-corners doctrine governs the analysis and that the Holmeses' petition should be liberally construed.

Arguing for a liberal construction of the plaintiff's pleadings is not equivalent to challenging the eight-corners doctrine or to requesting an exception to it. *See* TEX. R. CIV. P. 166a(c). Therefore, we do not disturb the court of appeals' judgment on the duty to defend and only address D.R. Horton's second issue: Whether the court of appeals erred in affirming the trial court's grant of Markel's motion for summary judgment on the duty to indemnify, even though D.R. Horton submitted evidence with its summary judgment response that raised fact questions as to whether Markel had an independent duty to provide coverage for D.R. Horton under Ramirez's CGL policy. We review a trial court's grant of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

III. DISCUSSION—DUTY TO INDEMNIFY

"In liability insurance policies generally, an insurer assumes both the duty to indemnify the insured, that is, to pay all covered claims and judgments against an insured, and the duty to defend any lawsuit brought against the insured that alleges and seeks damages for an event potentially covered by the policy, even if groundless, false or fraudulent," subject to the terms of the policy. 14 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 200:3 (3d ed. 2009); *see also Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 490 (Tex. 2008). However, the duty to defend and the duty to indemnify "are distinct and separate duties." *Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004) (quoting *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002)). We noted in *Farmers Texas County Mutual Insurance Co. v. Griffin* that one duty may exist

without the other. 955 S.W.2d at 82. To that extent, the duties enjoy a degree of independence from each other.[2] *See Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821–22 (Tex. 1997).

While analysis of the duty to defend has been strictly circumscribed by the eight-corners doctrine, it is well settled that the "facts actually established in the underlying suit control the duty to indemnify." *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 656 (Tex. 2009); *Guideone*, 197 S.W.3d at 310; *Cowan*, 945 S.W.2d at 821. As with any other contract, breach or compliance with the terms of an insurance policy is determined not by pleadings, but by proof. *See, e.g., Progressive County Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 551 (Tex. 2003); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995). The duty to defend, however, is established according to the eight-corners doctrine, considering only the factual allegations in the pleadings and the terms of the policy. *Pine Oak*, 279 S.W.3d at 654; *Cowan*, 945 S.W.2d at 821.

The insurer's duty to indemnify depends on the facts proven and whether the damages caused by the actions or omissions proven are covered by the terms of the policy. Evidence is usually necessary in the coverage litigation to establish or refute an insurer's duty to indemnify. This is

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[2] *Couch on Insurance* explains the distinction in this manner:

> The distinction between the duty to defend and the duty to indemnify is based upon the time when the duties are determined. The duty to defend arises prior to the completion of litigation, and therefore insurers are required to meet their defense obligation before the scope of the insured's liability has been determined. In contrast, the duty to indemnify arises only once liability has been conclusively determined. In other words, because the duty to defend arises whenever an insurer ascertains facts that give rise to the possibility or the potential of liability to indemnify, the duty to defend must be assessed at the very outset of a case, unlike the duty to indemnify, which arises only when the insured's underlying liability is established.

14 COUCH ON INSURANCE § 200:3.

especially true when the underlying liability dispute is resolved before a trial on the merits and there was no opportunity to develop the evidence, as in this case. We hold that even if Markel has no duty to defend D.R. Horton, it may still have a duty to indemnify D.R. Horton as an additional insured under Ramirez's CGL insurance policy. That determination hinges on the facts established and the terms and conditions of the CGL policy.[3]

Markel reasons that if the terms of the policy, when read in light of the allegations asserted in the petition, do not give rise to a duty to defend, then proof of all of those allegations could not give rise to a duty to indemnify. It relies on *Griffin* for this proposition,[4] but the holding in *Griffin* was fact-specific and cannot be construed so broadly. *See* 955 S.W.2d at 84. In *Griffin*, the issue was whether facts developed in the underlying tort suit for injuries caused by a drive-by shooting could form the basis for coverage under an automobile insurance policy. *Id.* We explained in that case that no "facts can be developed in the underlying tort suit that can transform a drive-by shooting into an 'auto accident.'" *Id.* In that scenario, "the duty to indemnify is justiciable before the insured's liability is determined in the liability lawsuit when the insurer has no duty to defend and the same reasons that negate the duty to defend will likewise negate any possibility the insurer will ever have a duty to indemnify." *Id.* This conclusion was grounded on the impossibility that the

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[3] Federal courts have predicted this outcome under Texas law. *See Nat'l Union Fire Ins. Co. v. Puget Plastics Corp.*, 532 F.3d 398, 404 (5th Cir. 2008); *Swicegood v. Med. Prot. Co.*, No. Civ.A.3:95-CV-0335-D, 2003 WL 22234928, at*14 (N.D. Tex. Sept. 19, 2003).

[4] Several authorities have mistakenly cited *Griffin* for this proposition. *See, e.g., Reser v. State Farm Fire & Cas. Co.*, 981 S.W.2d 260, 263 (Tex. App.—San Antonio 1998, no pet.); *see also* 14 COUCH ON INSURANCE § 200:3 (citing *Grimes Constr., Inc. v. Great Am. Lloyds Ins. Co.*, 188 S.W.3d 805, 818 (Tex. App.—Fort Worth 2006) ("The duty to defend is thus broader than the duty to indemnify; if an insurer has no duty to defend, it has no duty to indemnify."), *rev'd on other grounds*, 248 S.W.3d 171 (Tex. 2008)).

drive-by shooting in that case could be transformed by proof of any conceivable set of facts into an auto accident covered by the insurance policy. It was not based on a rationale that if a duty to defend does not arise from the pleadings, no duty to indemnify could arise from proof of the allegations in the petition. These duties are independent, and the existence of one does not necessarily depend on the existence or proof of the other.

In *Griffin*, in fact, we recognized that it may be necessary to defer resolution of indemnity issues until after the underlying third-party litigation is resolved because coverage may turn on facts actually proven in the underlying lawsuit. *See id.*; *see also Guideone*, 197 S.W.3d at 310 (explaining that "the facts actually established in the underlying suit control the duty to indemnify"); *Utica*, 141 S.W.3d at 204–05 (affirming an insurer's duty to defend, but reversing and remanding on the duty to indemnify issue because whether indemnification under the policy was triggered required a "factual resolution"); *Cowan*, 945 S.W.2d at 821 (explaining that the "the duty to indemnify is triggered by the actual facts establishing liability in the underlying suit").

In this case, unlike *Griffin*, D.R. Horton presented evidence with its response to Markel's summary judgment motion that showed Ramirez was a subcontractor for D.R. Horton for the home, Ramirez performed masonry work and repairs allegedly contributing to the defects, and Markel's CGL policy for Ramirez named D.R. Horton as an additional insured. This evidence raises fact questions that defeat Markel's motion for summary judgment in this case on the duty to indemnify claim. Of course, other terms, conditions, exclusions, or exceptions in the policy or other proof may establish or refute, before or during trial, the existence of CGL coverage for D.R. Horton. The insurer and the putative insured may introduce evidence in coverage litigation to establish or refute

the insurer's duty to indemnify. Where disputed facts are proven in the liability case, whether none, some, or most of the material coverage facts will have been established in that underlying suit depends on the circumstances of the case and other legal and equitable principles.

IV. CONCLUSION

We affirm the court of appeals' judgment on the duty to defend, for different reasons, and reverse the court of appeals' judgment on the duty to indemnify. Accordingly, we remand the duty to indemnify issue to the trial court for proceedings consistent with this opinion.

Dale Wainwright
Justice

OPINION DELIVERED: December 11, 2009

IN THE SUPREME COURT OF TEXAS

NO. 06-1022

DEL LAGO PARTNERS, INC. AND DEL LAGO PARTNERS, L.P.,
DOING BUSINESS UNDER THE ASSUMED NAME OF
DEL LAGO GOLF RESORT & CONFERENCE CENTER,
AND BMC-THE BENCHMARK MANAGEMENT COMPANY, PETITIONERS,

v.

BRADLEY SMITH, RESPONDENT

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

Argued December 6, 2007

JUSTICE WILLETT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE GUZMAN joined.

JUSTICE HECHT filed a dissenting opinion, in which JUSTICE JOHNSON joined.

JUSTICE WAINWRIGHT filed a dissenting opinion.

JUSTICE JOHNSON filed a dissenting opinion, in which JUSTICE HECHT joined.

This appeal concerns a bar owner's liability for injuries caused when one patron assaulted another during a closing-time melee involving twenty to forty "very intoxicated" customers. The brawl erupted after ninety minutes of recurrent threats, cursing, and shoving by two rival groups of patrons. The jury heard nine days of conflicting evidence from twenty-one witnesses and found the

owner fifty-one percent liable. The court of appeals affirmed the roughly $1.48 million award: "A reasonable person who knew or should have known of the one-and-a-half hours of ongoing 'heated' verbal altercations and shoving matches between intoxicated bar patrons would reasonably foresee the potential for assaultive conduct to occur and take action to make the condition of the premises reasonably safe."[1] We agree with the court of appeals and affirm its judgment.

I. Background[2]

Bradley Smith was injured when a fight broke out among customers at the Grandstand Bar, part of the Del Lago resort on the shores of Lake Conroe.[3] The 300-acre resort consists of a conference center, hotel, golf course, marina, health spa and fitness center, and other facilities. The Grandstand Bar is located in the conference center.

Del Lago has a security force that includes two off-duty law enforcement officers — John Chancellor, the chief of the Shenandoah, Texas police department, and Lanny Moriarty, a lieutenant in the Montgomery County sheriff's department. Ruben Sanchez, a retired fireman and paramedic, was Del Lago's loss-prevention officer. At times up to six security personnel patrolled the resort. On the evening in issue, Chancellor and Moriarty were patrolling the resort in a golf cart. Sanchez

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[1] 206 S.W.3d 146, 157–58.

[2] Some of the evidence we recite is disputed, but "[i]t is the province of the jury to resolve conflicts in the evidence" and we must "assume that jurors resolved all conflicts in accordance with [the] verdict." *City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005).

[3] Smith sued Petitioners Del Lago Partners, Inc. and Del Lago Partners, L.P., doing business as Del Lago Golf Resort & Conference Center, and Petitioner BMC-The Benchmark Management Company (collectively "Del Lago"). The parties and the courts below have essentially treated Petitioners as a single entity that owned and operated the bar, and the parties do not quarrel with this treatment. The trial-court judgment was entered against all of these entities collectively.

was also on duty.

Smith attended a Sigma Chi fraternity reunion at Del Lago from Friday to Sunday, June 8–10, 2001. On Friday evening he stayed at the bar until it closed. Smith and fellow fraternity member Spencer Forsythe testified that a uniformed officer was on duty in the bar for several hours that evening. The officer removed an unruly and intoxicated fraternity member and made everyone leave the bar at midnight, an hour before the usual closing time.

On Saturday, fraternity members and guests attended a reception and dinner at the conference center. Del Lago provided a cash bar. Around 9:00 p.m., Smith and other fraternity members proceeded to the Grandstand Bar, which was very busy. As many as seven employees were working in the bar that evening. Later that evening, a group of ten to fifteen mostly male members of a wedding party entered the bar. Fraternity member Toby Morgan testified that soon after the wedding party arrived, there was tension in the air, tension that grew as the night went on. Forsythe testified that within ten to fifteen minutes of the wedding party's arrival, verbal confrontations between the wedding party and some of the forty remaining fraternity members began. These heated confrontations involved cursing, name-calling, and hand gestures.

Fraternity member Cesar Lopez testified that the animosity between the two groups arose when one of the fraternity members made an offensive comment to the date of one of the wedding-party members. The comment led to men squaring up to each other, with "veins popping out of people's foreheads." Del Lago waitress Elizabeth Sweet observed the exchanges, describing them as "talking ugly" and consisting of cursing, threats, and heated words. Sweet testified that the participants appeared drunk and that these confrontations recurred throughout a ninety-minute

period. Morgan observed that the bar patrons were "very intoxicated" that night.

The verbal confrontations led to physical altercations. Forsythe testified that the first pushing and shoving match started after about ten minutes of yelling. Smith testified that he saw at least two physical incidents over the course of the evening. He saw a member of the wedding party square up chest to chest with a fraternity member, both pointing at each other and yelling and neither backing down. After three to five "very tense" minutes, the episode ended. Smith also saw a wedding-party member walk up to a group of fraternity members and push them from behind. The man cocked his arm back, but before anything further could happen other wedding-party members dragged him away.

Between 1:00 and 1:30 a.m., Forsythe saw some fraternity members and wedding-party members in each others' faces, and "things started getting really heated." The rest of the fraternity members walked over and saw that the confrontation was "getting to the serious point." Fifteen to twenty minutes before the final fight broke out, Smith heard yelling between the two groups.

Witnesses described more than one "pushing" match that evening. At least three witnesses described a particularly heated and intense shoving match that took place a few minutes before the ultimate fracas. The shoving match was followed by shouting and cursing.

Tensions finally came to a head when the bar staff attempted to close the bar. After the crowd refused to leave, the staff went table to table and formed a loose line to funnel the customers toward a single exit and into the conference center lobby. Smith testified that the staff was literally pushing the hostile parties out of the bar through the exit, prompting a free-for-all. He recalled that "it was just a madhouse," with punches, bottles, glasses, and chairs being thrown, and bodies "just

surging." In Forsythe's words, "all heck broke loose" with pushing, shoving, kicking, and punching. He recalled that after the patrons had been "corralled" by the bar staff they were forced out of the bar:

> I only remember one of the wait staff, and it was a female, and she was very close to the door, and she was very obnoxious, very belligerent, and saying, "Y'all get the 'F' out. All of y'all, get the 'F' out of here. Take the F-ing fight out of here. Get out." [And she] just pushed – matter of fact, one of our guys fell down, and she was pushing him while he was on the ground. "Just get the 'F' out. Get the 'F' out."

No one could give an exact number of fight participants, but estimates ranged from twenty to forty men, about equally divided between the wedding party and the fraternity.

Smith was standing against a wall observing the fight when he saw his friend Forsythe shoved to the floor. Smith knew Forsythe had a heart condition and waded into the scrum to remove him. By this time, the fight had moved into the lobby. Before Smith could extricate himself, an unknown person grabbed him and placed him in a headlock. Momentum carried Smith and his attacker into a wall, where Smith's face hit a stud. Smith suffered severe injuries including a skull fracture and brain damage.

Estimates of the fight's duration varied, but most testimony placed it between three and fifteen minutes. Waitress Sweet testified that "it wasn't a quick fight." The fight ended when a woman became caught up in it and was pushed to the ground.

After the fight began, Sweet went to the phone in the bar to call security. Next to the phone was a list of numbers, but none was for security. Sweet called the front desk to get the number. Instead of calling security, the front desk gave the number to Sweet. Instead of immediately calling the number given, Sweet passed it over to a bartender for him to make the call. Once the call was

made, the two security guards on duty, Officers Chancellor and Moriarty, responded swiftly, arriving within two to three minutes. Del Lago's loss-prevention officer, Sanchez, also responded and arrived within fifteen to twenty seconds of receiving the call. By the time he arrived, the fight was over.

Smith brought a premises-liability claim against Del Lago. After a nine-day trial involving twenty-one witnesses, the jury sifted through the conflicting evidence and found Del Lago and Smith both negligent, allocating fault at 51-49 percent in favor of Smith. The trial court reduced the jury's actual-damages award by forty-nine percent, and awarded Smith $1,478,283, together with interest and costs. A divided court of appeals affirmed.[4]

II. Discussion

A. Duty

Del Lago principally argues that it had no duty to protect Smith from being assaulted by another bar customer. In a premises-liability case, the plaintiff must establish a duty owed to the plaintiff, breach of the duty, and damages proximately caused by the breach.[5] Whether a duty exists is a question of law for the court and turns "on a legal analysis balancing a number of factors, including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant."[6] In premises-liability cases, the scope of the duty turns on the plaintiff's

[4] 206 S.W.3d at 164.

[5] *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

[6] *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 217, 218 (Tex. 2008).

status.[7] Here, Smith was an invitee, and generally, a property owner owes invitees a duty to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition about which the property owner knew or should have known.[8]

We have not held that a bar proprietor always or routinely has a duty to protect patrons from other patrons, and do not so hold today. Nor have we held that a duty to protect the clientele necessarily arises when a patron becomes inebriated, or when words are exchanged between patrons that lead to a fight, and do not so hold today.

Generally, a premises owner has no duty to protect invitees from criminal acts by third parties.[9] We have recognized an exception when the owner knows or has reason to know of a risk of harm to invitees that is unreasonable and foreseeable.[10] In *Timberwalk Apartments, Partners, Inc. v. Cain*, we addressed the circumstances under which an apartment owner could be held liable for failing to prevent the sexual assault of a tenant. In addressing the element of foreseeability, we stated that

> courts should consider whether any criminal conduct previously occurred on or near the property, how recently it occurred, how often it occurred, how similar the conduct was to the conduct on the property, and what publicity was given the occurrences to indicate that the landowner knew or should have known about them.[11]

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[7] *Urena*, 162 S.W.3d at 550.

[8] *Id.*; *see also Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998) (holding that premises liability claim was asserted when plaintiff claimed "defendants' failure to provide adequate security measures created an unreasonable risk of harm that defendants knew or should have known about and yet failed to correct").

[9] *Timberwalk Apartments*, 972 S.W.2d at 756.

[10] *Id.*

[11] *Id.* at 757.

Timberwalk recognized that "crime is increasingly random and violent and may possibly occur almost anywhere," and therefore rejected the imposition of a general duty to protect tenants "whenever crime *might* occur," since such a "duty would be universal."[12] *Timberwalk* provides a framework for analyzing how prior criminal conduct influences "what the premises owner knew or should have known" before the criminal act that injured the plaintiff.[13]

The *Timberwalk* factors — proximity, recency, frequency, similarity, and publicity — guide courts in situations where the premises owner has no direct knowledge that criminal conduct is imminent, but the owner may nevertheless have a duty to protect invitees because past criminal conduct made similar conduct in the future foreseeable. The *Timberwalk* factors are not the only reasons that a criminal act might be deemed foreseeable.[14] Although the court of appeals in this case considered prior criminal acts on the Del Lago premises in conducting an analysis of the *Timberwalk* factors,[15] we find those factors inapplicable to today's case.

The nature and character of the premises can be a factor that makes criminal activity more foreseeable.[16] In this case, the fight occurred in a bar at closing time following ninety minutes of

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[12] *Id.* at 756.

[13] *Id.* at 757.

[14] *Id*. at 759 (Spector, J., concurring) (stating that consideration of "other types of evidence" besides "similar incidents in the immediate vicinity" should be allowed in making foreseeability determination); *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654, 665 (Tex. 1999) (Baker, J., concurring) (stating that "the *Timberwalk* factors are not exclusive"); *id.* at 668 (O'Neill, J., dissenting) (seeing nothing in *Timberwalk* decision "to suggest that these factors are meant to be exclusive").

[15] 206 S.W.3d at 154–55, 158–59.

[16] *Mellon Mortgage*, 5 S.W.3d at 668 n.2 (O'Neill, J., dissenting) (collecting authorities); *Timberwalk Apartments*, 972 S.W.2d at 759–60 (Spector, J., concurring).

heated altercations among intoxicated patrons. As amicus curiae Mothers Against Drunk Driving notes, and as common sense dictates, intoxication is often associated with aggressive behavior.[17] According to the United States Department of Justice, alcohol use accompanies almost forty percent of all violent crimes.[18] Del Lago's security officer, Chancellor, agreed that threatening conversations are serious and that when intoxicated people start arguing, the "[n]ext thing you know," punches are thrown. He further testified that when faced with rowdy, verbally abusive people, he tries to separate them, and that in a bar atmosphere, removal of such patrons is warranted because, obviously, verbal confrontations "can escalate into a fight." That concern might have been the reason Del Lago removed a drunk patron from the bar the previous evening and closed the bar an hour early.

More generally, criminal misconduct is sometimes foreseeable because of immediately preceding conduct. The Second Restatement of Torts explains that since the landowner "is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, *or are about to occur*."[19] If "he should reasonably anticipate . . . criminal conduct on the part of third persons, either generally *or at some particular time*, he may be under a duty to take precautions against it."[20] The Third Restatement of Torts clarifies further: "[I]n certain situations criminal misconduct is sufficiently

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[17] Amicus curiae Pacific Legal Foundation similarly notes: "It cannot be denied that the consumption of alcohol increases the likelihood that people will exercise poor judgment, often leading to altercations."

[18] Lawrence A. Greenfield, U.S. Dep't of Justice, Bureau of Justice Statistics, *Alcohol and Crime: An Analysis of National Data on the Prevalence of Alcohol Involvement in Crime*, at iii, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ac.pdf (last visited March 29, 2010).

[19] RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965) (emphasis added).

[20] *Id.* (emphasis added).

foreseeable as to require a full negligence analysis of the actor's conduct. Moreover, the actor may have sufficient knowledge of the *immediate circumstances* . . . to foresee that party's misconduct."[21] As we have recognized, when a property owner "by reason of location, mode of doing business, or observation or past experience, should reasonably anticipate criminal conduct on the part of third persons, . . . [the owner] has a duty to take precautions against it."[22] This duty is recognized because "the party with the power of control or expulsion is in the best position to protect against the harm."[23]

In this case, Del Lago observed — but did nothing to reduce — an hour and a half of verbal and physical hostility in the bar. From the moment the wedding party entered, there was palpable and escalating tension. Del Lago continued to serve drunk rivals who were engaged in repeated and aggressive confrontations.

That a fight broke out was no surprise, according to the testimony of three fraternity members. According to Forsythe, everyone could tell serious trouble was brewing. Another fraternity member agreed that the fight was not unexpected but merely "a matter of time." A third characterized the situation as "very, very obvious"; if you did not see it you were "blind or deaf or [didn't] care."

We hold that Del Lago had a duty to protect Smith because Del Lago had actual and direct

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[21] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 cmt. f (2010) (emphasis added).

[22] *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993) (quoting *Morris v. Barnette*, 553 S.W.2d 648, 650 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.)); *see also Garner v. McGinty*, 771 S.W.2d 242, 246 (Tex. App.—Austin 1989, no writ) ("[W]e hold that a business invitor owes a duty to his business invitees to take reasonable steps to protect them from intentional injuries caused by third parties if he knows or has reason to know, from what he has observed or from past experience, that criminal acts are likely to occur, either generally or at some particular time.").

[23] *Tidwell*, 867 S.W.2d at 21 (internal quotation marks omitted).

knowledge that a violent brawl was imminent between drunk, belligerent patrons and had ample time and means to defuse the situation. Del Lago's duty arose not because of prior similar criminal conduct but because it was aware of an unreasonable risk of harm at the bar that very night. When a landowner "has *actual* or constructive knowledge of any condition on the premises that poses an unreasonable risk of harm to invitees, he has a duty to take whatever action is reasonably prudent" to reduce or eliminate that risk.[24]

JUSTICE WAINWRIGHT would hold that the risk of injury was not an *unreasonable* risk. He correctly notes that a property owner's duty to invitees extends only to reduce or eliminate an unreasonable risk of harm created by a premises condition.[25] Under the circumstances of this case, we think Smith faced an unreasonable risk of harm.

The unreasonableness of a risk cannot be completely separated from its foreseeability. It turns on the risk and likelihood of injury to the plaintiff, which for the reasons described above were substantial, as well as the magnitude and consequences of placing a duty on the defendant.[26] We do not see the burden of imposing a duty on Del Lago to take reasonable steps to protect patrons of the Grandstand Bar from potentially serious injury as unwarranted in these circumstances. Del Lago is a huge, multi-use facility covering hundreds of acres that provides entertainment and lodging to scores of guests daily. Like any similar facility, it recognized the need to provide private security

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[24] *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 295 (Tex. 1983) (emphasis added).

[25] *See W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

[26] *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) ("In determining whether the defendant was under a duty, the court will consider several interrelated factors, including 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 the consequences of placing the burden on the defendant.").

throughout the resort. It did so through a trained security force.

We do not announce a general rule today. We hold only, on these facts, that during the ninety minutes of recurrent hostilities at the bar, a duty arose on Del Lago's part to use reasonable care to protect the invitees from imminent assaultive conduct. The duty arose because the likelihood and magnitude of the risk to patrons reached the level of an unreasonable risk of harm, the risk was apparent to the property owner, and the risk arose in circumstances where the property owner had readily available opportunities to reduce it.[27]

B. Breach of Duty

Del Lago also contends that, assuming it had a duty to Smith, the evidence was legally insufficient on the essential elements of breach of duty and proximate causation. "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review."[28] We must view the evidence in the light most favorable to the verdict[29] and "must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not."[30]

A reasonable and fair-minded jury could find that Del Lago breached its duty of care to Smith by failing to take reasonable steps to defuse the dangerous situation at the bar. Del Lago's duty was

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[27] *See Eastep v. Jack-in-the-Box, Inc.*, 546 S.W.2d 116, 118 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) ("[A] long and continued course of conduct [is not required] to find that the proprietor had knowledge of the violent disposition of the other patron — all that is necessary is that there be a sequence of conduct sufficiently long to enable the proprietor to act for the patron's safety." (quoting *Coca v. Arceo*, 376 P.2d 970, 973 (N.M. 1962))).

[28] *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

[29] *Id.* at 822.

[30] *Id.* at 827.

to "take whatever action [was] reasonably prudent under the circumstances to reduce or to eliminate the unreasonable risk from that condition."[31] We have alternatively described the duty as requiring the premises owner to "either adequately warn of the dangerous condition or make the condition reasonably safe."[32]

The jury could have found that Del Lago breached its duty because security failed to monitor and intervene during the extended period when the two groups in the bar were becoming more and more intoxicated and antagonistic. Officers Chancellor and Moriarty, the uniformed security personnel on duty that night, testified that they would usually go through the bar five to eight times a night, but they did not have specific recollections of going through the bar that particular evening. At the time of the fight, the bar was the only place at the resort serving alcohol, and the security office was aware that the bar was crowded, but no witness saw any security in the bar during the

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[31] *TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 764–65 (Tex. 2009) (quoting *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 295 (Tex. 1983)).

[32] *Id.* at 765. JUSTICE JOHNSON's position, as we understand it, is that Del Lago cannot be liable unless *both* its failure to warn and its failure to make the premises safe independently caused Smith's injuries. We do not read Texas law as imposing such a universal requirement. We have recognized that owners must *adequately* warn or make safe, *id.*, and in some circumstances no warning can adequately substitute for taking reasonably prudent steps to make the premises safe. In today's case, a permanent sign warning bar patrons to "drink at your own risk," or a warning the night of the melee that a fight was imminent, hardly seems an adequate substitute for calling security or taking other reasonable steps during the course of the evening to prevent the fight. Further, as explained below, JUSTICE JOHNSON's view would revive the abandoned doctrine of voluntary assumption of the risk by completely barring recovery in cases where the premises condition was open and obvious, and where, therefore, a failure to warn could not have caused the injury.

Insofar as JUSTICE JOHNSON believes the jury charge required the jury to find that both a failure to warn and a failure to make the premises safe caused the injuries, Del Lago does not make this argument, and we do not so read the charge. The charge does not require separate proximate cause findings on failure to warn and failure to make safe to impose liability. It states that Del Lago's negligence could consist of the failure to use ordinary care "by both failing to adequately warn Bradley Smith of the condition and failing to make that condition reasonably safe." The jury could have and apparently did find that no warning would have been adequate under the circumstances, and that Del Lago was negligent in failing to use ordinary care to make the premises safe. Ordinary care as defined in the charge "means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances." The jury could have construed the charge to mean, and could have made the factual finding, that ordinary care under the circumstances required something other than a warning.

ninety minutes of yelling, threatening, cursing, and shoving between drunk patrons. Waitress Sweet specifically testified that she did not see security throughout the ninety minutes preceding the fight. The bar staff continued to serve drinks and did not call security until after the fight started. In contrast, security was on duty for hours in the bar the previous night and had ejected a drunk and unruly fraternity member.

There was legally sufficient evidence for the jury to conclude that Del Lago bar personnel were fully aware of the events transpiring in the bar and nevertheless unreasonably neglected to notify security. Forsythe testified that while the repeated confrontations were occurring, the wait staff and bartenders were watching and did nothing. Del Lago's security expert agreed at trial that he would "certainly" want the bar staff to call security after ninety minutes of serious verbal confrontations and at least one shoving match, if the staff did not feel the situation was under control. In his deposition, referred to at trial, he "absolutely" agreed that if his wife was in a bar that had experienced an hour and a half of verbal confrontations, he would want the bar staff to call security. Instead of calling security, asking patrons to leave, or otherwise bringing the situation under control, the bar staff continued to serve drinks.

The jury also could have found negligence on Del Lago's part by finding that bar personnel were not provided with the training and information needed to immediately notify security of an emergency; that the front desk failed to immediately notify security of the fight when the front desk was informed of the crisis, and instead gave the number for security back to a bar waitress to make the call; that the bar personnel should not have allowed the bar to stay open until 1:30 a.m. — a half-hour past the usual closing time — under the circumstances and should have asked unruly customers

to leave earlier; and that Del Lago acted unreasonably in failing to provide a security presence at closing time instead of forcibly funneling the warring factions through a single exit.

JUSTICE JOHNSON would reverse because Smith was equally aware of the events transpiring at the bar and could have walked away, but instead chose to stay and enter the fray. The jury found Smith contributorily negligent, and Smith, who says he entered the scrum to rescue a friend, does not argue otherwise here. JUSTICE JOHNSON's view would effectively revive the doctrine of voluntary assumption of the risk as a complete bar to recovery, but the Texas proportionate responsibility statute makes clear that a plaintiff's negligence bars recovery only "if his percentage of responsibility is greater than 50 percent."[33] Here, the jury found that Del Lago's negligence (fifty-one percent) exceeded Smith's (forty-nine percent). We abandoned the assumption-of-the-risk doctrine as a complete defense to tort liability thirty-five years ago,[34] holding that the Legislature's adoption of comparative negligence "evidenced its clear intention to apportion negligence rather than completely bar recovery."[35] A plaintiff's own risky conduct is now absorbed into the allocation of damages through comparative responsibility. We no longer compartmentalize negligence into rigid categories: "we have discarded categories like imminent-peril, last-clear-chance, and assumption-of-

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[33] TEX. CIV. PRAC. & REM. CODE § 33.001.

[34] *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975) (abolishing implied assumption of the risk but retaining affirmative defense of express assumption of the risk, when a plaintiff, before undertaking risky conduct, explicitly consents to take personal responsibility for potential injury-causing risks).

[35] *Id.*

the-risk in favor of a general submission of comparative negligence."[36] A plaintiff's appreciation of and voluntary exposure to a dangerous on-premises risk is something the jury can weigh when apportioning responsibility, as was done in this case.

Further, we have expressly abolished a "no-duty" doctrine previously applicable to open and obvious dangers known to the invitee. Instead, a plaintiff's knowledge of a dangerous condition is relevant to determining his comparative negligence but does not operate as a complete bar to recovery as a matter of law by relieving the defendant of its duty to reduce or eliminate the unreasonable risk of harm.[37] "A plaintiff's knowledge, whether it is derived from a warning or from the facts, even if the facts display the danger openly and obviously, is a matter that bears upon his own negligence; it should not affect the defendant's duty."[38] While presented in terms of a no-negligence or no-causation analysis, JUSTICE JOHNSON's view would in effect revive the no-duty rule rejected by statute and caselaw, and hold as a matter of law that an invitee's decision not to remove himself from a known and dangerous premises condition bars any recovery against the landowner.

JUSTICE HECHT's dissent posits a variant of JUSTICE JOHNSON's view. JUSTICE HECHT favors a rule drawn from section 343A(1) of the Second Restatement of Torts that says landowners cannot be liable for dangerous conditions that are "known or obvious" (though he would permit liability for

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[36] *Jackson v. Axelrad*, 221 S.W.3d 650, 654 (Tex. 2007) (citing *French v. Grigsby*, 571 S.W.2d 867, 867 (Tex. 1978) (disapproving of last-clear-chance doctrine); *Davila v. Sanders*, 557 S.W.2d 770, 771 (Tex. 1977) (same regarding imminent peril); *Farley*, 529 S.W.2d at 758 (same regarding assumption of the risk)).

[37] *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 516–17 (Tex. 1978). We recently distinguished *Parker* where the plaintiff was an employee of an independent contractor, but made clear that *Parker* remains the law applicable to invitees. *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 217 (Tex. 2008).

[38] *Parker*, 565 S.W.2d at 521.

unavoidable risks). On this record, we cannot embrace a principle that embodies something akin to assumption of the risk. As comment (e) to section 343A explains, if the invitee "knows the actual conditions," the landowner "may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will *voluntarily assume the risk* of harm if he does not succeed in doing so."[39]

The Second Restatement itself indicates that section 343A(1) is rooted in a doctrine that Texas, most other jurisdictions, and the Third Restatement of Torts have abandoned.[40] Professor Powers, Co-Reporter of the Third Restatement, explains that "[a]fter the advent of comparative responsibility . . . most courts abandoned the doctrine,"[41] and "[i]n light of these developments, the new Restatement rejects all forms of implied assumption of risk."[42]

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[39] RESTATEMENT (SECOND) OF TORTS § 343A cmt. e (1965) (emphasis added).

[40] The Delaware Supreme Court has observed that "an overwhelming majority of courts" have recognized that sections 343 and 343A "'are too heavily laden with the prohibited defenses of assumption of the risk and contributory negligence to be followed rigidly . . . .'" *Koutoufaris v. Dick*, 604 A.2d 390, 396 (Del. 1992) (quoting *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 347 (1st Cir. 1980)). Further, "[o]f those state courts which have addressed the issue of whether the principles espoused by § 343A survive the adoption of comparative negligence, only one appears to have answered in the affirmative." *Id.* Still further, "an even greater number of courts, while not addressing the precise issue presented here, have held that the rule articulated by § 343A does not limit a landowner's duty to latent dangers, but recognize that a landowner can be liable even for injuries resulting from obvious hazards thus posing a fact question for the jury," consistent with our holding today. *Id.* at 397.

JUSTICE HECHT advocated section 343A(1) in a recent dissent, *TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 771–72 n.18 (Tex. 2009) (Hecht, J., dissenting), but since the creation of Texas' comparative-negligence scheme, the Court has yet to adopt section 343A(1) as Texas law. Further, *TXI Operations*, as a procedural matter, turned solely on whether a premises owner gave an adequate warning. The dissent in that case contended that the warning was adequate to meet the landowner's duty as a matter of law. *Id.* at 769–70. Today's case poses a separate question, whether "in some circumstances no warning can adequately substitute for taking reasonably prudent steps to make the premises safe." __ S.W.3d at __ n.32. The issue here — whether a landowner is always absolved of all liability if the invitee knows about the dangerous condition — is different from the narrower issue presented in *TXI Operations*.

[41] William Powers, Jr., *Sports, Assumption of Risk, and the New Restatement*, 38 WASHBURN L.J. 771, 772 (1999).

[42] *Id*. at 775.

More to the point, JUSTICE HECHT's reliance on section 343A(1) gives short shrift to the section's last twelve words, which anticipate today's uncommon facts. Though section 343A(1) bars liability when an invitee is aware of the dangerous condition, that absolution comes with an exception: "unless the possessor should anticipate the harm despite such knowledge or obviousness." That is, if Del Lago had reason to expect harm notwithstanding Smith's awareness of the risk, it may still be liable. That caveat seems to capture today's narrow and fact-specific holding. We do not hold today that a landowner can never avoid liability as a matter of law in cases of open and obvious dangers. We merely hold that Smith's refusal to walk away does not completely bar recovery, given the jury's decision to apportion liability, and given Del Lago's actual and direct knowledge that a violent brawl was brewing notwithstanding Smith's awareness of the surroundings. In some circumstances, no warning can suffice as reasonably prudent action to reduce or remove an unreasonable risk. Indeed, the reason Del Lago "should anticipate the harm despite such knowledge or obviousness" is because Del Lago's own conduct that night did nothing to decrease the danger and much to promote it.

Ultimately, JUSTICE HECHT makes a compelling argument that Smith was negligent. We agree. So do Smith, Del Lago, JUSTICE JOHNSON, the court of appeals, the trial court, and the jury. Our only disagreement is whether Smith's negligence is a complete bar to recovery. On this record, it is not.

C. Causation

The evidence of proximate cause was also legally sufficient. There may be more than one

proximate cause of an event,[43] and indeed the jury found that both Del Lago and Smith contributed to Smith's injury. Proximate cause comprises two elements: cause in fact and foreseeability.[44] The ninety minutes of alcohol-fueled verbal and physical exchanges between the two groups in the bar, directly observed by Del Lago personnel, provide the element of foreseeability, as discussed above. "The 'foreseeability' analysis is the same for both duty and proximate cause."[45]

As to causation in fact, generally the test for this element is whether the defendant's act or omission was a substantial factor in causing the injury and without which the injury would not have occurred.[46] The jury could have found, on the lay and expert testimony presented, that a security presence and response in the bar at some point during the ninety minutes that the two antagonistic groups were confronting each other would have defused the situation and prevented the violent brawl at closing time. Security could have removed particularly unruly patrons prior to the fight. The jury heard evidence that the mere presence of uniformed security personnel can defuse barroom tensions. Bartender Arlene Duncan, for example, testified that uniformed officers can usually deter problems in the bar. She also believed that any failure of staff to report serious confrontations at the bar not only was a violation of Del Lago policy, but put "people in a situation that easily could've been avoided." Officer Chancellor testified that a uniformed presence can chill dangerous or criminal activity. He agreed that his ability to defuse hostile behavior might explain why he had never

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[43] *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001).

[44] *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005).

[45] *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654, 659 (Tex. 1999) (plurality opinion).

[46] *Urena*, 162 S.W.3d at 551.

witnessed a physical fight at Del Lago. Smith's security expert, Gerald Brandt, testified that Del Lago employees had ample opportunity to notify security of the hostile situation in the bar and that a security presence would have prevented the fight and Smith's injuries.

The jury also could have reasonably determined that Del Lago's bar and front-desk personnel moved too slowly to notify security after the fight broke out, and that this delay was a proximate cause of Smith's injuries. Although the evidence was conflicting as to the length of the fight, the jury heard evidence that security arrived in a matter of seconds after being notified.

In concluding that the evidence of causation was legally insufficient, JUSTICE JOHNSON relies on *East Texas Theatres, Inc. v. Rutledge*.[47] In that case, we held that the causation evidence was legally insufficient where a movie theater patron was injured by a bottle thrown by another patron. We held the evidence insufficient to establish that removing unruly patrons or a security presence would have prevented the incident. The Court noted that efforts to remove "rowdy persons" might not have succeeded in removing the unknown bottle thrower.[48] *Rutledge* is factually distinguishable. The combatants in today's case were not sitting in a hushed and darkened theater but in a raucous and lighted bar; security could have identified them more easily and removed them. Today's case is further distinguishable: (1) the melee was preceded by ninety minutes of repeated belligerence between obviously intoxicated patrons; (2) expert testimony was offered that a security presence could have prevented the fight; (3) one of Del Lago's bartenders testified that the situation that night "easily could've been avoided;" (4) a Del Lago security officer likewise opined that his mere

[47] 453 S.W.2d 466 (Tex. 1970).

[48] *Id.* at 469.

presence could defuse hostile behavior; and (5) on the previous night a rowdy customer had been removed from the bar and the bar had closed early, with the result that no confrontations occurred. Legally sufficient evidence of causation was presented on this record.

D. Premises Liability v. Negligent Activity

JUSTICE WAINWRIGHT would reverse because the case should have been submitted to the jury under a negligent-activity theory. For several reasons, we disagree.

As to landowners, we have recognized negligent-activity and premises-liability theories of liability.[49] Smith believed both theories were applicable to his case, but Del Lago objected to the submission of a negligent-activity theory. The trial court agreed and only submitted a premises-liability question. Del Lago cannot now obtain a reversal on grounds that the jury should have decided the facts under a theory of liability that Del Lago itself persuaded the trial court not to submit to the jury.[50]

Even if Del Lago had preserved this ground for reversal in the trial court, neither Del Lago's petition nor briefs to us mention it, and we should not stretch for a reason to reverse that was not raised.[51] This ground for reversal was waived.

Ignoring preservation of error problems, the case was properly submitted on a premises-liability theory. We have repeatedly treated cases involving claims of inadequate security as

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[49] *E.g.*, *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998).

[50] *See Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000) (citing TEX. R. CIV. P. 272, 274, 278, 279).

[51] *See* Tex. R. App. P. 53.2(f), 55.2(f).

premises-liability cases.[52] Today's case, largely based on Del Lago's failure to properly use its security resources, does not warrant different treatment. We have recognized that negligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury,[53] while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe.[54] This case was properly tried and submitted as a premises-liability case, as Smith primarily complained of Del Lago's nonfeasance — its failure to remedy an unreasonably dangerous condition for ninety minutes and failure to react promptly once the fight started.

The lines between negligent activity and premises liability are sometimes unclear, since "almost every artificial condition can be said to have been created by an activity."[55] Smith complained of some conduct that might be cognizable as a negligent-activity claim, such as Del Lago's decision to move the patrons through a single exit immediately before the fight erupted, but

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[52] *See Timberwalk Apartments*, 972 S.W.2d at 753 (holding, in inadequate security case, that jury was properly charged under premises-liability theory rather than negligent-activity theory); *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654, 655 & n.3 (Tex. 1999) (plurality opinion) (discussing, in inadequate security case, prior "premises liability cases" and noting that Court's analysis "is complementary, not contradictory, to the traditional premises liability categories"); *id.* at 661 (Enoch, J., concurring) ("Thus, we are left with the traditional premises liability classifications to determine Mellon's duty."). We also note that in *Trammell Crow Central Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9 (Tex. 2008), another inadequate security case, we did not expressly address the issue of whether premises liability versus negligent activity applied, but we decided the case by closely following the rules set out in *Timberwalk Apartments*, which in turn expressly rejected the argument that an inadequate security case should be tried under a negligent-activity theory instead of a premises-liability theory.

[53] *See Timberwalk Apartments*, 972 S.W.2d at 753 ("'Recovery on a negligent activity theory requires that the person have been injured by or as a contemporaneous result of the activity itself . . . .'") (quoting *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992)).

[54] *Id.* (describing premises liability as "failing to remedy an unreasonable risk of harm due to the condition of premises").

[55] *Keetch*, 845 S.W.2d at 264.

Del Lago persuaded the trial court not to give Smith an alternative negligent-activity question. The error in not allowing Smith to pursue a separate negligent-activity claim, if any, occurred at Del Lago's behest. Even as to the allegation "that we herded them out the door," Del Lago argued at the charge conference that this evidence did *not* support a negligent-activity claim because "[t]here is no direct relation between Del Lago's conduct and Brad's injury."

Further, the evidence regarding the bar staff's affirmative conduct was relevant to issues of negligence and causation under the premises-liability claim, since Smith could and did properly contend under this theory that instead of using due care to make the premises safe by calling security or closing early, Del Lago made the unreasonably dangerous condition worse by continuing to serve drinks and funneling the hostile factions into closer physical contact. In any event, Del Lago makes no argument that the trial court improperly admitted evidence.

Finally, JUSTICE WAINWRIGHT does not explain what elements of a negligent-activity claim were not presented in the jury charge. To impose liability, the jury was required under the charge to find that Del Lago "failed to exercise ordinary care" to make an unreasonably dangerous condition safe, that "ordinary care" means the "degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances," and that this failure to use due care proximately caused Smith's injury. The trial court was concerned about giving Smith two bites at a negligence verdict in the charge, and we think it correctly noted that under the single question presented, Smith would "be able to argue exactly what [he has] argued in support of negligent activity."

III. Conclusion

One need not believe that Del Lago has a universal duty to insure patrons' safety against all third-party crimes, or that prior criminal activity at Del Lago imposed a duty to post security guards in the bar at all times, in order to accept that on *this* record *this* sequence of conduct on *this* night in *this* bar could foretell *this* brawl. "Tort law does not provide a remedy for every harm,"[56] nor must a bar call 911 for every blowhard drunk, but the record in this case documents that for an hour and a half Del Lago knowingly served rowdy and drunk rivals who were engaged in repeated and aggressive verbal and physical confrontations. Tension at the bar turned into cursing, cursing led to threats, threats grew into pushing, and all of the above culminated in a full-scale brawl. Del Lago observed — but did nothing to reduce — this persistent hostility, and while the antagonism may have ebbed and flowed over those ninety minutes, the liquor simply flowed. Given this evidence, the jury was free to find Del Lago's response not just unalert but unreasonable, and we do not disturb that finding.

In summary, the jury heard nine days of sharply disputed evidence, chose what testimony to believe and which witnesses to credit, and carefully apportioned liability 51-49 percent against Del Lago, finding it breached its duty to remedy an unreasonably dangerous condition by doing nothing until after the free-for-all melee that injured Bradley Smith erupted. Accordingly, we affirm the court of appeals' judgment.

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[56] James R. Adams, *From Babel to Reason: An Examination of the Duty Issue*, 31 MCGEORGE L. REV. 25, 53 (1999).

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Don R. Willett
Justice

OPINION DELIVERED: April 2, 2010

IN THE SUPREME COURT OF TEXAS

NO. 06-1022

DEL LAGO PARTNERS, INC., AND DEL LAGO PARTNERS, L.P.
DOING BUSINESS UNDER THE ASSUMED NAME OF
DEL LAGO GOLF RESORT & CONFERENCE CENTER,
AND BMC-THE BENCHMARK MANAGEMENT COMPANY, PETITIONERS,

v.

BRADLEY SMITH, RESPONDENT

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

Argued December 6, 2007

JUSTICE HECHT, joined by JUSTICE JOHNSON, dissenting.

The rule in Texas is that a possessor of land discharges his duty to protect an entrant from a condition that poses an unreasonable risk of harm by giving an adequate warning.[1] Now the Court tells us that "in some circumstances" no warning can be adequate. Which ones, exactly, the Court does not specify, saying only that Bradley Smith's full appreciation of the risk of injury from a bar fight "hardly seems" adequate.[2] So the rule has become that an adequate warning discharges a land

[1] *State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996) (per curiam).

[2] *Ante* at ___ n.34.

possessor's duty except in circumstances when any warning hardly seems adequate. In other words, there is no rule, as the Court admits: "We do not announce a general rule today."[3] The land possessor who simply wants to be sure to avoid any exposure to liability is left without guidance.

The Court's application of its non-rule in this case portends a misguided change in the law. It is quite *possible* that Smith would not have been injured in a fight at the Grandstand Bar if the Del Lago Resort had provided better security. But it is quite *certain* he would not have been injured if he had left the Bar by either of its exits at any time during the 90 minutes he thought a fight was obvious, as he was completely free to do. The Court's holding in this case is that a possessor of land must protect an entrant from a potentially dangerous condition that any reasonable person could clearly see, fully appreciate, and easily avoid. This has never been the law of Texas. It is not the law in most states, and for good reason. It exposes a possessor of land to liability for harm that any reasonable person could have avoided.

The rule in section 343A(1) of the *Restatement (Second) of Torts* is to the contrary:

> 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.[4]

Based on this rule, I would reverse and render judgment for Del Lago. Accordingly, I respectfully dissent.

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[3] *Ante* at ___.

[4] RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965).

I

Bradley Smith, 29, and a large crowd of his Sigma Chi fraternity brothers had been in the Del Lago Resort's Grandstand Bar for several hours celebrating their fraternity's 40th reunion when around midnight, in came a wedding party. Everyone had been drinking, and within a few minutes, a man in the wedding party apparently took umbrage at advances being made upon women in his party by the fraternity brothers. Recurrent shouting and shoving ensued for some 90 minutes, escalating in frequency and intensity with the approach of closing time. From the tension in the room, Smith — who recalled having had only one beer all night and could therefore clearly appreciate what was happening — thought it obvious to all there would be a fight. As one of the brothers testified at trial: "I mean, if you didn't know that this was going on, then you're either blind or deaf or don't care."

Security officers were on duty at the Resort, and had they been called to the Bar at the first sign of trouble, the fight that erupted in the doorway, just as the wait staff was insisting that everyone leave, might have been prevented. Smith was not part of that fight, but his friend Spencer Forsythe was. At trial, Forsythe recounted:

> Q [T]here were about forty Sigma Chi guys there, right?
>
> A I would say so.
>
> Q Ten or fifteen in the wedding party, right?
>
> A Right.

* * *

Q And some of the Sigma Chi fellows down at one end of the bar are having some words with the people in the wedding party, right?

A Right.

* * *

Q So you were concerned when you saw this verbal altercation go on between your Sigma Chi friends and these wedding party friends that this thing could develop into a bar fight?

A Sure.

* * *

Q Then what happens is . . . that a group of your friends — people you knew, right? Sigma Chi fellows? — moved, kind of, down towards the door? Not at the door, but towards the door, right?

A Right.

Q And we have some chest-thumping, that type of thing, right?

A Right.

Q And you chose to go to that fight, right?

A Yes. I — yes, I did.

Q Were you sitting or standing at the bar?

A I was actually — I was leaning on the bar.

Q Okay. You were leaning on the bar, and you looked down at the other part of the bar over here and you see some of your friends, and they're kind of doing the whole chest thing, the whole "I'm a tough guy" thing, right?

A Right.

* * *

Q You walked right over here to it, didn't you.

A Okay. Yes. Yes.

Q You came —

A Yes.

Q You came over here to support your friends in the Sigma Chi, didn't you?

A Right.

Q You wanted to show some force and show that you were here for them?

A Right. Yes.

Q You made that decision?

A I made that decision.

* * *

Q And then once you interjected yourself into that situation, now you're there, and now you're in the fight, right?

A After a few minutes. Yes.

Smith had not taken part in any of the evening's altercations and had stayed in another area of the Bar. He entered the fray at closing solely to rescue Forsythe. He testified at trial:

Q Were you in any way in the middle of this? Involved in the conflict?

A No, ma'am. I was actually up against — my right side was against this wall.

* * *

Q Now what was the extent of your involvement in this fight? If you could, tell the jury.

A The only involvement I had was going back in to get Spencer out.

Forsythe testified that he could have left at any time before the fight, and could have used the Bar's other exit, but chose not to:

Q [T]here are a couple of exits out of The Grandstand, right?

A Yes.

* * *

Q And you can use either one of those exits as long as it's during the hours of the club, correct?

A Yes.

* * *

Q Did you, at that time, choose to leave the bar —

A No.

Q — through either exit?

A No. I did not.

Q Did, at that time, you say, "Look, let's go out to our cottages, and let's just hang out there; these guys are too much of a hassle"?

A No. No. I did not.

* * *

Q You could've invited several of the Sigma Chi fellows, say, "Let's go out to the cottage," or "Let's go back to the lobby," "Let's get away from the situation which now I'm concerned about", right?

A Right.

Q And you chose not to do that?

A Right.

* * *

Q If you had chosen to take one of the two exits and go back to your cottage or go to some other part of the resort, you wouldn't have been involved in that fight, right?

A Right.

Presumably, Smith had the same options. Forsythe acknowledged that he could have asked for security to be called:

Q Or if you'd chosen — since you said you were concerned about it — if you'd chosen to advise the wait staff to go get security, that fight wouldn't have happened, right?

A Right.

* * *

Q If it was so obvious to you, Mr. Forsythe, that this verbal incident was going to break into a fight over here — if it was so obvious to you — why didn't you stop one of the wait staff and say, "I assume somebody's on the way; have you guys got somebody on the way?" Why didn't you do that?

A I don't — why was it my responsibility?

There is no reason to think Smith could not have done the same. And Forsythe admitted that even inside the bar, he could have stayed completely out of the fight:

Q Okay. Now, if you'd been sitting back over here, leaning up against the bar like you were before, you wouldn't have been in that fight, right?

A Most likely. Right.

Smith, in fact, had stayed out of the fight until he ventured back to rescue Forsythe.

Another fraternity brother, Cesar Lopez, stayed out of the fight altogether because, as he testified: "I'm not a fighter. I had to go to work Monday morning. I didn't want to go to work with a black eye from some fight." He added:

> Q As soon as you saw that blows were happening, you said you backed away, you didn't want to get in a fight?
>
> A Right.
>
> Q Well, where did you go?
>
> A Back towards the bar.
>
> Q Okay. You played it safe?
>
> A Yes.
>
> Q You decided to play it safe and backed away?
>
> A Right.
>
> Q And you were not injured?
>
> A No.

Smith, like Lopez, could have played it safe.

II

Smith's only claim, based on premises liability, is that Del Lago is liable for failing to protect him from an unreasonably dangerous condition in the Grandstand Bar, viz, the tension among the patrons that led to a fight. The settled rule in Texas is that a possessor of land "must either adequately warn" an entrant onto the property of an unreasonably dangerous condition "or make the

condition reasonably safe";[5] he need not do both.[6] There is no question that Smith was fully aware that a fight was brewing, not because of any sign displayed by the Bar, but because of events unfolding before his very eyes for 90 minutes, and that he had a ready means of avoiding all injury.

While an adequate warning discharges a land possessor's duty, as the Court says, "in some circumstances, no warning can adequately substitute for taking reasonably prudent steps to make the premises safe."[7] Those circumstances are to be found in *Parker v. Highland Park, Inc.*[8] Parker, a widow in her late 60s, tripped and fell at night in an unlit stairwell while descending from an apartment belonging to her sister and brother-in-law, the Masseys. It was obvious that the stairwell was dark and therefore dangerous, but there was no better way to leave. The Masseys escorted Parker down the stairs, Justice Massey leading the way while his wife held a flashlight to illuminate the steps, but Parker still stumbled and fell. We concluded that Parker was not precluded from recovery merely because the danger due to the darkness was obvious. No warning of tripping in the dark would have kept her from falling. She could see the danger for herself, and so could the Masseys. They used the only exit reasonably available and took every precaution.

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[5] *TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 765 (Tex. 2009); *accord State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996) (per curiam); *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992); *see Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 295 (Tex. 1983); *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 454-455 (Tex. 1972) (overruled on other grounds, as noted in *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517-518 (Tex. 1978), by *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975)); *see also* RESTATEMENT (SECOND) OF TORTS § 343 (1965).

[6] *Williams*, 940 S.W.2d at 584 ("The State argues that it had a duty to warn or make safe, but not both. In other words, the State argues that it was not negligent unless it *neither* adequately warned Williams *nor* made the condition reasonably safe. Stated differently still, the State argues that it was not negligent unless it *both* failed to adequately warn Williams *and* failed to make the condition reasonably safe. We agree with the State.").

[7] *Ante* at ___ n.34; *see ante* at ___.

[8] 565 S.W.2d 512 (Tex. 1978).

But suppose Parker could have avoided all danger by using an identical, well-lit stairwell adjacent to the dark one. Would the landowner have been liable for letting the light go out in one stairwell when any reasonable person would be expected to take the other one? Surely the answer is no. The *Parker* case illustrates the situation in which no warning is adequate: when heeding it cannot prevent harm. Parker and Smith were both fully aware of the risk of danger. The crucial difference between Parker's situation and Smith's is that Parker had no realistic way of avoiding the risk of descending the darkened stairs, while Smith could easily have avoided being hurt in a fight by leaving early or through another exit. The risk of danger to Parker was unavoidable; Smith need not have run any risk at all.

A landowner may be liable for an unreasonably dangerous condition, even if it is open and obvious, but not if a reasonable person would avert harm. That is the rule of section 343A(1) of the *Restatement (Second) of Torts*, which states:

> 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.[9]

It is also the rule in most states.[10]

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[9] RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965). Contrary to the Court's suggestion, the proposed *Restatement (Third)* does not abandon section 343A(1). RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 51, cmt. k (Tentative Draft No. 6, 2009) ("Section 343A(1) of the Restatement Second of Torts requires possessors to take reasonable precautions for known or obvious dangers when the possessor 'should anticipate the harm despite such knowledge or obviousness.' The duty imposed in this Section, as amplified in this Comment, is consistent with § 343A . . . .").

[10] *See Dolgencorp, Inc. v. Taylor*, No. 1070900, 2009 Ala. LEXIS 150, at *10-12, 2009 WL 1643347, at *3-4 (Ala. June 12, 2009) (adopting invitor's argument that it, by establishing its affirmative defense that the condition was open and obvious, negated its duty to invitee, and defeated invitee's injury claim without the operation of affirmative defenses like contributory negligence or assumption of the risk); *Kuykendall v. Newgent*, 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))); *LaFever v. Kemlite Co.*, 706 N.E.2d 441, 447-448 (Ill. 1998) (same); *Konicek 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, 755-756 (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 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."); *Wrenn 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, 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, 41-44 (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 to 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);

The Court argues that under *Parker*, the obviousness of a risk never relieves a possessor of land from the duty to protect an entrant; in every case both parties' fault must be determined and responsibility allocated between them. This is incorrect for at least three reasons. First, the Court went out of its way to reject this broad reading of *Parker* shortly after that case was decided. In *Dixon v. Van Waters and Rogers*, we denied the application for writ of error but wrote to correct the same misinterpretation of *Parker* that the Court now espouses:

> 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.[11]

Second, *Parker* did not purport to address the situation in which an entrant to property was not only fully aware of a risk of harm but fully capable of avoiding it. The Court cites this passage in *Parker*:

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 44, 147-150 (Ore. 1984), or another state statute, *see Vigil v. Franklin*, 103 P.3d 322, 323, 328-332 (Colo. 2004) (holding that COLO. REV. STAT. ANN. § 13-21-115 preempted the "open and obvious danger" 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. Wackenhut Corp.*, 824 P.2d 293, 297-298 (N.M. 1992); *Rockweit by Donohue v. Senecal*, 541 N.W.2d 742, 748-749 (Wis. 1995).

[11] *Dixon v. Van Waters & Rogers*, 682 S.W.2d 533, 533-534 (Tex. 1984) (per curiam noting writ ref'd, n.r.e.) (citation omitted).

> A plaintiff's knowledge, whether it is derived from a warning or from the facts, even if the facts display the danger openly and obviously, is a matter that bears upon his own negligence; it should not affect the defendant's duty.[12]

That was true in the context in which it was written, but a plaintiff's awareness of a risk of harm, when coupled with a safe alternative for proceeding, is relevant in determining whether a reasonable person would ever incur the risk, and therefore whether the land possessor should be obliged to protect against it. And third, we have continued to analyze the duty owed by a possessor of land in different circumstances.[13] The obviousness of risk is but one factor among others, repeatedly considered by this Court, in determining the nature of a land possessor's duty.

The Court protests that to hold that Del Lago owed Smith no duty is tantamount to reviving the long-rejected absolute defense of voluntary assumption of the risk, but this is not true. We rejected the defense because it placed undue weight on the subjective intent of the plaintiff in a negligence action governed by an objective reasonable-person test.[14] The rule stated in section 343A(1) of the *Restatement (Second)* is an objective rule. Under that rule, the issue is not, subjectively, whether the plaintiff voluntarily chose to risk harm, but objectively, whether a

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[12] *Parker*, 565 S.W.2d at 521.

[13] *See*, *e.g.*, *Trammell Crow Cent. Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9, 17 (Tex. 2008) ("[W]e conclude that [the landowner] could not have reasonably foreseen or prevented the crime and thus owed no duty in this case."); *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 213 (Tex. 2008) ("We agree the jury alone can decide [negligence], but disagree that a jury can decide what legal duties landowners owe to independent contractors.").

[14] *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975) (rejecting voluntary assumption of the risk as an issue in negligence cases based on the legislative adoption of comparative negligence and the "cogent and compelling reasons" stated in *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 538-539 (Tex. 1975) ("The heart of the matter is that the *volenti* doctrines represent an attempt to impose the analysis of subjective intent on a behavioral tort rather than resolve liability or not on the basis of fault under traditional concepts of negligence. Put more simply, negligence is a measure of a party's conduct and the test is generally objective, whereas *volenti* is a subjective inquiry into a party's actual, conscious knowledge. The standards are different.") (Justice Steakley, joined on this point by two justices)).

reasonable person could have avoided harm. Thus, the defense would have barred Parker's recovery, but section 343A(1) would not. An entrant is not denied recovery because he subjectively consented to assume the risk but because any reasonable person would have avoided it. Defining Del Lago's duty does not reintroduce the defense through a back door.

The Court says that a warning to Smith that a fight was imminent "hardly seems an adequate substitute for calling security or taking other reasonable steps during the course of the evening to prevent the fight."[15] Calling security *could* have helped — the jury found it would have — but it would not have guaranteed Smith's safety. The presence of officers might have brought reason to a bar full of men who had been drinking and cursing each other all night. Or if not, perhaps the officers could have arrested them all and carted them off before one slugged another. But whatever quieting influence security officers could have had, one absolutely sure way for Smith, who had drunk only one beer all night, to avoid injury was to walk out one of the exits before things escalated. If Smith had had no warning and no sure means of protecting himself, then I would agree that Del Lago was obliged to protect him. But he did.

If Smith's full appreciation of the risk and ample opportunity to avoid it hardly seemed an adequate substitute for calling security, the Court never says why. Nor does it attempt to explain how its notions about adequate substitutes provide a workable rule of law. The Court's job is not

[15] *Ante* at ___ n.34.

to offer its musings on the case but to state a clear rule of law, which it acknowledges it does not do: "We do not announce a general rule today",[16] only a "narrow and fact-specific holding."[17]

Legal duties should be determined categorically rather than ad hoc, should be based on sound policy, and should be as clear as possible. Section 343A(1) does all that. It applies an objective standard in all circumstances. It recognizes that as a policy matter, a possessor of land is entitled to know, before injury has occurred, what the law requires and whether he has complied with it. It embodies the policy that obedience is better than the sacrifices made in the time and expense of a lawsuit.

* * *

Any reasonable person who saw a bar fight brewing and was concerned for his safety should be expected to avoid it if he could. Smith, Forsythe, and Morgan could easily have avoided the fight in the Grandstand Bar, and Morgan did. As he said, he "played it safe". Smith and Forsythe did not. Under the rule in section 343A(1), Del Lago's duty to Smith was fully discharged. I would therefore reverse and render judgment for Del Lago. Because the Court disagrees, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: April 2, 2010

[16] *Ante* at ___.

[17] *Ante* at ___.

IN THE SUPREME COURT OF TEXAS

NO. 06-1022

DEL LAGO PARTNERS, INC. AND DEL LAGO PARTNERS, L.P.,
DOING BUSINESS UNDER THE ASSUMED NAME OF
DEL LAGO GOLF RESORT & CONFERENCE CENTER,
AND BMC-THE BENCHMARK MANAGEMENT COMPANY, PETITIONERS,

v.

BRADLEY SMITH, RESPONDENT

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

Argued December 6, 2007

JUSTICE WAINWRIGHT, dissenting.

Bradley Smith was seriously injured in a bar fight at the Grandstand Bar on the premises of the Del Lago Golf Resort & Conference Center (Del Lago) in Montgomery, Texas. Smith claimed, among other things, that Del Lago had a duty to take steps to preclude a fight or to remedy an unreasonably dangerous situation—the bar fight—once it arose. The trial court submitted the case to the jury on a premises liability charge and declined to submit the proposed negligent activity charge. The jury determined that Del Lago was liable and apportioned 51% of the damages award to it and assessed 49% against Smith. The trial court rendered judgment on the jury's verdict, and the court of appeals affirmed.

We are once again presented with the question of when a premises owner or possessor is liable for the conduct of other persons that cause personal injury to an invitee on the property. Smith's case turns on the alleged contemporaneous acts and omissions of the Del Lago staff and invitees in the Grandstand Bar as he has made no complaint about the "condition of the land." Accordingly, this case presents not a premises liability but a negligent activity case, and the trial court erred by refusing to submit plaintiff's proposed submission on negligent activity. Smith erred, however, by failing to appeal to this Court the trial court's refusal of his negligent activity submission. Smith's claim should not succeed on a premises liability theory because he failed to identify a necessary predicate of a premises liability claim—i.e., a physical defect in the condition of the premises. And Smith's allegation of inadequate security fails as a premises claim because he did not establish an unreasonable risk of serious harm necessary for Del Lago to owe him a duty. Because the Court approves Smith's recovery as a premises liability claim, I respectfully dissent.

I. Smith's Claim Is Not One for Premises Liability

The days of the general demurrer when claims would live or die on the basis of the form of the pleading generally are gone. But the cause of action pled dictates the answers to important questions in a case. The pleading defines the elements of a claim, facts to be proven, potential defenses to recovery, and damages recoverable. A strict liability products claim is different from a negligence claim that seeks the same damages arising from the same product and the same incident. *See Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 181 (Tex. 2004). A simple breach of contract claim arising from a transaction is not a tort claim, artful pleading notwithstanding. *See Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494–95 (Tex. 1991). Similarly, a cause of action for

premises liability is different from one for negligent activity. In *Keetch v. Kroger Co.* and *Timberwalk Apartments, Partners, Ltd. v. Cain*, we explained the difference between liability for negligent activity and liability for failing to remedy an unreasonable risk of harm arising from the condition of a premises:

> "Recovery on a negligent activity theory requires that the person have been injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity." Negligence in the former context means simply doing or failing to do what a person of ordinary prudence in the same or similar circumstances would have not done or done. Negligence in the latter context means "failure to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition which the owner or occupier [of land] knows about or in the exercise of ordinary care should know about."

Timberwalk Apartments, Partners, Ltd. v. Cain, 972 S.W.2d 749, 753 (Tex. 1998) (quoting *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264, 267 (Tex. 1992)). In short, unlike a negligent activity claim, "a premises defect claim is based on the property itself being unsafe." *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006).

In this case, Smith asserts he was injured when some members of his group of fraternity brothers and some members of a wedding party, all invitees, engaged in a fight at the Grandstand Bar, which had experienced no prior fights causing serious injuries. In this Court, rather than defend his position at the trial court that his cause of action was for negligent activity, Smith defends the trial court judgment on the premises liability claim. But this is not a case for damages caused by a pothole in a road, a slick floor from the misapplication of wax, a grape on a grocery store floor, the lack of adequate lighting in an apartment parking lot, or a trespasser's criminal attack on invited guests at a business. Although a species of negligence, premises liability cases are predicated on a

property possessor's failure to warn or make safe dangerous or defective conditions on property; negligent activity cases arise from contemporaneous actions or omissions in the conduct of people. Smith's case is about the conduct of people at the bar, but the trial court's charge defines negligence "[w]ith respect to the condition of the premises," and instructs the jury that Del Lago was negligent if "the condition posed an unreasonable risk of harm . . . ."[1] Smith did not identify any defective or dangerous physical condition of the premises.

The common law has recognized for a long time that the basis of a premises liability claim is a physical defect or condition on property. *See Kallum v. Wheeler,* 101 S.W.2d 225, 229 (Tex. 1937) (Where a building's decayed wooden floor gave way injuring a guest, the Court held "it appears to be settled in this state that one in possession of premises is under a duty to exercise

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[1] The full text of the jury question follows:

> Did the negligence, if any, of those named below proximately cause the occurrence in question?
> With respect to the condition of the premises, Del Lago was negligent if—
> a. the condition posed an unreasonable risk of harm, and
> b. Del Lago knew or reasonably should have known of the danger, and
> c. Del Lago failed to exercise ordinary care to protect Bradley Smith from the danger, by both failing to adequately warn Bradley Smith of the condition and failing to make that condition reasonably safe.
> "Ordinary Care," when used with respect to the conduct of Del Lago as an owner or occupier of a premises, means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances.

This is the Pattern Jury Charge submission for premises liability claims in which plaintiff is an invitee. STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–MALPRACTICE, PREMISES, PRODUCTS PJC 66.4, at 137 (2006).

ordinary care to make them safe" for invitees.). Relying on section 343 of the Restatement (Second) of Torts, we held that "[a] possessor of land is subject to liability for physical harm caused to his invitees *by a condition on the land*." *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 454 (Tex. 1972) (Pope, J.) (emphasis added); *see also McKee v. Patterson*, 271 S.W.2d 391, 395 (Tex. 1954) (involving an allegedly slick floor as a dangerous condition on the premises), *abrogated on other grounds by Parker v. Highland Park*, 565 S.W.2d 512, 517–18 (Tex. 1978). Comments to section 343 discuss the "physical condition" of the land, the "actual condition of the premises and [duty] to make reasonably safe by repair or to give warning," and potential dangerous qualities "of the place itself and the appliances provided therein . . . ." RESTATEMENT (SECOND) OF TORTS § 343 cmts. b, d, f (1965). The Restatement also distinguishes between "Activities Dangerous to Invitees" addressed in section 341A and the section 343 topic of "Dangerous Conditions Known to or Discoverable by Possessor." *Id.* §§ 341A, 343. The First Restatement recognized a similar dichotomy. RESTATEMENT (FIRST) OF TORTS §§ 341, 343 (1939). Although the Restatement (Third) of Torts collapses the differing duties, based on the status of the injured party, into a unitary standard, it continues to recognize the distinction between "conduct by the land possessor" and artificial or natural "conditions" on the land. *See* RESTATEMENT (THIRD) OF TORTS § 51 (Tentative Draft No. 6, 2009).

Opinions of this Court consistently illustrate that premises liability claims arise from physical conditions or defects on property, including:

- A pothole in a dirt road allegedly causing a driver's neck injury, *TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 764–65 (Tex. 2009);

- Ice from a soft drink dispenser making a grocery store floor slippery, *Brookshire Grocery Co. v. Taylor*, 222 S.W.3d 406, 407, 409 (Tex. 2006);
- An unstable metal and wood platform accessing a storage shed, *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 98–99 (Tex. 2000);
- Leaking water making a basketball court slippery, *City of San Antonio v. Rodriguez*, 931 S.W.2d 535, 536–37 (Tex. 1996);
- Store abduction occasioned by premises owner's disconnection of existing security alarm devices, poor external lighting, and failure to have two clerks on a late night shift, *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 457, 459 (Tex. 1992).
- Plant spray making a floor slick, *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992);
- Grapes from a self-service grape bin falling on the floor and making a grocery store floor slippery, *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 297 (Tex. 1983);
- An unlit apartment stairwell where there was no other exit route, *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 513–14 (Tex. 1978);
- Misapplication of wax making a floor dangerously slick, *State v. Tennison*, 509 S.W.2d 560, 561 (Tex. 1974);
- Soapy foam making a spa floor slippery, *Adam Dante Corp. v. Sharpe,* 483 S.W.2d 452, 453–54 (Tex. 1972);
- Showroom rug alleged to be a tripping hazard, *Seideneck v. Cal Bayreuther Assocs.*, 451 S.W.2d 752, 753 (Tex. 1970); and

- A decayed wooden floor in a building through which a guest fell, *Kallum v. Wheeler*, 101 S.W.2d 225, 226–27 (Tex. Com. 1937).

In contrast to physical conditions, we have recognized that negligent activity claims arise from:

- Failure to warn taxi drivers not to carry guns, *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 524–25 (Tex. 1990);
- Independent contractor's operation of a mechanical pump on property, *Abalos v. Oil Dev. Co. of Tex.*, 544 S.W.2d 627, 628, 631 (Tex. 1976); and
- Failure to remove "rowdy" patrons before one such patron allegedly threw a bottle injuring another patron in a theater, *E. Tex. Theatres, Inc. v. Rutledge*, 453 S.W.2d 466, 467–68 (Tex. 1970).

Smith fails to implicate any premises condition at the Grandstand Bar in causing his injury.

Texas law also recognizes a duty of premises owners to take reasonable measures to prevent injury occasioned by the criminal conduct of trespassers, or third parties, if the type of harm is unreasonable and foreseeable. *Timberwalk*, 972 S.W.2d at 756. We have analyzed these claims as premises liability claims. Assuming the existence of an unreasonable risk of harm, property owners have a duty to act within reason to prevent the harm if evidence of the *Timberwalk* factors establish foreseeability.[2] *See e.g.*, *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 15 (Tex. 2008); *Timberwalk*, 972 S.W.2d at 757.

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[2] The *Timberwalk* factors are "whether any criminal conduct previously occurred on or near the property, how recently it occurred, how often it occurred, how similar the conduct was to the conduct on the property, and what publicity was given the occurrences to indicate that the landowner knew or should have known about them." *Timberwalk*, 972 S.W.2d at 757.

In *Timberwalk*, we held that an apartment complex did not have a duty to protect a tenant from sexual assault by a stranger because that type of serious crime was not foreseeable. The injuries and criminal violations in the past had not made that type of crime one the premises owner knew or should have known was likely to occur, thereby prompting a legal duty to take reasonable precautions to prevent it. 972 S.W.2d at 758–59. The Court approved the plaintiff's pleading of the dispute as a premises liability case allegedly brought about by the defendants' failure to provide adequate security measures and the absence of allegations that she was "injured by or as a contemporaneous result of any activity of defendants." *Id*. at 753 (quoting *Keetch*, 845 S.W.2d at 264). The Court, significantly, noted that the alleged inadequate security measures included defective physical security-related components—missing "charley" bars or pin locks for sliding glass doors, inoperative alarm systems in the apartments, inadequate lighting, inoperative access gates to the complex and the absence of security guards. *Id.* at 751.

In *Trammell Crow*, we again analyzed a dispute as a premises liability claim where plaintiff alleged negligently inadequate security to prevent a third party from shooting an invitee who was leaving a movie theater on the premises. 267 S.W.3d at 11–12. We held there was no duty to prevent the shooting because any prior criminal activity at the mall was not sufficiently similar and frequent to give rise to a duty to prevent the death. *Id.* at 17.[3]

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[3] *Mellon Mortgage Co. v. Holder* is a difficult case to categorize. 5 S.W.3d 654 (Tex. 1999). In *Mellon*, an on-duty police officer stopped Holder, took possession of her drivers license, and instructed her to follow him. *Id.* at 654. He led her to Mellon Mortgage's parking garage and assaulted her in his squad car. *Id.* Plaintiff sued Mellon Mortgage. *Id.* The Court was sharply divided in the case as there was only a plurality opinion. *See generally id.* No invitees were injured by third parties who came onto the property, and there was no contemporaneous activity that the

All of these cases raising premises liability claims for third party injury to persons legally on the premises concern, to some degree, the alleged failure of defendants to employ adequate security measures. These security measures could be inadequate lighting, disconnected existing alarm systems, broken pin locks for sliding glass doors, inoperative security gates, an unrepaired opening in a security fence, or the absence of guards for business parking lots. *See Timberwalk*, 972 S.W.2d at 751; *Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 55 (Tex. 1997). These types of premises liability cases have in common the existence of defective physical conditions of the premises that allegedly allowed the criminal conduct to occur. The plaintiffs showed a nexus between their injuries and some physical defect or inadequacy in the property. Here, Smith implicates no physical condition of the property in his complaints.

Accordingly, Smith appropriately offered a negligent activity charge in the trial court, and the trial court erred in refusing it. *See Keetch*, 845 S.W.2d at 264. He claims that the acts and omissions of the Grandstand Bar staff during the evening were negligent. However, Smith erred in failing to appeal the trial court's improper submission of this case to the jury as a premises liability claim. Because the Court approves the award in this case on a premises liability charge (with respect to the "condition of the premises"), it opens almost any negligence dispute involving contemporaneous activities to being tried as a premises case. The Court's opinion is untethered to

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premises owner knew or should have known about. *Id.* This case does not fit neatly under the typical premises liability or negligent activity rubric. Without determining whether Holder was an invitee, licensee, or trespasser, the Court resolved the case by concluding no duty arose in any event because foreseeability principles limited the scope of the defendant's duty. *Id.* at 658.

our long line of precedents drawing a distinction between negligent activity and premises liability causes of action.

II. Smith Fails to Show That the Risk of Harm Was Unreasonable

Smith also fails to establish that Del Lago owed a duty to prevent the type of injury he suffered. Premises owners are not obligated to insure the safety of invitees on their premises. However, a premises owner has a duty to protect invitees if he knows or has reason to know of an "unreasonable and foreseeable risk of harm to the invitee." *Timberwalk*, 972 S.W.2d at 756 (quoting *Lefmark*, 946 S.W.2d at 53); *see also TXI Operations*, 278 S.W.3d at 764–65; *Trammell Crow*, 267 S.W.3d at 12; *CMH Homes*, 15 S.W.3d at 101; *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993). The common law imposes this duty on premises owners based on the rationale that, as between an invitee and a premises owner, the premises owner is in the better position to know of and take precautions against the risk of such harm. *Tidwell*, 867 S.W.2d at 21.

Although foreseeability has received the lion's share of the attention of Texas courts considering this duty, for premises owners to have a duty to protect invitees, the risk of harm must also be unreasonable. *TXI Operations*, 278 S.W.3d at 764; *Lefmark*, 946 S.W.2d at 53. The question is not whether the harm itself is unreasonable, but whether the risk of that type of harm occurring is unreasonable. A great harm may not, but a small harm may, be unreasonable, depending on the risk of it occurring.

To determine whether the risk of this type of harm was unreasonable, courts must weigh the type of risk involved, the likelihood of injury and its magnitude—including the nature, condition, and location of the defendant's premises—and the harm to be avoided by imposing a duty, against

the consequences of placing the burden on the defendant. *See Trammell Crow*, 267 S.W.3d at 18 (Jefferson, C.J., concurring); *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 218 (Tex. 2008); *Timberwalk*, 972 S.W.2d at 759 (Spector, J., concurring); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); *see also Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 212 n.5 (Cal. 1993) (explaining that courts weigh foreseeability of the harm against other factors, including the burden imposed on the premises owner); *McClung v. Delta Square L.P.*, 937 S.W.2d 891, 902 (Tenn. 1996) (holding that duty is determined by balancing the likelihood and gravity of harm against the burden imposed on the premises owner to prevent the harm). For example, if a premises owner could easily prevent a certain type of harm, it may be unreasonable for the premises owner not to exercise ordinary care to address the risk. On the other hand, if the burden of preventing the harm is unacceptably high, the risk of the harm is not unreasonable. *See Ann M.*, 863 P.2d at 215.

In determining whether Del Lago had a duty to protect against this type of crime, we consider whether Del Lago knew or should have known of the likelihood of this type of crime before Smith's accident. The evidence shows only one crime and approximately four undocumented incidents per year in the Grandstand Bar, only one of which involved several people. Most of the incidents that had occurred at the Grandstand Bar, as the evidence shows, were relatively minor alcohol-induced physical and verbal altercations that quickly resolved without intervention, or minimal intervention, by Del Lago security. The likelihood of a fight at the bar involving several people was very low; nothing similar in size or scale had occurred in the past. *See Trammell Crow*, 267 S.W.3d at 17

(protecting premises owners from liability for "crimes that are so random, extraordinary, or otherwise disconnected") (footnotes omitted).

That does not end the analysis, however. In determining the likelihood of injury, case law focuses on the nature, condition, and location of the defendant's premises to determine if Del Lago's Grandstand Bar was a dangerous place or a relatively safe facility. *Timberwalk*, 972 S.W.2d at 759 (Spector, J., concurring). In this case, nothing about the premises indicates that this type of serious injury was imminent, as it never had occurred at Del Lago before. *See Trammell Crow*, 267 S.W.3d at 19 (Jefferson, C.J., concurring). The Grandstand Bar was part of an upscale resort. It did not border an area or particular establishment that posed a threat to Del Lago's invitees, have a conspicuous lack of security that would encourage criminal behavior, or otherwise attract or indicate impending criminal activity. The lack of such evidence here weighs against imposing a duty on Del Lago.

The likelihood of Smith incurring this type of serious injury was relatively low. Again, we examine the harm to be avoided from Del Lago's perspective before the fight that injured Smith. The typical harm resulting from the incidents at the Grandstand Bar that previously occurred and were most likely to occur again—alcohol-induced scuffles—resulted in only minor injuries, such as bruises and scrapes. Even a larger-scale scuffle would typically involve only those same types of minor injuries, but perhaps to more than one person. *See Trammell Crow*, 267 S.W.3d at 19 (Jefferson, C.J., concurring) ("Because the relatively few incidents of violent crime at the Quarry Market during the two-year period before Gutierrez's death did not pose an unreasonable risk of

harm, and in light of the tremendous burden that would be required to prevent such brazen attacks, I would hold that Trammell Crow owed Gutierrez no duty to prevent this crime.").

Weighing the above considerations against the burden to be imposed on a premises owner, the law considers not the burden of preventing crime on the premises of Del Lago in general, but the imposition of a further duty to prevent this particular type of serious crime from occurring in the Grandstand Bar itself. Smith also argues that Del Lago had a duty to post a security guard in the bar. The security personnel at Del Lago were experienced and well-trained. They consisted of two off-duty police officers, Shenandoah Chief of Police John Chancellor and Lieutenant Lanny Moriarty of the Montgomery County Sheriff's Office, who had a combined fifty years of police experience, as well as Director of Security and Safety Ruben Sanchez, a twenty-year veteran fireman and paramedic, and the Manager-on-Duty Ken Jeffrion. Smith did not dispute at trial that the size of the security staff was adequate. On the night in question, Chancellor and Moriarty were patrolling together in a golf cart on the grounds of Del Lago, which included the golf course, a group of cottages, and a hotel. Del Lago had a substantial security force.[4] Reallocating the security guards

[4] If I were considering foreseeability, applying the *Timberwalk* factors to the claim that there was a duty to place security guards in the bar would result in the conclusion that, based on past experience, it was not foreseeable that a serious injury would occur. The evidence showed twelve prior crimes on the 300-acre Del Lago resort property in the three years preceding Smith's assault. Four of the twelve crimes were assaults in or near the Grandstand Bar, and eight were assaults in other portions of the resort. Officer Chancellor, employed by Del Lago, testified that he was called to the Grandstand Bar approximately five times per year for incidents that received no documentation. Officer Sanchez estimated he is called to the Grandstand Bar every two to three months to intercede in an argument. None of the incidents was of a magnitude to cause serious injury to the persons involved. Hence, there was no duty to provide security guards in the bar or additional security at Del Lago.

from patrol could leave the rest of the premises understaffed, especially when most of the documented crimes—and arguably the more serious incidents—occurring on the resort premises did not occur at the Grandstand Bar, but instead on other parts of the 300 acres.

Although Del Lago could have taken extraordinary measures to prevent this type of bar altercation, the law does not require premises owners to take draconian measures to prevent all unlikely but theoretically conceivable types of crime. *Timberwalk*, 972 S.W.2d at 756; *see also Boren v. Worthen Nat'l Bank of Ark.*, 921 S.W.2d 934, 941–42 (Ark. 1996). It is neither feasible nor desirable to impose such a requirement because of both the additional cost and the chilling effect it could have on the activities of invitees. While there may have been a risk of alcohol-induced altercations in the Grandstand Bar, the frequency, recency, and severity of prior incidents do not indicate that the risk of harm of this magnitude was unreasonable. Del Lago may have had a duty to act reasonably to prevent the typical scuffle from occurring at the Grandstand Bar, but that duty is less onerous than the one Smith demands and would not impose an inordinate burden on Del Lago. However, to require Del Lago to take further security measures—including, for example, the added cost of increased security training for all personnel and adding at least one stationary guard in the Grandstand Bar—would impose unreasonably large costs in order to prevent a type of crime that had never before occurred at the resort and may never occur again. *See Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 768 (La. 1999) ("The economic and social impact of requiring businesses to provide security on their premises is an important factor.").

The analysis of whether the risk of crime is unreasonable must always be determined based on what the premises owner knew or should have known before the criminal act occurred. Del Lago

took many, considerable steps to avoid risks of reasonable harm. The security at the Del Lago resort that evening was very experienced and well-trained, and the adequacy of the number of guards on duty that night was not questioned. In this case, I would hold that the burden on the defendant outweighs the likelihood, magnitude, and risk of harm to be avoided, taking into account the visible presence of security guards and their quick response time,[5] the added cost and inconvenience of having additional personnel, allocating existing personnel differently, or requiring additional training—all designed to prevent an unprecedented, albeit dangerous, fight. Because there was not an unreasonable risk of a barroom fight occurring and a serious injury resulting therefrom, Del Lago had no duty to protect against the risk of serious harm.

The Court argues that the jury's verdict should supercede our determination of the duty issue. That approach places the cart before the horse because the existence of a duty is a predicate to liability in tort. *Moritz*, 257 S.W.3d at 217; *see also Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (1928) ("The question of liability is always anterior to the question of the measure of the consequences that go with liability."). In the landmark case of *Palsgraf*, the court held, with Chief Judge Benjamin Cardozo writing, that whether action is required to prevent harm is a question of duty. *Palsgraf*, 162 N.E. at 101. Disagreeing with the court, dissenting Justice Andrews asserted that predicating negligence on the existence of a legal duty to take care is "too narrow a concept." *Id.* at 102 (Andrews, J., dissenting). He believed that "[w]here there is the unreasonable act, and some right that may be affected there is negligence . . . ." *Id.* "Everyone," he wrote, "owes to the

[5] The first officer was on the scene of the fight about twenty seconds after being called. Two others arrived within two or three minutes of being called.

world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." *Id.* at 103. Texas law does not define duty so expansively or, as the *Palsgraf* dissent, restrict limitations on duty only to the role of proximate cause. *Id.* Similarly, a duty arises from risks of harm that are both foreseeable and not unreasonable for premises owners to prevent.

Finally, the Court's description of the evening suggests that there was both a foreseeable and unreasonable risk of serious harm. First, there is no evidence that a serious injury ever occurred previously at the Grandstand Bar, described by the parties as an upscale bar. Establishing foreseeability or an unreasonable risk of serious harm in this case is a difficult climb. Second, the evidence does not portray a caldron of escalating events leading inevitably to a huge brawl. The testimony presented at trial paints a somewhat different picture of the events of the evening. No doubt the atmosphere in the Grandstand Bar was not calm and peaceful all evening. Members of the two groups exchanged heated words that night, and the physical confrontations in the bar happened "off and on" over the course of the evening. Smith and fraternity brothers Toby Morgan, Spencer Forsythe, and Michael Brooks testified that they witnessed shoving between some group members before the fight, but those situations diffused on their own. These incidents resolved themselves without staff intervention. Both Arlene Duncan and Elizabeth Sweet, the bartender and cocktail waitress on-duty that night, testified that they certainly would have called security had they seen assertive physical behavior that would have led to a fight. "Tensions" between bar patrons alone do not constitute an unreasonably dangerous situation. Although there were people in the bar not part of either the fraternity reunion or the wedding party, Smith presented no evidence that even one bar patron complained about the behavior of the fraternity or wedding party members, called security,

requested that security be called, left the bar to escape the situation, or otherwise expressed concern for his physical safety, either in word or deed.

In addition, the Court claims that the fight was a "closing-time melee involving twenty to forty 'very intoxicated' customers." The evidence shows that a number of people were in the *area* of the fight but only two to four people were involved in the actual fight. The length of the fight is also characterized as lasting fifteen minutes. Only one of the testifying witnesses stated that the fight lasted fifteen minutes. The other witnesses stated that the fight lasted between ten seconds and five minutes. This time frame is corroborated by the fact that when the first security officer arrived (within twenty seconds of being called), the fight was over. Though the Court disclaims creating a universal duty of these premises owners to prevent serious harm in these situations, its opinion paves a road in that direction.

III. If a Duty Arose to Act During the Fight, the Standard of Conduct to Which Del Lago Is Held Is Very High

The case was submitted to the jury on a premises liability charge, and the Court confirms liability against Del Lago on a negligent activity analysis. If the case had been submitted as a negligent activity claim, then the jury would properly have considered whether Del Lago breached its duty to use ordinary care to make the premises reasonably safe once the altercation broke out. *See E. Tex. Theatres, Inc. v. Rutledge*, 453 S.W.2d 466, 469–70 (Tex. 1970). Smith argues that the Bar staff should have taken timely steps to stop the altercation. On the issue of breach of that duty,

the evidence shows that the security personnel's response times that evening were exemplary,[6] and the liability finding in spite of the security response would be concerning, but for some evidence of delay in calling security sufficient that the jury could conclude that Del Lago breached this duty, as the facts show.

Once the fight began, the bartender and one of the waitresses took action. Duncan immediately attempted to break up the fight, while Sweet called security. Sweet testified that she was in shock when the fight arose, such that she could not immediately find the number. A sticker on the phone itself instructed "Dial 0 for Emergency," which directly connected to Del Lago's security when dialed. Instead, the waitress dialed the front desk, obtained the number for security, and then quickly gave it to another bar employee to alert security. Smith does not argue that the delay by the waitress in calling the front desk rather than security directly was a breach of Del Lago's duty. That is the only delay in this sequence of events that occurred that could constitute a breach. Del Lago's security force responded promptly to the calls. Sanchez, the first officer on the scene, arrived at the bar fifteen to twenty seconds after being called, and the fight was over when he got there. The other two officers arrived after Sanchez, within two to three minutes of being called. None of these facts is disputed. These are the response times we want in security personnel. I am persuaded not to conclude that Del Lago did not breach its duty in this regard only because of the one piece of evidence that is barely sufficient but on which the jury could conclude there was a breach—i.e., the waitress's testimony that it took her about three to four minutes to get the proper

[6] The security personnel at Del Lago that evening included three officers with some seventy years of combined law enforcement and paramedic experience.

telephone number and give it to another employee to make the call to security. I would be concerned if the message from the Court is to hold premises owners to a standard of perfection, instead of a standard of reasonable care.

IV. Conclusion

Because I believe the case was improperly submitted as a claim that it is not, I respectfully dissent. This dispute is either a premises liability case for alleged inadequate security (Smith's only allegation that raises a premises liability claim) or a negligent activity claim based on the contemporaneous acts or omissions of the Del Lago personnel and invitees, or it may be both if plaintiff articulates different facts in support of both claims. The charge for a negligent activity claim should not instruct the jury to find a dangerous "condition of the premises" as that finding addresses premises liability. I agree with the Pattern Jury Charge comment on this point that because the elements of these two theories are different, "it is important to submit the questions, instructions, and definitions that are applicable to the particular theory." COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–MALPRACTICE, PREMISES, PRODUCTS PJC 65.1 (Comment), at 121 (2006). Submission of a premises liability charge for a negligent activity claim muddles the duties and undermines clarity in the law.

Dale Wainwright
Justice

OPINION DELIVERED: April 2, 2010

IN THE SUPREME COURT OF TEXAS

NO. 06-1022

DEL LAGO PARTNERS, INC. AND DEL LAGO PARTNERS, L.P.,
DOING BUSINESS UNDER THE ASSUMED NAME OF
DEL LAGO GOLF RESORT & CONFERENCE CENTER,
AND BMC-THE BENCHMARK MANAGEMENT COMPANY, PETITIONERS,

v.

BRADLEY SMITH, RESPONDENT

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

Argued December 6, 2007

JUSTICE JOHNSON, joined by JUSTICE HECHT, dissenting.

Justice Hecht articulates what I believe is the correct view of a premises occupier's duty to invitees. I join his dissent.

I also dissent for further reasons, beginning with the Court's starting from an incomplete, and thus improper, premise as to the duty Del Lago owed to Smith. Citing *Western Investments, Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005), and *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998), the Court says that "Smith was an invitee, and generally, a property owner owes invitees a duty to use ordinary care to reduce or eliminate an unreasonable risk of harm

created by a premises condition about which the property owner knew or should have known." ___ S.W.3d at ___. The Court's statement of duty is incomplete, is not supported by *Urena*, takes the Court's statement in *Timberwalk* out of context, and is at odds with the unobjected-to jury charge given in this case.

In *Urena*, a child living in an apartment complex was lured into an apartment by an adult resident of the apartments and sexually assaulted. *Urena*, 162 S.W.3d at 549. The resident who assaulted the child fled and could not be found. *Id.* The suit against the apartment complex was based on both ordinary negligence and premises liability theories. *Id.* at 550. The Court noted that premises liability is a special form of negligence, but the difference was not discussed in depth because it was not material to disposition of the case:

> We analyze Urena's negligence and premises-liability claims together. To prevail on her negligence cause of action, Urena must establish the existence of a duty, a breach of that duty, and damages proximately caused by the breach. *Premises liability is a special form of negligence where the duty owed to the plaintiff depends upon the status of the plaintiff at the time the incident occurred*. . . .
>
> Negligence and premises liability, therefore, involve closely related but distinct duty analyses. But *we need not delve into this distinction to resolve this case because recovery under either cause of action is foreclosed in the absence of evidence that Front Royale's acts or omissions proximately caused L.U.'s injuries*.

Id. at 550-51 (emphasis added) (citations omitted). The Court referenced the duty owed by a premises occupier to an invitee briefly in the context of proceeding to the causation question on which it decided the case, but the Court did not re-examine the duty owed by a premises occupier to an invitee. *Id.*

In *Timberwalk*, the plaintiff was assaulted in her apartment by an intruder. *Timberwalk*, 972 S.W.2d at 751. The trial court submitted the case on a premises liability charge, and the jury found against the plaintiff. *Id.* at 752. The first issue the Court considered was whether the case was properly submitted as a premises liability case instead of a negligent activity case. *Id.* at 753. In determining that the case was properly submitted, the Court discussed in a brief manner the difference between the two theories of liability as to a premises occupier:

> In *Keetch v. Kroger Co.*, 845 S.W.2d 262 (Tex. 1992), we explained the difference between liability for negligent activity and liability for failing to remedy an unreasonable risk of harm due to the condition of premises. "Recovery on a negligent activity theory requires that the person have been injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity." Negligence in the former context means simply doing or failing to do what a person of ordinary prudence in the same or similar circumstances would have not done or done. Negligence in the latter context means "failure to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition which the owner or occupier [of land] knows about or in the exercise of ordinary care should know about."

Id. (citations omitted). The Court determined that the case was properly submitted as a premises liability case, but the defendant had no duty to the plaintiff because the criminal assault was not foreseeable. *Id.* at 758-59. As in *Urena*, the Court was not undertaking to re-examine or re-define the duty owed by a premises occupier to an invitee. That duty had been specifically considered and explicitly addressed in *State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996) (per curiam), which issued only two years before *Timberwalk*. There the Court directly considered the proper jury instruction to be used in a premises liability case. *Id.* The State contended that the duty imposed on it was to use ordinary care to either warn of an unreasonably dangerous condition or make it

reasonably safe. *Id.* The Court held that a premises occupier is not liable to an invitee if the occupier either adequately warns of the condition or makes it reasonably safe:

> The State argues that it had a duty to warn or make safe, but not both. In other words, the State argues that it was not negligent unless it *neither* adequately warned Williams *nor* made the condition reasonably safe. Stated differently still, the State argues that it was not negligent unless it *both* failed to adequately warn Williams and failed to make the condition reasonably safe. . . . We agree with the State. . . . In *State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992), we held that to establish the liability of a premises owner, a plaintiff must prove that "the owner failed to exercise ordinary care to protect the [licensee or invitee] from danger." The owner can provide the required protection by either warning the plaintiff or making the premises reasonably safe. This statement of the duty eliminates the confusion caused by PJC 66.05.

Id.; *see also Harris County v. Eaton*, 573 S.W.2d 177, 180 (Tex. 1978) (noting duty of the County as to a special defect was to "warn as in the case of the duty one owes to an invitee").

The differences between general negligence cases and suits against premises occupiers based on conditions of the premises are important. *See Urena*, 162 S.W.3d at 550. A premises occupier has specific duties of care. When a claim against the occupier is based on a condition of the premises, the jury is instructed on the specific elements of the occupier's duty and what must be proved before the plaintiff may prevail. *See Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997).[1] In this case, Smith pleaded that his injury was caused by both Del Lago's negligent activity and a dangerous condition on the premises. He requested jury questions on both theories, but the trial court charged the jury only on the dangerous condition theory. Smith does not assert that the trial court erred by refusing to submit a jury question on negligent activity, nor does

[1] Premises occupiers may be liable for injuries to invitees when the injuries are caused by (1) negligent activities of the occupier or (2) unreasonably dangerous conditions on the premises. *See Timberwalk*, 972 S.W.2d at 753.

he complain of the jury instructions. Del Lago does not assert charge error. Thus, the parties' contentions and the evidence should be measured by the charge given. *See St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 530 (Tex. 2002).

Question 1 of the jury charge asked whose negligence, if any, proximately caused Smith's injuries. As relevant to Question 1 and the issue before us, the charge contained the following instructions and definitions:

> "Proximate Cause" means that cause which, in a natural and continuous sequence, unbroken by any new and independent cause, 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 person 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 an event, but if an act or omission of any person not a party to the suit was the "sole proximate cause" of an occurrence, then no act or omission of any other person could have been a proximate cause.
>
> With respect to the condition of the premises, **Del Lago** was negligent if-
> (a) the condition posed an unreasonable risk of harm, and
> (b) Del Lago knew or reasonably should have known of the danger, and
> (c) Del Lago failed to exercise ordinary care to protect Bradley Smith from the danger, *by both failing to adequately warn Bradley Smith of the condition and failing to make that condition reasonably safe*.[2]
>
> "Ordinary Care," when used with respect to the conduct of **Del Lago** as an owner or occupier of a premises, means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances. (emphasis added).

Under the jury charge, Smith's burden was to prove Del Lago negligent by proving it failed in two regards: (1) it failed to use ordinary care to adequately warn of the condition posing an unreasonable

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[2] *See Williams*, 940 S.W.2d at 584; *see also* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises & Products* PJC 66.4 (2006).

risk of harm and (2) it failed to use ordinary care to make the condition reasonably safe. Because Del Lago could have been negligent only if it failed to act with ordinary care in regard to both, it is not liable unless that negligence, including both components, proximately caused Smith's injury.

The Court's statement of Del Lago's duty and its analysis of the case focuses only on Del Lago's duty to make a dangerous condition reasonably safe. In doing so, the Court neglects part of Smith's burden of proof: that Del Lago failed to use ordinary care to adequately warn him of the condition about which he complains.

I would hold that under these facts, Del Lago did not violate a duty of ordinary care to warn Smith of a condition that he did not need to be warned about. I would also hold there is no evidence that even if Del Lago breached a duty of care, the breach proximately caused Smith's injuries.

To review the essence of the case, Smith and his fraternity friends were in Del Lago's Grandstand Bar Friday night until it closed at midnight, then returned on Saturday evening. Smith suffered injuries at approximately 1:30 a.m. on Sunday morning while he and other late-staying patrons of the bar were being ushered out of the bar at closing time. He complains that Del Lago failed to protect him from a condition he had known of for approximately an hour and a half, but his complaint is bottomed on the injury he suffered at the hands of an unknown assailant in a bar fight he was not initially involved in, yet chose to subject himself to. No one could identify who started the fight, why it started, or who injured Smith. Smith could not sue the unknown person who injured him, but he could and did sue Del Lago and recovered a judgment for over $1,400,000.

Smith complains that ongoing interaction between members of his fraternity and the wedding party was an unreasonably dangerous condition,[3] Del Lago knew of the condition or should have known of it, and Del Lago failed to provide proper security to protect patrons from injury in the event of a fight. Del Lago essentially asserts that there was no unreasonably dangerous condition on the premises that it knew of or should have known of, so it did not owe a duty to provide more security or take other action to protect patrons such as Smith. It also asserts that even if it did owe Smith a duty, the evidence is legally insufficient to support the findings that it breached the duty or that the breach proximately caused Smith's injury.

I agree with the Court that occurrences on and around the Del Lago premises *outside* the bar before the night of the incident are dissimilar from and do not support a finding that Del Lago should have foreseen the general risk that patrons of the Grandstand Bar would be assaulted in a brawl *inside* the bar. *See Timberwalk*, 972 S.W.2d at 758. The bar was not the type of secluded or out-of-the-way area where a robbery, sexual assault, or other similar crime might typically, and possibly foreseeably, take place. The bar was lighted and occupied by patrons and bar personnel up until closing time when Smith was injured. Nor does the evidence establish sufficient prior occurrences inside or specifically related to the bar and similar to the events on the evening of Smith's injury so that Del Lago had a general duty to provide unusual amounts of security to protect patrons from assaults by other patrons. *See id.* The bar was not the scene of frequent fights, much less fights involving multiple participants.

[3] Justice Wainwright argues persuasively that the activities in the bar were not conditions of the premises insofar as duties owed by Del Lago to invitees. Although I do not necessarily disagree with his analysis, the parties address the activities as being a premises condition, and the Court addresses them as such; thus I will do so.

On the other hand, there is no reason to relieve Del Lago of a duty of ordinary care to its bar patrons if a specific, unreasonably dangerous condition developed on its premises. *See, e.g., Seideneck v. Cal Bayreuther Assocs.*, 451 S.W.2d 752, 754 (Tex. 1970); RESTATEMENT (SECOND) OF TORTS § 343 cmt. b (1965) ("To the invitee the possessor owes . . . [the] duty to exercise reasonable affirmative care . . . at least to ascertain the condition of the land, and to give such warning that the visitor may decide intelligently whether or not to accept the invitation . . . ."). Here, the jury found, under the charge as given, that an unreasonably dangerous condition arose. That finding had evidentiary support in testimony by Smith and other persons that persons were drinking, loudly cursing, challenging each other, making hand gestures toward each other, and even occasionally physically pushing each other. Witnesses, including a police officer Del Lago employed during his off-duty hours as a security officer, testified that such behavior in a bar setting is the way a lot of fights happen.[4] The evidence is legally sufficient to support the jury finding that conditions in the bar developed to the point that an unreasonable risk of harm was posed to bar patrons.

As Justice Hecht explains, Smith also fully knew of and was charged with knowledge of the condition at a time and under conditions giving him the choice of remaining in the bar and encountering the condition, or avoiding the conditions by leaving or taking other action—such as staying away from any fights that broke out. That should end the matter, but because it does not, the jury charge and burden of proof issues must be examined. Addressing those, I would hold that for

[4] Smith also urges that the lack of sufficient security was part of the condition. But the alleged insufficient security was not part of the condition posing a risk of harm; it was a component of Del Lago's action in meeting the duty Del Lago had to its invitees. Smith's argument that insufficient security was part of a premises condition conflates the condition alleged—the ongoing aggressive behavior of bar patrons—with the question of whether Del Lago exercised ordinary care to protect him from the condition.

two reasons, Del Lago is not liable for Smith's damages. First, Smith does not deny knowing full well about the condition he complains of. His knowledge of the condition, when he knew of it, and his ability to either encounter or avoid the condition should be balanced against Del Lago's duty to adequately warn him of the condition. I would hold that under the circumstances, Del Lago was not negligent because it did not breach a duty of *ordinary care* to warn Smith as a matter of law. Next, even assuming Del Lago was negligent, there is no evidence its negligence was a proximate cause of Smith's injury.

In *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 521 (Tex. 1978), this Court held that an invitee's knowledge of a dangerous condition does not relieve the premises occupier of its duty to the invitee.[5] In those situations in which the invitee's knowledge does not relieve the premises occupier of its duty, however, the invitee still must prove that the premises occupier failed to

[5] The rule in most states is to the contrary: the premises occupier has no duty to warn of open and obvious conditions when the danger can be fully appreciated and averted by a reasonable person. *See TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 771-72 n.18 (Tex. 2009) (Hecht, J., dissenting) (listing jurisdictions holding that a landowner has no duty to warn of a condition of which the invitee is aware, or should be aware of). The rationale underlying this doctrine is that "'the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.'" *See Armstrong v. Best Buy Co.*, 788 N.E.2d 1088, 1089 (Ohio 2003) (quoting *Simmers v. Bentley Constr. Co.*, 597 N.E.2d 504, 506 (Ohio 1992)). This is also the rule of the Restatement (Second) of Torts, and in many other contexts, is the law in Texas. RESTATEMENT (SECOND) OF TORTS § 343 (1965); *see, e.g.*, *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 218 (Tex. 2008) (premises owner owes no duty to warn an independent contractor's employees of an open and obvious danger); *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 660 (Tex. 2007) (explaining that the recreational use statute does not obligate a landowner to warn of known conditions); *Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566, 568 (Tex. 2007) (per curiam) (noting that an employer owes no duty to warn of hazards that are commonly known or already appreciated by the employee); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 184 (Tex. 2004) (holding that product seller owes no duty to warn of commonly known risks of the product's use); *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 387-88 (Tex. 1991) (holding there is no duty to warn of risks associated with prolonged and excessive alcohol consumption because such risks are common knowledge).

Jurisdictions retaining the open-and-obvious risk doctrine have also logically concluded that a landowner has no duty to an invitee to warn or make safe known and obvious conditions when the invitee has assisted in creating the conditions; under such circumstances, a landowner should anticipate the invitee will avoid harm from the known condition and warning is unnecessary. *See, e.g., Baber v. Dill*, 531 N.W.2d 493, 496 (Minn. 1995) ("To hold a landowner has a duty to warn an invitee of danger created, in part, by that individual is untenable.").

exercise ordinary care by failing to both adequately warn the invitee of the condition and take action to make the condition reasonably safe. In *Williams*, the Court specifically approved the format of the jury question and instructions given in this case. *Williams*, 940 S.W.2d at 584-85.

The Court says that there are some conditions for which no warning could possibly be adequate. Assuming that is so, for the sake of argument, it cannot be the case here because several of Smith's witnesses testified that the possibility of a fight was evident for a long period of time and one of Smith's witnesses, a fellow fraternity brother, testified that he did not enter the fight when it started because he did not want to go to work with a black eye. Clearly the "condition" was one for which an adequate warning could have been given if one were needed. By diminishing the importance of the duty to warn that invitees must prove premises occupiers breached in order to prove liability, the Court moves premises liability law close to that of simple ordinary negligence.

In its third issue, Del Lago argues that there is no evidence it breached its duty to Smith. Smith argues that there is evidence Del Lago knew of an escalating situation but took no action to defuse it or call security to protect bar patrons. Del Lago focuses on the credibility of the witnesses. It urges that Smith and his witnesses were not believable as to what took place during the evening while the believable evidence—that to which Del Lago's witnesses testified—is conclusive on the question of whether security was sufficient for the conditions. I disagree with Del Lago as to its credibility assertion. The record supports the jury's determination that at least some of Smith's testimony was credible. Nevertheless, I would hold that Del Lago did not breach its duty to Smith and was not negligent.

The purpose of requiring premises occupiers to warn invitees of unreasonably dangerous conditions is to provide the invitee with a choice at a time and place where the invitee can decide (1) whether to come onto or remain on the premises, accept the risk of harm posed by the condition, and take action to avoid or protect himself from the risk or (2) refuse to accept the risk by either not coming onto the premises or by leaving. *See* RESTATEMENT (SECOND) OF TORTS § 343 cmt. b (1965) (stating that the possessor owes the duty "to give such warning that the [invitee] may decide intelligently whether or not to accept the invitation, or may protect himself against the danger if he does accept it"); *see also Bill's Dollar Store, Inc. v. Bean*, 77 S.W.3d 367, 370 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). As to Smith, a warning by Del Lago would have been similar to a passenger telling a driver who was consciously exceeding the speed limit that exceeding the speed limit could result in a ticket for speeding. Such a statement is not a warning, it is a superfluous reminder of what the driver already knows.

At some point, the ordinary care standard must mean something. I would hold that it means something here. The question is, would reasonable persons exercising ordinary care in Del Lago's position have gone around the room telling Smith and other adult members of the groups who were in the bar after midnight and into the wee hours of the morning about what was occurring and that there was potential for a fight? I think not. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. I (Proposed Final Draft No. 1, 2005) ("Sometimes reasonable minds cannot differ about whether an actor exercised reasonable care . . . . In such cases, courts take the question of negligence away from the jury and determine that the party was or was not negligent as a matter of law. Courts sometimes inaptly express this result in terms of duty. . . . [T]hese cases

merely reflect the one-sidedness of the facts bearing on negligence . . . ."). Such actions would not have added to Smith's knowledge, and to require them imposes a requirement of meaningless ritual. And more to the point, should tort liability attach because Del Lago's personnel did not do so? Smith's knowledge under these facts gave him the same knowledge and opportunity to avoid potential harm from the condition as if he did not know of the escalating conditions in the first place and Del Lago had given him an adequate warning of the conditions and the ultimate fight. His knowledge, considering when he obtained it and the adequacy of the choices that were available to him, must be weighed when determining whether Del Lago failed to act with ordinary care to warn him. The greater Smith's knowledge of the condition, the less an ordinary person would believe Smith needed warning. Once his knowledge reached the level of what an adequate warning would have conveyed, as it did that evening and early morning, Del Lago's duty of ordinary care to warn should be deemed fulfilled as a matter of law. I would hold, as a matter of law, that under these facts Del Lago did not breach its duty of ordinary care to warn Smith.

The purpose of the law is not to make the premises occupier an insurer of its invitee's safety and thus insulate an invitee from all risk of injury, but rather to afford the invitee sufficient knowledge and reasonably available choices to make an informed decision about whether to encounter or avoid a condition. It is contrary to both common sense and logic to impose liability on Del Lago because its employees did not warn Smith during the evening that "members of Sigma Chi and a wedding party are drinking, acting belligerently toward and threatening each other," or take similar action when, according to Smith's own testimony, he knew as much as the warning would have conveyed. Parties should be held liable in tort because they did or failed to do something

substantive that caused injury to another, not because they performed or failed to perform meaningless acts. If it is otherwise, premises occupiers can be held liable for failing to perform a meaningless act, as is being done to Del Lago here.

Further, even assuming Del Lago was negligent, I would hold that there is no evidence its negligence was a proximate cause of Smith's injury. One reason is there is no evidence the absence of the warning was a cause-in-fact of the injury. A second reason is there is no evidence that even if security had been present earlier and at the time of the fight, or if Del Lago personnel had taken actions such as escorting rowdy patrons out of the bar, the person or persons who started the fight and the person who injured Smith would not have been present at the time of the fight.

As to the first reason, proof of cause-in-fact ("but-for" causation) requires evidence that the negligent act or omission was a substantial factor in bringing about the injury and that absent the act or omission, the harm would not have occurred. *See Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). Thus, Smith was required to prove that the absence of a warning by Del Lago was a substantial cause of his injury and that his injury would not have occurred but for the absence of the warning. *See id.* Including both the warning and "making safe" elements in one instruction did not lessen Smith's burden to prove that both elements proximately caused his injury. *See Williams*, 940 S.W.2d at 584 ("The State argues that it had a duty to warn or make safe, but not both. . . . We agree . . . .").

Under some circumstances, when a defendant has the duty to give a warning, the plaintiff is aided by a rebuttable presumption that a warning would have been heeded if it had been given. *See, e.g.*, *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 357-59 (Tex. 1993); *Tex. Dep't of Transp. v.*

Fontenot, 151 S.W.3d 753, 765 (Tex. App.—Beaumont 2004, pet. denied); *see also Barron v. Tex. Dep't of Transp.*, 880 S.W.2d 300, 304 (Tex. App.—Waco 1994, writ denied). But even when such a presumption applies, it is rebutted by evidence from which an inference can be drawn that the plaintiff would not have reacted differently if a warning had been given. *See Saenz*, 873 S.W.2d at 358-59. For example, the presumption is rebutted by evidence suggesting that the plaintiff knew the information a warning would have provided but nevertheless knowingly and voluntarily chose to face the risk. *See Guzman v. Synthes (USA)*, 20 S.W.3d 717, 720-21 (Tex. App.—San Antonio 1999, pet. denied); *see also Stewart v. Transit Mix Concrete & Materials Co.*, 988 S.W.2d 252, 256-57 (Tex. App.—Texarkana 1998, pet. denied). Once the presumption is rebutted, it ceases to play any part in determining causation. *See Saenz*, 873 S.W.2d at 359.

As noted above, and also by the Court and Justice Hecht, Smith knew all the information an adequate warning by Del Lago would have conveyed. He testified that he was aware of the tension between the groups, he witnessed episodes he described as "severe escalation," and at least an hour before the fight he saw men yelling, "squaring up chest to chest, kind of in a standoff," and "taunting back and forth." He also testified that when the fight finally broke out, he knew of the fight because he saw it even though he was not part of it. As Smith put it in his brief to this Court:

> Smith was not fighting and was standing against the wall until he saw his friend Spencer Forsythe go down. Forsythe was thrown against a wall and shoved to the floor. He was being kicked in the head, legs, and stomach when Smith leaned over and grabbed him by the shirt to pull him up and move him out of the bar.

There is no question about what Smith would have done if he had the knowledge a warning would have conveyed about the condition: he had the knowledge, yet he stayed in the bar with his

friends until closing time and then moved from a place of safety into the fight after he knew it was occurring. Smith did not testify that a warning by Del Lago was necessary for him to know what was happening or that a warning would have affected his conduct or prevented his injury, and there is no other evidence that if he had been warned by Del Lago employees about the ongoing aggressive behavior and confrontations during the evening, the alleged lack of sufficient security, or even the fight itself, the warning would have made a difference to him. In short, there is no proof that but for Del Lago's failure to warn Smith of the condition, or even the fight itself, his injury would not have occurred. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 18 cmt. c (Tentative Draft No. 1, 2001) ("To justify liability in a negligent failure-to-warn case, there must be a finding of causation—a finding that the warning, if given, would have prevented the harm that resulted . . . .").

Next, there is no evidence that the presence of security or the removing of rowdy persons from the bar would have prevented Smith's injury; in other words, that they were a cause-in-fact of his injury. In regard to the causation analysis, the facts in this case are similar to those in *East Texas Theatres, Inc. v. Rutledge*, 453 S.W.2d 466 (Tex. 1970). There the Court considered whether a theatre owner's failure to provide security proximately caused injury to a patron. The plaintiff was on the ground floor of the theatre when she was hit in the head by a bottle thrown from the balcony. *Id.* at 467. The plaintiff claimed, and the jury found, that persons in the balcony were acting in a rowdy manner during the movie, the theatre and its employees negligently failed to remove the rowdy persons, and the theatre's negligence proximately caused the plaintiff's injuries. *Id.* During the movie, there was "hollering" from patrons in the almost-full balcony and on the ground floor and

paper and cups were falling or being thrown from the balcony. *Id.* at 467-68. After the movie ended, the plaintiff was leaving the theatre when she was hit in the head by a bottle thrown from the balcony. *Id.* at 467. No particular person in the balcony was identified during trial as having been rowdy, nor was the person who threw the bottle identified. *Id.* at 468. The Court assumed, without deciding, that the finding of negligence was supported by evidence, but held there was no evidence the negligence proximately caused the plaintiff's injuries. *Id.* at 468-69. The Court rejected two contentions of the plaintiff that are substantively the same as those made by Smith in this case: rowdy patrons could and should have been removed and the balcony should have been supervised more closely. *Id.* at 469. As to the first contention, the Court held there was no evidence the bottle-thrower was one of the rowdy persons, so even if the rowdies had been removed, there was no evidence the bottle-thrower would have been removed. *Id.* As to the second contention, the Court held that it was speculative to say supervision would have prevented the bottle-thrower from injuring the plaintiff because no one knew who did the throwing. *Id.*

In reaching its conclusion that Del Lago's failure to provide adequate security was a proximate cause of Smith's injuries, the majority relies on lay and expert testimony that a security presence in the bar during the ninety minutes that the two groups were confronting each other would have defused the situation and prevented the brawl at closing time. However, no one knew who or what started the fight as the patrons were leaving the bar. The testimony was that there was a press of bodies going out the door when all of a sudden "all heck broke loose." There was no evidence that only fraternity members and wedding guests were exiting the bar or that a member of one of the groups started the melee. There was no evidence about why the fight started, that is, for example,

whether one of the fraternity or wedding group members started it because of earlier friction, or whether someone unrelated to either group took offense at a remark or insensitive touch or rub and threw a punch, or whether someone tripped and fell into another person who pushed back, thus starting a chain reaction of pushing and fighting. Nor was there testimony that a member of either the fraternity or wedding groups was the person who injured Smith or that the person who injured Smith was intoxicated or involved in the earlier jousting between the groups. Just as in *East Texas Theatres*, there is no evidence that if security had escorted rowdy patrons out of the bar earlier, the person or persons who started the fight would not have been present at closing time, the cause of the fight would have been eliminated, or the person who injured Smith by holding him in a headlock and hitting his head against the wall would not have been in the fight. *Id.* (stating that, unless the identity of the bottle-thrower was known, it was impossible to determine the effectiveness of the suggested control measures).

I would reverse the judgment of the court of appeals and render judgment that Smith take nothing.

Phil Johnson
Justice

OPINION DELIVERED: April 2, 2010

IN THE SUPREME COURT OF TEXAS

NO. 07-0123

DENNIS L. MIGA, PETITIONER,

v.

RONALD L. JENSEN, RESPONDENT

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

Argued December 14, 2008

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

A judgment debtor is entitled to supersede the judgment while pursuing an appeal; this defers payment until the matter is resolved but does not halt the accumulation of interest on the judgment. If the debtor rejects the supersedeas option and does not otherwise suspend enforcement, the creditor may execute on the judgment by seizing bank accounts or other property. To avoid seizure, the debtor may pay the judgment outright, which stops the accumulation of post-judgment interest. But these alternatives to suspending enforcement put at risk the judgment debtor's ability to recoup the seized assets or payment when the appeal is successful. The judgment debtor in this case, under an agreement with the judgment creditor, made a payment toward satisfying the judgment and subsequently won the appeal. The question is whether the creditor may nevertheless keep the money

because equitable principles of restitution do not apply. Because we reject the creditor's approach, we affirm the court of appeals' judgment.

I
Background

This case stems from Ronald Jensen's breach of an option agreement with Dennis Miga, under which Miga would have been entitled to buy stock in a privately held corporation. The facts and the parties are well known to us. *See Miga v. Jensen* (*"Miga I*"), 96 S.W.3d 207, 209 (Tex. 2002). In the initial round of litigation, a jury found for Miga on all issues, and the trial court rendered judgment in his favor for almost $19 million, plus more than $4 million in prejudgment interest. To suspend execution during his appeal, Jensen posted a supersedeas bond in the amount of $25,496,623.39, which subsequent riders increased to $29,500,000. *Id*. at 210. The court of appeals largely affirmed the trial court's judgment. *Id*.

Despite the bond, postjudgment interest continued to mount. Shortly after the court of appeals' decision, the parties entered into an agreed order under which Jensen made "an unconditional tender [to Miga] . . . of the sum of $23,439,532.78 . . . toward satisfaction of the Judgment in order to terminate the accrual of post-judgment interest on that sum." *Id*. Jensen then filed a petition for review with this Court. Miga moved to dismiss Jensen's petition, arguing that Jensen's tender mooted the appeal. We rejected that argument. *Id.* at 212. We noted that, while "explicitly reserving the right to appeal when the judgment is paid would be the safe practice in these circumstances, . . . payment on a judgment will not moot an appeal of that judgment if the judgment debtor clearly expresses an intent that he intends to exercise his right of appeal and appellate relief

is not futile." *Id.* at 211-12. We observed that, in negotiating the order, Jensen discussed its anticipated jurisdictional effect with Miga and that "Jensen informed Miga that he believed the Agreed Order would not moot his complaint, and that he would continue to pursue appellate review." *Id.* at 212. Although "Miga . . . complain[ed] that his refusal to accede to an express reservation of appeal in the agreed judgment and Jensen's removal of that language [from an earlier draft] ma[de] the payment of the judgment misleading," we disagreed:

> While Miga may have believed that Jensen's payment mooted the appeal, he could not have had any reasonable doubt that Jensen believed it did not, or that Jensen intended to pursue the appeal if legally allowed to do so. Consequently, because Jensen's payment was coupled with an expressed intent to pursue his appeal, he did not waive his right to continue to contest the judgment.

Id.

On the merits, we held that Miga's contract damages should have been measured by the value of the option at the time of breach, rather than at the time of trial. We reversed the court of appeals' judgment on that issue and rendered judgment for Miga for $1,034,400. *Id.* at 217. Miga moved for rehearing, arguing, among other things, that "[i]f the Court somehow implicitly [held] that Miga has any potential repayment obligation, the Court should grant rehearing and correct that error." The Court denied the motion without comment. On remand, the trial court rendered a modified judgment of $1,879,382.11 in Miga's favor. The judgment stated that it addressed "the issues specifically directed in the mandate of the Texas Supreme Court . . . and none other." Accordingly, Jensen's motion seeking to recover the lion's share of the money he had previously paid Miga remained unresolved.

Jensen then sought restitution of $21,560,150.67, the difference between the amount paid to Miga—$23,439,532.78—and the amount owed under the modified judgment. When Miga refused to tender that amount, Jensen filed this suit. The trial court granted Jensen's and denied Miga's motion for summary judgment.[1] A divided court of appeals affirmed. 214 S.W.3d 81. We granted the petition for review.[2] 51 Tex. Sup. Ct. J. 771 (Apr. 18, 2008).

II
Restitution After Reversal

Restitution after reversal has long been the rule in Texas and elsewhere. *See, e.g., Bank of U.S. v. Bank of Wash.*, 31 U.S. 8, 17 (1832) ("On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost."); *Cleveland v. Tufts*, 69 Tex. 580, 583 (Tex. 1888) ("It is settled that money paid upon a judgment afterward reversed may be recovered by the party making the payment."); *see also* RESTATEMENT OF THE LAW OF RESTITUTION ("RESTATEMENT") § 74; RESTATEMENT OF THE LAW (THIRD) - RESTITUTION AND UNJUST ENRICHMENT ("RESTATEMENT (THIRD)") § 18 (Tentative Draft No. 1 2001)[3]; Charles W. Tainter, 2d., *Restitution of Property Transferred Under Void or Reversed Judgments*, 9 MISS L. J. 157, 158 (1936) ("The right of the

[1] Miga's wife, Mary Patricia Miga, was a defendant in the trial court but has been dismissed by stipulation.

[2] We received amicus curiae briefs from Sharon E. Callaway, David M. Gunn, Deborah G. Hankinson,, Shannon H. Ratliff, Robert M. "Randy" Roach, Jr., and Stephen G. Tipps, supporting parts of Miga's petition for review; and from Professor Douglas Laycock and the Texas Association of Business, supporting Jensen's response.

[3] The Restatement of the Law (Third), Restitution and Unjust Enrichment will replace the original Restatement of Restitution, promulgated in 1936. This draft has been tentatively approved by both the Council and the Membership. *See* http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=14 (last visited Oct. 21, 2009 and copy available in Clerk of Court's file).

successful party . . . is conditional at least upon his having a good cause of action, and if his judgment is reversed he must, usually, make restitution in some form to the successful appellant."); *Peticolas v. Carpenter*, 53 Tex. 23, 29 (Tex. 1880) (noting that "[w]here a judgment for debt is reversed after it has been enforced by execution, and the case is finally decided in favor of defendant, he is certainly entitled to restitution"). The question here is whether this case presents an exception to that rule. Miga contends that it does, for three reasons.

A. Does the parties' contract preclude restitution?

Miga first argues that because the parties' agreement made Jensen's $23,439,532.78 tender "unconditional," the restitution remedy is unavailable. *See* RESTATEMENT § 74 (requiring restitution upon reversal unless it "would be inequitable or the parties contract that payment is to be final"). While it is true that "when a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory," *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000), here both sides agree that the Agreed Order is silent on restitution. The order provides that "Defendant Ronald L. Jensen ("Jensen") desires to make an unconditional tender to Plaintiff Dennis L. Miga ("Miga") of the sum of $23,439,532.78 (the "Tender Amount") toward satisfaction of the Judgment in order to terminate the accrual of post-judgment interest on that sum."

Many of the parties' arguments here repeat those made last time the case was before us, and our prior opinion answers most of them. Miga contends that he and Jensen contracted for the payment to be final, but if that were so, we would not have held that Jensen's appeal—despite the payment—was viable. *Miga I*, 96 S.W.3d at 212. We concluded, instead, that the parties agreed to

disagree: "[w]hile Miga may have believed that Jensen's payment mooted the appeal, he could not have had any reasonable doubt that Jensen believed it did not, or that Jensen intended to pursue the appeal if legally allowed to do so." *Id*. We agree with the court of appeals that "implicit in reserving a right to appeal is the right to a refund of the money in the event that the judgment is later modified or reversed." 214 S.W.3d at 89. Miga recognized as much in *Miga I*, arguing that "[i]t is fundamentally inconsistent for Jensen to say that his 'unconditional' payment was conditioned on his right to appeal *and seek restitution*." (Emphasis added.) In this case, he asserts that there is "no language requiring Miga to refund any of the $23.4 million payment in the event the judgment were later reversed or rendered," and Jensen agrees. They are correct—the parties no more agreed that Jensen could not seek reimbursement than they agreed that he could. The situation would be no different had Miga executed on a non-superseded judgment. In that instance, there would be no "agreement" that Jensen could seek restitution and no agreement that he could not, but the right to recover the funds upon reversal of the judgment would nevertheless be established as a matter of law. Because the parties' agreement is silent on this point, it does not displace the restitution-after-reversal rule.

Miga argues that our decision in *Excess Underwriters at Lloyds, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (Tex. 2008), in which we declined to recognize an equitable right of reimbursement, should apply here. We disagree. This case involves restitution upon reversal of a judgment, not insurers seeking restitution from an insured on a third-party claim, against the backdrop of a highly regulated industry. *See Frank's Casing*, 246 S.W.3d at 46-47 (noting that "allowing an insurer to settle claims and then sue its policyholder 'foster[s] conflict and

distrust in the relationship between an insurer and its insured'") (quoting *Tex. Ass'n of County Gov't Risk Mgmt Pool v. Matagorda County*, 52 S.W.3d 128, 134 (Tex. 2000)). Restitution in insurance-related cases involves policy concerns not present here:

> [D]isputes between insurers and policyholders over the insurer's duty to pay a claim, or to settle or defend a claim brought against the policyholder, present special difficulties for the law of restitution, because the insurer's duty to indemnify and defend is subject to extensive regulation under local law.

RESTATEMENT (THIRD) § 35, cmt. c (Tentative Draft No. 3 2004). In addition, in *Frank's Casing*, "the insurance policies spell[ed] out the parties' respective obligations in great detail," *Frank's Casing*, 246 S.W.3d at 50, while the Agreed Order did not address the effect of a successful appeal. We agree with Jensen that *Frank's Casing* is inapposite.

B. Was Jensen's payment voluntary?

Second, Miga argues that the voluntary payment rule precludes restitution. This common law principle provides that "money voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, duress, or compulsion, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability." *Pennell v. United Ins. Co.*, 243 S.W.2d 572, 576 (Tex. 1951) (quoting 40 AM. JUR. § 205 (1942)). It is a defense to a restitution claim. *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 768-69 (Tex. 2005) (citing RESTATEMENT (THIRD) § 6 cmt. e (Tentative Draft No. 1, 2001)) ("The restitution claim to recover a payment in excess of an underlying liability . . . meets an important limitation in the so-called voluntary-payment rule."). The rule, "widely used by parties and some Texas courts at one time," has diminished in scope, as "the rule's equitable policy concerns have been addressed

through statutory or other legal remedies." *Peake*, 178 S.W.3d at 771 (noting that "this Court has affirmatively applied the rule only once in the last forty years, and that holding has itself been modified since"). *But see Dallas County Cmty. College Dist. v. Bolton*, 185 S.W.3d 868, 883 (Tex. 2005) (holding that voluntary payment rule barred claim for repayment of student services fee imposed by public junior college district).

The voluntary payment rule precludes a party from "pay[ing] out his money, leading the other party to act as though the matter were closed, and then be in the position to change his mind and invoke the aid of the courts to get it back." *Peake*, 178 S.W.3d at 768-69. In *Miga I*, we rejected the notion that the voluntary payment rule mooted Jensen's appeal. *Miga I*, 96 S.W.3d at 211-12. As we made clear, Jensen never led Miga to believe that the matter was closed. His pursuit of an appeal—and stated intent to seek restitution if that appeal was successful—removed any reasonable doubt to the contrary. *Id.*; *see also Peake*, 178 S.W.3d at 770. The initial filings in this Court in *Miga I* show that the parties appreciated these issues even then. Miga complained that Jensen "cannot reverse course now and seek to recover the payment," while Jensen responded that the controversy could ultimately be resolved "either by an appropriate order that Miga return the wrongly awarded funds, or by a set-off against any liability that might result in the unlikely event that the Court granted Miga's petition and decided in his favor the issues raised therein."

In one of only two cases in which we have affirmatively applied the voluntary payment rule in the last forty years, we held that a services fee paid by community college students fell within the rule: "In light of the choices retained and [the students'] right to request a waiver of the fees or otherwise protest the imposition of the fee, any coercion that existed was not actual and imminent

and did not constitute duress as a matter of law," making the payment voluntary. *Bolton*, 185 S.W.3d at 883. We recognized that certain financial incentives or disincentives, like the fee, do not "transform a choice into coercion." *Id*.

In contrast, Jensen faced not only mounting post-judgment interest but the coercive power of the judgment. In *Highland Church of Christ v. Powell*, 640 S.W.2d 235, 237 (Tex. 1982), we hinted at this notion, determining that the voluntary payment rule was inapplicable when a church paid a judgment but made clear its intent to pursue an appeal. We held that the church's payment was made under "implied duress," caused by accruing penalties and interest, as well as the embarrassment the Church would have faced had execution issued against it. *Highland Church*, 640 S.W.2d at 237. The Third Restatement explains it more fully:

> Nor is the restitution claim of the judgment debtor barred by the doctrine of "voluntary payment" if the debtor elects to pay a judgment that he or she regards as invalid, without waiting for the issuance or levy of execution. On the contrary, any payment made in response to a judgment is treated as a payment made under compulsion, at least for the purpose of permitting the judgment debtor to avoid the consequences that would flow from regarding the payment as "voluntary."

RESTATEMENT (THIRD), § 18, cmt. c; *see also id.* ch. 2, Introductory Note (Tentative Draft No. 1, 2001) (referring to a payment made in compliance with a judgment as "[a] transfer[] made under legal compulsion"); RESTATEMENT § 74, cmt. b. (noting coercive effect of judgment).

The court of appeals held that the voluntary payment rule did not apply because "Jensen signed the Agreed Order under economic duress." 214 S.W.3d at 92 (noting that "interest on the judgment was accruing at a rate of ten percent, compounded annually"). In *Miga I*, we observed that, "[l]ike Highland Church, Jensen was 'justifiably anxious to avoid the . . . interest which would

accrue while the case was on appeal.'" *Miga I*, 96 S.W.3d at 211 (quoting *Highland Church*, 640 S.W.2d at 237). Miga complains that, under *Bolton*, the mere running of interest on a judgment is insufficient to constitute duress, and Jensen's ability to supersede the judgment eliminated any compulsion. But, as outlined above, it is not just the interest but the judgment's coercive effect that make the payment involuntary, regardless of the judgment debtor's means. To avoid execution pending appeal, Jensen could either pay the judgment or make arrangements to suspend its enforcement. *See* TEX. R. APP. P. 24.1. His ability to secure a supersedeas bond does not make his payment voluntary. *See* RESTATEMENT § 74, cmt. b (noting that, upon reversal of a judgment, amounts paid can be recovered "although no execution was issued, and although the payor could have obtained a supersedeas or stay of execution"); RESTATEMENT (THIRD) § 18, cmt. a (noting that "a party is under no obligation to postpone compliance with a judgment that he seeks to overturn"). When, as here, payment on a judgment is coupled with an expressed intent to appeal when appellate relief is attainable, *see Miga I*, 96 S.W.3d at 212, the voluntary payment rule will not preclude restitution if the judgment is later reversed.

C. Does Miga's tax payment raise a fact issue on the equities of restitution?

Finally, Miga asserts that restitution would be inequitable because, believing the funds to be his, he paid $5 million in income taxes. *See* RESTATEMENT § 74 (requiring restitution upon reversal "unless restitution would be inequitable"). But Miga does not contend that restoring $5 million of the $21 million he received would be inequitable—he argues that restoring *any* of the money would be inequitable. In response to an interrogatory that asked whether Miga contended he should be

excused from making restitution "of all or any part of the Payment on the grounds that [he] lack[ed] sufficient means to make restitution in full," Miga answered:

> No. Defendants contend that Plaintiff's claims are barred in their entirety by the express terms of the Rule 11 Agreement between Jensen and Dennis Miga, which provides that the sums Jensen seeks to recover were paid unconditionally to Dennis Miga.

Miga successfully resisted discovery of his net worth on the same basis, and still maintains that the tax payment is an absolute defense to a restitution claim.

Miga's contention is incorrect. Restitution is rooted in principles of unjust enrichment. *See* RESTATEMENT § 1 ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other."); RESTATEMENT (THIRD) § 1 (Discussion Draft 2000) ("A person who is unjustly enriched at the expense of another is liable in restitution to the other."). While the law of restitution recognizes a defense based on change of position, the defense generally applies only to the extent that restitution would cause loss to an innocent party, not the judgment creditor. *See, e.g.*, RESTATEMENT § 142, cmt. f (recognizing change of circumstances defense and providing that "[i]f part of the subject matter is lost or destroyed, the recipient still has a duty of making restitution of the remainder"); *see also id.* § 74, cmt. c (providing "[n]or is change of position a defense to the creditor").

Moreover, to assess equities, we must also consider Miga's conduct. Miga's tax obligation arose because he exercised control over Jensen's $23,439,532.78 tender. Well aware that Jensen would continue his appellate fight to reverse the judgment, Miga could have opted to decline the payment and await the appellate outcome. Instead, Miga gambled on the strength of his appeal.

Jensen's ultimate success meant that the multimillion dollar trial court judgment was, in large part, erroneous. Prohibiting restitution would penalize Jensen for the court's mistake and is inimical to the unjust enrichment principles underlying the doctrine. We can no more fault Jensen for his dogged pursuit of an appellate remedy than reward Miga for wagering on an affirmation of the judgment. The trial court and the court of appeals correctly concluded that, as a matter of law, restitution comports with the equities.

III
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: October 23, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0135

EAST TEXAS SALT WATER DISPOSAL COMPANY, INC., PETITIONER,

v.

RICHARD LEON WERLINE, RESPONDENT

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

Argued January 16, 2008

JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE GUZMAN joined.

JUSTICE WILLETT filed a concurring opinion.

CHIEF JUSTICE JEFFERSON filed a dissenting opinion, in which JUSTICE MEDINA and JUSTICE GREEN joined.

The issue in this case is whether the Texas General Arbitration Act (TAA)[1] allows an appeal from a trial court's order that denies confirmation of an arbitration award and instead, vacates the award and directs that the dispute be arbitrated anew. We hold that it does and accordingly affirm the judgment of the court of appeals.[2]

I

Petitioner East Texas Salt Water Disposal Company, an oilfield service business, employed respondent Richard Leon Werline, an experienced petroleum engineer, as its Operations Manager under a written Employment Agreement. If the Company materially breached the Agreement,

[1] TEX. CIV. PRAC. & REM. CODE §§ 171.001-.098. All references to the TAA are to these provisions.

[2] 209 S.W.3d 888, 901 (Tex. App.–Texarkana 2006).

Werline had the right to terminate and receive two years' salary as severance pay. A little over halfway into the Agreement's five-year term, Werline gave notice of termination and demanded severance pay, claiming that the Company had changed his position and stripped him of his duties. The Company denied that it had breached the Agreement and contended that Werline had simply quit. As required by the Agreement, Werline and the Company submitted their dispute to "final and binding" arbitration. They selected an AAA arbitrator, who, after a three-day hearing, found for Werline and awarded him severance pay ($244,080.00), stipulated attorney fees ($28,272.50) and expenses ($11,116.76), and costs ($9,535.73).

The Company petitioned the district court to vacate, modify, or correct the award, and Werline counterclaimed for confirmation. The Company did not assert in its petition, and made no effort to establish, any of the grounds for vacating, modifying, or correcting an arbitration award under the TAA.[3] Rather, the Company argued that the award was so contrary to the evidence that it was arbitrary and capricious and therefore the arbitrator must have been biased. Although Werline objected that these were not statutory grounds for vacating an arbitration award, he and the Company submitted the verbatim record of the arbitration hearing to the court and proceeded to argue their dispute all over again.

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[3] *Id*. at 898 n.13 ("We note East Texas has not alleged any grounds [for vacatur] under the TAA.").

The grounds for vacating an award are set out in section 171.088(a), which states: "On application of a party, the court shall vacate an award if: (1) the award was obtained by corruption, fraud, or other undue means; (2) the rights of a party were prejudiced by: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption in an arbitrator; or (C) misconduct or wilful misbehavior of an arbitrator; (3) the arbitrators: (A) exceeded their powers; (B) refused to postpone the hearing after a showing of sufficient cause for the postponement; (C) refused to hear evidence material to the controversy; or (D) conducted the hearing, contrary to Section 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that substantially prejudiced the rights of a party; or (4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection."

The grounds for modifying or correcting an award are set out in section 171.091(a), which states: "On application, the court shall modify or correct an award if: (1) the award contains: (A) an evident miscalculation of numbers; or (B) an evident mistake in the description of a person, thing, or property referred to in the award; (2) the arbitrators have made an award with respect to a matter not submitted to them and the award may be corrected without affecting the merits of the decision made with respect to the issues that were submitted; or (3) the form of the award is imperfect in a manner not affecting the merits of the controversy."

The court's judgment denied confirmation and vacated the arbitration award, holding that "the material factual findings in the Award are so against the evidence . . . that they manifest gross mistakes in fact and law".[4] The judgment also ordered that the matter be "re-submitted to arbitration by a new arbitrator with the sole issue before that Arbitrator being whether or not there was a material breach of the Employment Agreement by ETSWD [the Company] consistent with the findings in this Judgment." Those findings were:

- "There is no evidence to support a finding of a material breach of any provision of the Employment Agreement";
- "[A]n assignment of new and/or additional duties for Werline . . . was . . . not a material breach of the Employment Agreement";
- "The change in Werline's title . . . was not a material breach of the Employment Agreement";
- "There is no evidence to support a finding that . . . a material breach was committed by the Board of Directors, officers, or representatives of ETSWD with regard to Werline and the Employment Agreement"; and
- "Werline voluntarily resigned his employment with ETSWD".

Thus, the do-over the court ordered was to be one in which every material fact, and even the result itself, were already conclusively established against Werline.

Werline appealed. The court of appeals held that it had jurisdiction to consider the appeal,[5] that there was evidence to support the award,[6] and that "[t]he arbitrator did not err so egregiously as

[4] The court's judgment also stated that "[t]he Arbitrator . . . exceeded his authority by not limiting his findings and award to those issues contractually established in the Employment Agreement", even though the Agreement called for arbitration of "any disagreement . . . under any provision", and the arbitrator found that Werline was entitled to severance pay under the "Employer Breach" provision of the Agreement. The Company does not argue on appeal that the arbitrator exceeded his authority by deciding issues outside the contractual scope of arbitration.

[5] 209 S.W.3d at 896.

[6] *Id.* at 901. The court commented: "We are not convinced an arbitration award can be reviewed for legal sufficiency of the evidence. . . . However, it is not necessary for us to decide this issue since . . . there is clearly more than a scintilla of evidence supporting the arbitrator's award." *Id.* at 898 n.14. We, of course, express no opinion on the subject.

to imply bad faith or a failure to exercise honest judgment".[7] Accordingly, the court reversed the trial court's judgment and rendered judgment confirming the award.[8]

The Company petitions for review on one ground only: that the court of appeals had no jurisdiction over the appeal under section 171.098(a) of the TAA.

II

Section 171.098(a) states:

> A party may appeal a judgment or decree entered under this chapter or an order:
> (1) denying an application to compel arbitration . . . ;
> (2) granting an application to stay arbitration . . . ;
> (3) confirming or denying confirmation of an award;
> (4) modifying or correcting an award; or
> (5) vacating an award without directing a rehearing.

The district court's judgment expressly denied confirmation of Werline's arbitration award and was thus appealable under subsection (3).

But the Company argues that the statute cannot be read so simply or so literally. Rather, the Company contends, subsection (5) implies (though it does not state) that a court order vacating an award *and* directing a rehearing is *not* appealable, and that implication creates an exception to subsection (3), so that an order denying confirmation and therefore appealable under subsection (3) is rendered not appealable by subsection (5) if it also vacates the award and directs a rehearing. For several reasons, we disagree.

First: The court's judgment denying confirmation of the arbitration award fits squarely under subsection (3). The judgment is not insulated from appellate review expressly conferred under subsection (3) merely because the trial court also vacated the award and directed a rehearing. In

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[7] *Id*. at 901. Although the Company did not assert any statutory basis for vacating the award, the court held that the common law, in addition to the TAA, allows an arbitration to be set aside for "(1) fraud; (2) misconduct; or (3) such gross mistake as would imply bad faith and failure to exercise honest judgment." *Id*. at 898 (citing *Riha v. Smulcer,* 843 S.W.2d 289, 292 (Tex. App.–Houston [14th Dist.] 1992, writ denied)). We express no opinion on this issue.

[8] 209 S.W.3d at 901.

denying Werline's request for confirmation of the award, the district court made clear that it rejected the award and all bases on which it rested. The court went so far as to hold that the material facts the parties had vigorously disputed in the first arbitration should all be established against Werline in the second arbitration.

When an arbitration award is unclear or incomplete or contains an obvious error, a limited rehearing to correct the problem is but a preface to determining confirmation, not a decision on the issue. If, for example, the arbitrator's award required clarification or interpretation,[9] a rehearing for that limited purpose would not necessarily be a denial of confirmation of the award, but merely a deferral of final ruling until the arbitration was complete. When rehearing is necessary for the issue of confirmation to be fully presented, vacatur pending rehearing is not appealable, not because the order falls outside subsection (5), but because it falls outside subsection (3) and the rest of section 171.098(a).

Second: The Company's argument requires that subsection (5) operate as an exception to subsection (3), even though it provides a separate basis for appeal. In essence, the Company reads subsection (3) to allow an appeal from an order denying confirmation *unless* it also vacates the award and directs rehearing. But section 171.098(a) is a disjunctive list of orders that *can* be appealed; it does not list orders that *cannot* be appealed. The five subsections are connected by "or". To equate

> "denying confirmation . . . or . . . vacating an award without directing a rehearing"

with

> denying confirmation . . . but not if . . . vacating an award and directing a rehearing

[9] *See*, *e.g.*, *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990), *citing Hanford Atomic Metal Trades Council, AFL-CIO v. Gen. Elec. Co.*, 353 F.2d 302, 307-308 (9th Cir. 1965) ("We share the view of the district court that the opinion required clarification and interpretation. We also share the view of the district court that this was a task to be first performed by the arbitration committee and not the court, and that the court properly remanded the matter to the arbitration committee for such clarification and interpretation."); *Hartford Steam Boiler Inspection and Ins. Co. v. Underwriters at Lloyd's and Cos. Collective*, 857 A.2d 893, 905-906 (Conn. 2004).

is a strange reading of the word "or". Instead of two separate categories of appealable orders, the Company argues there should be but one smaller category. The proper construction of section 171.098(a) gives full, literal effect to subsections (3) and (5) both. An order denying confirmation can be appealed, just as subsection (3) provides, including a denial of confirmation in the form of a vacatur with rehearing; and an order vacating an arbitration award without directing rehearing can be appealed, just as subsection (5) provides.

Third: Because Texas law favors arbitration,[10] judicial review of an arbitration award is extraordinarily narrow.[11] The right of appeal provided by section 171.098(a) assures that a trial court does not exceed the limitations on its authority to review an arbitration award. Those limitations would be circumvented if re-arbitration could be ordered for reasons that would not justify denying confirmation, and appeal thereby delayed. As the United States Court of Appeals for the Fifth Circuit has observed: "Such a result would disserve the policies that promote arbitration and restrict judicial review of awards."[12] And where, as here, the parties have agreed to "final and binding" arbitration only for the Company to be given a Mulligan, their right to contract is also subverted.

The Company argues that the district court's order should not be appealable because it was like granting a motion for new trial in a case, which is not appealable. But the analogy does not fit. A new trial occurs in the court that granted the motion; the rehearing here is not before the trial court but a separate tribunal, a new arbitrator. The district court's order is more like remanding an

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[10] *Prudential Sec., Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995) (per curiam) ("Arbitration of disputes is strongly favored under federal and state law.") (citing, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

[11] *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) ("The courts will not overthrow an award such as this, except in a very clear case.")).

[12] *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990).

administrative decision to the agency for further proceedings, which is ordinarily appealable.[13] A still closer analogy would be to Texas appellate procedure. An appellate court may direct a trial court to take corrective action while the appeal remains pending to allow proper presentation of the appeal,[14] and that directive is not appealable. But an appellate court judgment remanding a case to the trial court for a new trial is certainly appealable. Similarly, an order vacating an arbitration award and directing rehearing for the limited purpose of correcting, clarifying, or completing the arbitration to allow proper presentation of issues relating to confirmation is not appealable, while an order requiring a new arbitration is as final a decision as an appellate court's remand of a case to a trial court for a new trial, and therefore appealable.

Fourth: The law in other states does not require that we embrace the Company's argument. The TAA provides that it "shall be construed to effect its purpose and make uniform the construction of other states' law applicable to an arbitration."[15] Other states appear to differ in whether an appeal should be allowed in the situation here presented, although many cases are far from clear. In New York, where there is no statute governing appeals in arbitration cases specifically, an appeal would be allowed.[16] One other state, West Virginia, has no specific statute. The Uniform Arbitration Act[17]

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[13] *See*, *e.g.*, TEX. GOV'T CODE §§ 2001.174 (allowing remand after judicial review in certain administrative cases) and 2001.901 (allowing appeal); *see also R. R. Comm'n of Tex. v. Home Transp. Co.*, 654 S.W.2d 432 (Tex. 1983), and *R.R. Comm'n of Tex. v. Vidaurri Trucking, Inc.*, 661 S.W.2d 94 (Tex. 1983) (both holding final, for purposes of appeal, a trial court remand to an agency, even with certain conditions or reservations, under former TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(e), a statutory predecessor to TEX. GOV'T CODE § 2001.174).

[14] TEX. R. APP. P. 44.4 ("[I]f the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals . . . and . . . the trial court can correct its action or failure to act . . . , the court of appeals must direct the trial court to correct the error [and] will then proceed as if the erroneous action or failure to act had not occurred.").

[15] TEX. CIV. PRAC. & REM. CODE § 171.003.

[16] *In re Baar & Beards, Inc.*, 282 N.E.2d 624, 625 (N.Y. 1972) ("An order vacating an arbitration award and directing a new arbitration before new arbitrators is final and appealable.").

[17] UNIF. ARBITRATION ACT § 19(a), 7 U.L.A. 739 (1956) ("An appeal may be taken from: (1) An order denying an application to compel arbitration made under Section 2; (2) An order granting an application to stay arbitration made under Section 2(b); (3) An order confirming or denying confirmation of an award; (4) An order modifying or correcting an award; (5) An order vacating an award without directing a rehearing; or (6) A judgment or decree entered pursuant

or the Revised Uniform Arbitration Act[18] provision regarding appeals has been adopted in thirty-four other states and the District of Columbia,[19] and two other states have similar provisions.[20] But even in these thirty-seven jurisdictions with similar statutory language, the decisions directly addressing this issue fail to reach any sort of consensus. Courts in seven states — California,[21] Kentucky,[22] Maine,[23] Nebraska,[24] Nevada,[25] North Carolina[26] and South Dakota[27] — and in the District of

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to the provisions of this act.").

[18] REV. UNIF. ARBITRATION ACT § 28(a), 7 U.L.A. 94 (2000) ("An appeal may be taken from: (1) an order denying a [motion] to compel arbitration; (2) an order granting a [motion] to stay arbitration; (3) an order confirming or denying confirmation of an award; (4) an order modifying or correcting an award; (5) an order vacating an award without directing a rehearing; or (6) a final judgment entered pursuant to this [Act].").

[19] ALASKA STAT. § 09.43.550; ARIZ. REV. STAT. ANN. § 12-2101.01; ARK. CODE ANN. § 16-108-219; COLO. REV. STAT. § 13-22-228; DEL. CODE ANN. tit. 10, § 5719; D.C. CODE § 16-4427; FLA. STAT. § 682.20; HAW. REV. STAT. § 658A-28; IDAHO CODE ANN. § 7-919; IND. CODE § 34-57-2-19; IOWA CODE § 679A.17; KAN. STAT. ANN. § 5-418; KY. REV. STAT. ANN. § 417.220; ME. REV. STAT. ANN. tit. 14, § 5945; MASS. GEN. LAWS ch. 251, § 18 and ch. 150C, § 16; MINN. STAT. § 572.26; MO. REV. STAT. § 435.440; MONT. CODE ANN. § 27-5-324; NEB. REV. STAT. § 25-2620; NEV. REV. STAT. § 38.247; N.J. STAT. ANN. § 2A:23B-28; N.M. STAT. § 44-7A-29; N.C. GEN. STAT. § 1-569.28; N.D. CENT. CODE § 32-29.3-28; OKLA. STAT. tit. 12, § 1879; OR. REV. STAT. § 36.730; 42 PA. CONS. STAT. § 7320; S.C. CODE ANN. § 15-48-200; S.D. CODIFIED LAWS § 21-25A-35; TENN. CODE ANN. § 29-5-319; UTAH CODE ANN. § 78B-11-129 (amended, in 2003, at (f), to "a final judgment entered pursuant to this chapter"); VT. STAT. ANN. tit. 12, § 5681; VA. CODE ANN. § 8.01-581.016; WASH. REV. CODE § 7.04A.280; WYO. STAT. ANN. § 1-36-119.

[20] A Mississippi statute that applies only to arbitration under construction contracts uses UAA language. MISS. CODE ANN. § 11-15-141. A California statute uses language similar to the UAA. CAL. CIV. PROC. CODE § 1294 ("An aggrieved party may appeal from: (a) An order dismissing or denying a petition to compel arbitration. (b) An order dismissing a petition to confirm, correct or vacate an award. (c) An order vacating an award unless a rehearing in arbitration is ordered. (d) A judgment entered pursuant to this title. (e) A special order after final judgment.").

[21] *Long Beach Iron Works, Inc. v. Int'l Molders & Allied Workers Union of N. Am., Local 374*, 103 Cal. Rptr. 200 (Cal. Ct. App. 1972); *accord Kamboj v. Schofield*, No. C048320, 2005 Cal. App. Unpub. LEXIS 5944, 2005 WL 1581255 (Cal. Ct. App. July 7, 2005).

[22] *Paul Miller Ford, Inc. v. Craycraft*, Nos. 2005-CA-000634-MR and 2005-CA-000692-MR, 2005 Ky. App. LEXIS 152, 2005 WL 1593418 (Ky. Ct. App. July 8, 2005).

[23] *Me. Dep't of Transp. v. Me. State Employees Ass'n*, 581 A.2d 813 (Me. 1990); *Crowley-King v. Kennebec Valley Radiology, P.A.*, 580 A.2d 687 (Me. 1990).

[24] *Neb. Dep't of Health & Human Servs. v. Struss*, 623 N.W.2d 308 (Neb. 2001).

[25] *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 204 P.3d 1262 (Nev. 2009).

[26] *In re Arbitration Between the State of N.C. & Davidson & Jones Constr. Co.*, 323 S.E.2d 466 (N.C. Ct. App. 1984).

[27] *Double Diamond Constr. v. Farmers Coop. Elevator Ass'n*, 656 N.W.2d 744 (S.D. 2003).

Columbia[28] have dismissed appeals from orders similar to the order in this case providing both for vacatur and a rehearing. Courts in four states — Arizona,[29] Massachusetts,[30] Tennessee[31] and Utah[32] — have not. Courts in at least two states — Minnesota[33] and Missouri[34] — have gone both ways. Six states have statutes more like the FAA.[35] Courts in one of those states — Ohio — appear to allow appeals when the federal courts would.[36] Two other states have statutes more like the FAA but in limited contexts.[37] Three states have statutes allowing appeals in arbitration cases as in other

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[28] *Connerton, Ray & Simon v. Simon*, 791 A.2d 86 (D.C. 2002) (per curiam).

[29] *Wages v. Smith Barney Harris Upham & Co.*, 937 P.2d 715 (Ariz. Ct. App. 1997).

[30] *Fazio v. Employers' Liab. Assur. Corp.*, 197 N.E.2d 598 (Mass. 1964); *Bernard v. Hemisphere Hotel Mgmt., Inc.*, 450 N.E.2d 1084 (Mass. App. Ct. 1983).

[31] *Boyle v. Thomas*, No. 02A01-9601-CV-00022, 1997 Tenn. App. LEXIS 807, 1997 WL 710912 (Tenn. Ct. App. Nov. 17, 1997).

[32] *Hicks v. UBS Fin. Servs.*, No. 20080950-CA, 2010 Utah App. LEXIS 20, 2010 WL 375564 (Utah Ct. App. Feb. 4, 2010).

[33] *Kowler Assocs. v. Ross*, 544 N.W.2d 800 (Minn. Ct. App. 1996) (dismissing appeal); *Safeco Ins. Co. v. Goldenberg*, 435 N.W.2d 616 (Minn. Ct. App. 1989) (allowing appeal).

[34] *Crack Team USA, Inc. v. Am. Arbitration Ass'n*, 128 S.W.3d 580 (Mo. Ct. App. 2004) (dismissing appeal); *Air Shield Remodelers, Inc. v. Biggs*, 969 S.W.2d 315 (Mo. Ct. App. 1998) (allowing appeal); *Nat'l Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334 (Mo. Ct. App. 1995) (allowing appeal).

[35] CONN. GEN. STAT. § 52-423 ("An appeal may be taken from an order confirming, vacating, modifying or correcting an award, or from a judgment or decree upon an award, as in ordinary civil actions."); LA. REV. STAT. ANN. § 9:4215 ("An appeal may be taken from an order confirming, modifying, correcting, or vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action."); N.H. REV. STAT. ANN. § 542:10 ("An appeal may be taken from an order confirming, modifying, correcting, or vacating an award, or from a judgment entered upon an award as in the case of appeals from the superior to the supreme court."); OHIO REV. CODE ANN. § 2711.15 ("An appeal may be taken from an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding or from judgment entered upon an award."); R.I. GEN. LAWS § 10-3-19 ("Any party aggrieved by any ruling or order made in any court proceeding as authorized in this chapter may obtain review as in any civil action, [including] an order confirming, modifying or vacating an award . . . ."); WIS. STAT. § 788.15 ("An appeal may be taken from an order confirming, modifying, correcting or vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action.").

[36] *Cleveland Police Patrolmen's Ass'n v. Cleveland*, 668 N.E.2d 548 (Ohio Ct. App. 1995) (allowing appeal when trial court ordered re-arbitration of the only claim made, distinguishing *Stewart v. Midwestern Indem. Co.*, 543 N.E.2d 1200 (Ohio 1989) (disallowing appeal when trial court remanded for panel to complete arbitration by considering claim not previously decided)).

[37] MD. CODE ANN., CTS. & JUD. PROC. § 3-2B-08 (appeals from international commercial arbitrations); MICH. COMP. LAWS § 600.5082 (appeals from arbitrations in domestic relations cases).

civil cases.[38] Of these, one, Alabama,[39] would apparently allow an appeal like the one before us. Thus, the seventeen jurisdictions, other than Texas, that have considered whether to allow appeal in a situation like the one in this case appear about evenly divided on the issue. As a result, to "make uniform the construction of other states' law" on the subject before us, as the TAA mandates,[40] is beyond our power. We honor the statute's spirit by making matters no worse than they already are.

Two courts of appeals have concluded that an appeal should not be allowed in this situation, and to that extent, we disapprove them.[41]

* * *

In sum: The district court's order denied confirmation, expressly and effectively, and was thus made appealable by the literal text of the TAA. The judgment of the court of appeals is accordingly

Affirmed.

Nathan L. Hecht
Justice

Opinion delivered: March 12, 2010

[38] ALA. CODE § 6-6-15 ("Either party may appeal from an award . . . . as in other cases."); GA. CODE ANN. § 9-9-16 ("Any judgment or any order considered a final judgment under this part may be appealed . . . ."); 710 ILL. COMP. STAT. 5/18 ("Appeals may be taken in the same manner, upon the same terms, and with like effect as in civil cases.").

[39] *Jenks v. Harris*, 990 So. 2d 878 (Ala. 2008).

[40] TEX. CIV. PRAC. & REM. CODE § 171.003.

[41] *Thrivent Fin. for Lutherans v. Brock*, 251 S.W.3d 621 (Tex. App.–Houston [1st Dist.] 2007, no pet.); *Stolhandske v. Stern,* 14 S.W.3d 810, 815 (Tex. App.–Houston [1st Dist.] 2000, pet. denied); *Prudential Sec., Inc. v. Vondergoltz,* 14 S.W.3d 329 (Tex. App.–Houston [14th Dist.] 2000, no pet.).

IN THE SUPREME COURT OF TEXAS

NO. 07-0135

EAST TEXAS SALT WATER DISPOSAL COMPANY, INC., PETITIONER,

v.

RICHARD LEON WERLINE, RESPONDENT

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

Argued January 16, 2008

JUSTICE WILLETT, concurring.

I join fully the Court's opinion that the Texas Arbitration Act (TAA)[1] allows an appeal when a trial court denies confirmation of an arbitration award, vacates the award, and sends the dispute back for re-arbitration. The Court explains cogently why appellate-court jurisdiction exists in a do-over situation like this, but a bit more can be said.

The governing language, section 171.098(a) of the TAA, states:

> A party may appeal a judgment or decree entered under this chapter or an order:
> (1) denying an application to compel arbitration . . . ;
> (2) granting an application to stay arbitration . . . ;
> (3) confirming or denying confirmation of an award;
> (4) modifying or correcting an award; or
> (5) vacating an award without directing a rehearing.

[1] TEX. CIV. PRAC. & REM. CODE §§ 171.001–.098.

First, the Company reads more into subsection (5) than it says. By its terms subsection (5) allows an appeal when a rehearing is not granted, but does it also *dis*allow every appeal when a rehearing *is* granted? The answer, as the Court explains, depends on subsection (3), which indicates, with no indication of exception, that a judgment or decree "denying confirmation of an award" is appealable. A vacatur with rehearing is appealable if it amounts to a denial of confirmation; otherwise not.

When as here a trial court vacates an award and directs rehearing because it believes the award is wrong and should be set aside completely, the ruling is indistinguishable from a denial of confirmation appealable under subsection (3). As the Court points out, this trial court's denial of confirmation left no doubt the court was rejecting the award topside and bottom, going so far as to say the disputed facts from Arbitration 1 should be established against Werline in Arbitration 2. The Court is right that this "fits squarely under subsection (3)."[2]

Second**,** to construe section 171.098(a) as precluding appeal from an order vacating an arbitration award and requiring re-arbitration works an odd result, as this case illustrates. Having incurred the expense of one arbitration and one court proceeding, the parties have been ordered to do it all over again. While re-arbitration in this case would no doubt be quick, since the district court has ordered all material facts established against Werline and predetermined an award for the Company, a second arbitration and second confirmation proceeding would be additional, wasted

[2] ___ S.W.3d at ___. Even if the judgment had not denied confirmation expressly, the fact that it effectively did so makes it appealable under section 171.098(a). Otherwise, a trial court could determine whether its order could be appealed by tweaking the language without changing the effect. Nothing in section 171.098(a) suggests that appealability turns on such technicalities.

expense to the parties. They would then face the delay and expense of a second appellate proceeding, just to arrive where they are now: with the first award confirmed, as the court of appeals has held it should have been, a result the Company has not chosen to contest in this Court. If the district court had not stacked the deck against Werline in the second arbitration, the redo would take even longer and cost even more.

In general, deferring appeal until after re-arbitration is not likely to be more efficient, since judicial review of arbitration awards is very limited and the issues are much narrower than those involved in the arbitrated dispute. Nor is there reason to think that mandamus review of orders requiring re-arbitration would be more efficient than appeal. On the other hand, deferring appeal allows the possibility that a trial court can avoid confirmation and the limits on its review by simply ordering re-arbitration until there is a result the court approves, or one or both parties have been exhausted. Such a construction of section 171.098(a) would not serve the purpose of arbitration, which is to provide an "expedited and less expensive disposition of a dispute."[3] Our construction does.

Third, while this case arises solely under the TAA, which is free to vary from the Federal Arbitration Act (FAA)[4] (assuming no preemption), it is worth noting that the Court's result mirrors what the result would be under federal law. Section 16 of the FAA provides in pertinent part that "[a]n appeal may be taken from . . . (1) an order . . . (D) confirming or denying confirmation of an

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[3] *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992).

[4] 9 U.S.C. §§ 1–16.

award or partial award, or (E) modifying, correcting, or vacating an award . . . ."[5] Subsection (1)(E) does not include the TAA's limiting phrase, "without directing a rehearing." The federal courts "routinely assume . . . that an order vacating an arbitrator's decision but remanding for additional arbitration is appealable under § 16(a)(1)(E) . . . ."[6] But the lack of any caveat does not mean that every vacatur is appealable. A vacatur with a remand to the same arbitrators merely for clarification does not have the degree of finality required for an appealable order.[7] Thus, federal courts have construed section 16 of the FAA to operate with respect to vacaturs the same way we construe section 171.098(a) of the TAA today: a vacatur for re-arbitration is appealable, while a vacatur merely for clarification is not.

In sum, the Company's position invites us to:

- draw an inference when none is permitted;[8]
- create an exception in a statutory provision that has none;[9]

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[5] *Id*. § 16(a)(1)(D)–(E).

[6] *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 328 (1st Cir. 2000) (internal quotation marks omitted) (quoting *Perlman v. Swiss Bank Corp. Comprehensive Disability Prot. Plan*, 195 F.3d 975, 980 (7th Cir. 1999), and citing *Jays Foods, L.L.C. v. Chem. & Allied Prod. Workers Union, Local 20*, 208 F.3d 610, 613 (7th Cir. 2000); *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1020 (5th Cir. 1990); and *Virgin Islands Hous. Auth. v. Coastal Gen. Constr. Servs. Corp.*, 27 F.3d 911, 914 (3rd Cir. 1994)).

[7] *Virgin Islands Hous. Auth.*, 27 F.3d at 914 ("[T]he distinction is whether the additional hearing is ordered merely for purposes of clarification — an order that would not be appealable — or whether the remand constitutes a re-opening that would begin the arbitration all over again."); *Forsythe*, 915 F.2d at 1020 n.1 ("Had the district court remanded to the same arbitration panel for clarification of its award, the policies disfavoring partial resolution by arbitration would preclude appellate intrusion until the arbitration was complete.").

[8] Urging that subsection (5) implies that a vacate-and-re-arbitrate order is not appealable, thus escaping subsection (3).

[9] Urging that subsection (5), which grants a stand-alone basis for appeal, acts as an exception to subsection (3).

- weaken the strictures on limited judicial review of arbitration awards;[10]
- create the real possibility of a serious injustice by allowing endless re-arbitrations;[11] and
- inject the disruption of needless inconsistency with the FAA.[12]

The Court is wise to decline.

_____
Don R. Willett
Justice

OPINION DELIVERED: March 12, 2010

[10] Urging that trial courts may exceed the Legislature's pro-arbitration provisions.

[11] Urging that parties can be forced into time- and money-wasting arbitral mulligans until the trial court is satisfied.

[12] Urging that the TAA forbids what the FAA plainly permits.

IN THE SUPREME COURT OF TEXAS

NO. 07-0135

EAST TEXAS SALT WATER DISPOSAL COMPANY, INC., PETITIONER,

v.

RICHARD LEON WERLINE, RESPONDENT

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

Argued January 16, 2008

CHIEF JUSTICE JEFFERSON, joined by JUSTICE MEDINA and JUSTICE GREEN, dissenting.

The Texas General Arbitration Act (TAA) permits a party to appeal an order "confirming or denying confirmation of an award" or "vacating an award without directing a rehearing." TEX. CIV. PRAC. & REM. CODE § 171.098(a)(3),(5). In this case, the trial court vacated an arbitration award and also refused to confirm it. Had the trial court stopped there, the order would have been final and appealable. But the court also ordered a rehearing. That order makes the trial court's judgment interlocutory and, in line with almost all decisions in Texas and beyond, ineligible for appeal. By refusing to dismiss the appeal, the Court disregards a clear statutory mandate and goes against the weight of those decisions that have addressed the issue. I respectfully dissent.

I. The trial court's interlocutory order lacks finality under the TAA.

The TAA appeals provision, adopted verbatim in 1965 from the Uniform Arbitration Act, authorizes appeals of certain trial court orders, even if they are interlocutory, as long as they have attributes of finality. *See* TEX. CIV. PRAC. & REM. CODE § 171.098(a); HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, prefatory note, 162 (1955) (stating "[t]he Section on Appeals is intended to remove doubts as to what orders are appealable and to *limit appeals prior to judgment to those instances where the element of finality is present*" (emphasis added)). The interlocutory order at issue here, which mandated a rehearing of Werline's claims, lacks any "element of finality." We must abide by the Legislature's decision to exempt from appeal those cases that are bound to be reheard. *See Ogletree v. Matthews*, 262 S.W.3d 316, 319 n.1 (Tex. 2007) ("Texas appellate courts have jurisdiction only over final orders or judgments unless a statute permits an interlocutory appeal."); *cf. Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007) (observing that we strictly construe the general interlocutory appeals statute as "'a narrow exception to the general rule that only final judgments are appealable'" (quoting *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001))).

II. The Court's holding conflicts with the majority of courts to examine the issue.

The TAA requires Texas courts to construe the act to "effect its purpose and make uniform the construction of other states' law applicable to an arbitration." TEX. CIV. PRAC. & REM. CODE § 171.003. Section 171.098 is identical to section 19 of the Uniform Arbitration Act, so we look not only to Texas cases but also to those from courts in other states that have adopted section 19. *Compare id.* § 171.098(a), *with* UNIF. ARBITRATION ACT § 19, 7 U.L.A. 739 (1956). The majority

of Texas courts of appeals that have considered the issue have concluded that an order denying confirmation of an award, while also vacating and directing a rehearing, is not appealable. *See Thrivent Fin. for Lutherans v. Brock*, 251 S.W.3d 621, 627 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Prudential Sec., Inc. v. Vondergoltz*, 14 S.W.3d 329, 331 (Tex. App.—Houston [14th Dist.] 2000, no pet.). *But see* 209 S.W.3d 888, 895. This is the identical conclusion reached by the state supreme courts that have considered the question. *See, e.g., Me. Dep't of Transp. v. Me. State Employees Ass'n*, 581 A.2d 813, 815 (Me. 1990) (stating that "[t]o allow a party to appeal before the rehearing by simply filing a motion to confirm, a motion that would be denied by the court in conjunction with its order vacating the award and directing a rehearing, would be to circumvent [provisions equivalent to TAA (a)(5)]"); *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 204 P.3d 1262, 1265-66 (Nev. 2009) (holding that such an order is not "sufficiently final to be suitable for appellate review"); *Double Diamond Constr. v. Farmers Coop. Elevator Ass'n of Beresford*, 656 N.W.2d 744, 746 (S.D. 2003) (noting that the language "without directing a rehearing" in the Nebraska statute is "meaningful and not superfluous" (internal quotations omitted)). Intermediate appellate courts in other UAA jurisdictions have come to the same conclusion. *See, e.g., Connerton, Ray & Simon v. Simon*, 791 A.2d 86, 88 (D.C. 2002) (holding that "[w]hen it is apparent that an order confirming or denying confirmation of an arbitration award does not represent the conclusion of the proceeding on the merits, it lacks the quality of finality . . . and is not appealable"); *Kowler Assocs. v. Ross*, 544 N.W.2d 800, 802 (Minn. Ct. App. 1996) (ruling that "when a rehearing is directed, appellate review is premature because the arbitration process has not been completed").

The Nevada Supreme Court examined the caselaw on both sides of the issue and held:

> [W]e find the decisions concluding that appellate courts lack jurisdiction to review orders denying confirmation of an arbitration award and vacating the award while directing a rehearing better reasoned and more persuasive. In particular, we agree with the various courts that have concluded that the plain language of their version of [the UAA], which provides for an appeal from orders vacating an arbitration award without directing a rehearing, bars appellate review of orders vacating an award while directing a rehearing, even if the order also denies confirmation of the award, which, on its own, would be appealable under a statute analogous to [the UAA]. As noted in these decisions, because in this matter the district court directed a rehearing, permitting appellate review at this point would render [the UAA's] "without directing a rehearing" language superfluous.
>
> Further, we agree with the conclusion reached by several courts that the statutory structure providing for appeals from arbitration-related orders, when read as a whole, is designed to permit appeals only from orders that bring an element of finality to the arbitration process. Here, the district court's order vacating the arbitration award and remanding for supplemental proceedings extended, rather than concluded, the arbitration process, and has not been identified by [the UAA] as sufficiently final to be suitable for appellate review. Accordingly, finding no statutory basis for an appeal from the district court order, we conclude that this court lacks jurisdiction over this appeal.

Karcher, 204 P.3d at 1265-66.

The Court asserts that "jurisdictions, other than Texas, that have considered whether to allow appeal in a situation like the one in this case appear about evenly divided on the issue," ___ S.W.3d at ___, but the case law in fact leans the other way. *See* Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 576 (2009) (noting that states may require re-arbitration with an appeal of the initial order awaiting completion of the arbitration process and observing that "most states have in fact adopted precisely this approach"). Of the cases enumerated by the Court, almost all are distinguishable and most were decided a decade or more ago.

The Court's reliance on a New York case, *In re Baar & Beards, Inc.*, is beside the point, because New York has no statute governing appeals in arbitration cases. The court in *Baar* turned to state common law to resolve the issue, and its analysis is therefore inapplicable for our purposes. *See In re Baar & Beards, Inc.*, 282 N.E.2d 624, 625 (N.Y. 1972). The Arizona and Missouri cases are also inapposite because both of those states, by statute, authorize general appeals from orders granting new trials, which is not so in Texas. *Compare Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993) ("An order granting a new trial is an unappealable, interlocutory order."), *with Wages v. Smith Barney Harris Upham & Co.*, 937 P.2d 715, 719 (Ariz. Ct. App. 1997), *and Nat'l Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334, 338 (Mo. Ct. App. 1995) (noting that Missouri practice is distinguishable because "[The Missouri statute] specifically authorizes an appeal 'from any order granting a new trial' in any civil case"). Furthermore, as noted by the Court, Missouri case law has in fact come out both ways. *See, e.g.*, *Crack Team USA, Inc. v. Am. Arbitration Ass'n*, 128 S.W.3d 580, 583 (Mo. Ct. App. 2004) (dismissing appeal).

Although the Court cites a Massachusetts case that appears to allow an appeal from an order that denies confirmation and directs a rehearing, the case never discusses the nature of the interlocutory order, or the authority on which it grants the appeal. *See Fazio v. Employers' Liab. Assurance Corp.*, 197 N.E.2d 598, 600 (Mass. 1964). More recent Massachusetts decisions have directly addressed the issue of orders to vacate with a rehearing (without denying confirmation), and have denied the right of appeal—without even citing *Fazio*. *See Suffolk County Sheriff's Dep't v. AFSCME Council 93*, 737 N.E.2d 1276, 1277 (Mass. App. Ct. 2000) (holding that the ordering of a rehearing caused the judgment to not be final and appealable); *School Comm. of Quincy v. Quincy*

Educ. Ass'n, 491 N.E.2d 672, 673-74 (Mass. App. Ct. 1986) ("Since the order was one which contemplated a further hearing, it was not appealable.").

The Court also points to a recent Utah court of appeals decision allowing for appeal. However, in that case, the court was required to do so because of state precedent interpreting the Utah constitutional provision authorizing appeals, not because the UAA mandated such a result. *See Hicks v. UBS Fin. Servs., Inc.*, No. 20080950-CA, 2010 Utah App. LEXIS 20, at *16-*17 (Utah Ct. App. Feb. 4, 2010) (noting that a "majority" of courts have dismissed such appeals, while a "minority" have allowed them).

A few cases do, in fact, support the Court's interpretation: an unpublished appellate case out of Tennessee, which provides no jurisdictional analysis, *Boyle v. Thomas*, No. 02A01-9601-CV-00022, 1997 Tenn. App. LEXIS 807, at *5 (Tenn. Ct. App. Nov. 14, 1997); and a Minnesota decision which, as noted by the Court, ___ S.W.3d at ___, is one of two Minnesota cases that come to opposite conclusions: one permitting appeal without discussing jurisdiction, *Safeco Ins. Co. v. Goldenberg*, 435 N.W.2d 616, 621 (Minn. Ct. App. 1989), and the other disallowing appeal because it "would be inconsistent with the rules of statutory interpretation and the statutory prohibition against appeals from orders directing a rehearing," *Kowler*, 544 N.W.2d at 801. Thus, it is accurate to say that the majority of states that have arbitration statutes comparable to ours have concluded that there is no appeal from an order that vacates an award, directs a rehearing, and denies confirmation. Even more compelling is the fact that every other Texas appellate decision concerning this issue, with the exception of the court of appeals' opinion in this case, has interpreted it the same way. *See Thrivent*, 251 S.W.3d at 627; *Stolhandske v. Stern*, 14

S.W.3d 810, 813 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Vondergoltz*, 14 S.W.3d at 331.

The TAA directs us to construe its provisions so as to "make uniform the construction of other states' law applicable to an arbitration"; we come closer to that mandate by holding that an interlocutory order that directs a rehearing may not be appealed.

III. Precedent and statutory interpretation instruct us to treat an order vacating an award and directing a rehearing as the functional equivalent of an order granting a new trial.

The Court takes issue with the analogy drawn between the district court's order in this case and the granting of a motion for new trial. ___ S.W.3d at ___ ("The Company argues that the district court's order should not be appealable because it was like granting a motion for new trial in a case, which is not appealable. But the analogy does not fit.").

Whether the Court can find a more fitting analogy is beside the point: both precedent and the statute itself direct us to treat much of the process as we would a civil trial, and "an order vacating an arbitration award and directing a rehearing is the functional equivalent of an order granting a new trial." *Stolhandske*, 14 S.W.3d at 814; *see also Bison Bldg. Materials, Ltd. v. Aldridge*, 263 S.W.3d 69, 75 (Tex. App.—Houston [1st Dist.] 2006, pet. granted) (holding that order to vacate award and order new arbitration "'is the functional equivalent of an order granting a new trial'" and therefore not subject to direct appellate review (quoting *Stolhandske*, 14 S.W.3d at 814)); *Thrivent*, 251 S.W.3d at 623 (same); *Me. Dep't of Transp.*, 581 A.2d at 815 (holding that barring appeal from an order that vacates an arbitration award and directs a rehearing "is consistent with the

policy of barring an immediate appeal from the granting of a new trial in a civil case"); *Minn. Teamsters Pub. & Law Enforcement Employees Union, Local No. 320 v. County of Carver*, 571 N.W.2d 598, 599 (Minn. Ct. App. 1997) (holding that order vacating award and ordering rehearing is analogous to order granting new trial).

Notably, the TAA looks to civil court procedure to define how parties are to conduct multiple aspects of the arbitration and appeals process, including the taking of oaths, TEX. CIV. PRAC. & REM. CODE § 171.049, depositions, *id*. § 171.050(b), subpoenas, *id*. § 171.051(d), witness fees, *id*. § 171.052, notice requirements, *id*. § 171.093, service of process for subsequent applications, *id*. § 171.095(a), and, most relevant of all, appealing orders: "The appeal shall be taken in the manner and to the same extent as an appeal from an order or judgment in a civil action," *id*. § 171.098(b). Because the appeal must be taken "in the same manner" and "to the same extent" as an appeal from a judgment in a civil action, we have no discretion to ignore the interlocutory character of the trial court's rehearing order.

IV. The concurrence observes that the Court's result "mirrors what the result would be under federal law" but ignores the substantive differences between the FAA and the TAA.

This case concerns only the Texas Arbitration Act, not its federal counterpart, which perhaps explains why the Court rejects JUSTICE WILLETT's proposal to conflate the two. *See* Huber, *supra*, at 577 ("Neither the Supreme Court nor any federal court of appeals have seriously suggested, let alone decided, that [the FAA appeals provision] supplants different state law in state courts."). Where parties agree to abide by state rules of arbitration, and where the dispute is not preempted by the FAA, courts apply state law, even when it differs from the FAA. *Ford v. Nylcare Health Plans*

of the Gulf Coast, Inc., 141 F.3d 243, 248 (5th Cir. 1998) ("'Where . . . the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the [FAA] would otherwise permit it to go forward.'" (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989))). The TAA prohibits appeal of an order "vacating an award without directing a rehearing"; the FAA omits "without directing a rehearing" from its appellate provision. *Compare* 9 U.S.C. § 16, *with* TEX. CIV. PRAC. & REM. CODE § 171.098(a)(5). That the Court's interpretation leads to an identical result under both statutes only highlights the fact that the words "without directing a rehearing" are now superfluous under Texas law. *See Vondergoltz*, 14 S.W.3d at 331 ("To hold [that an appeal was allowed] would render the language 'without directing a rehearing' without effect and would elevate form over substance . . . ."); *see also First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008) (holding that a court must interpret the words of a statute "according to their common meaning in a way that gives effect to every word, clause, and sentence" (internal quotations omitted)).

The Court and the concurrence rewrite the TAA to make it consistent with the FAA, even though the TAA explicitly differs. This is contrary to the TAA's plain language as well as its mandate—that we construe it "to effect its purpose and make uniform the construction of *other states*' law applicable to an arbitration." TEX. CIV. PRAC. & REM. CODE § 171.003 (emphasis added); *see also* TEX. GOV'T CODE § 311.028 ("A uniform act included in a code shall be construed to effect its general purpose to make uniform the law of those states that enact it."). Texas, not federal, law governs this case, and that law is clear: a party may not appeal an order that grants rehearing.

V. Section 171.098(a)(5) is uniformly interpreted to prohibit appeals when a rehearing is granted.

The concurrence also argues that "subsection (5) allows an appeal when a rehearing is not granted," but does not *"dis*allow every appeal when a rehearing *is* granted." ___ S.W.3d at ___. Instead, the concurrence crafts an exception for a vacatur with rehearing that "amounts to a denial of confirmation." *Id.* at ___. This interpretation sidesteps the statute's plain language, further eviscerating subsection (5)'s policy that disallows an appeal when an order, which grants a rehearing, is interlocutory. Even the court of appeals in this case rejected such an argument, conceding that "[u]nder the plain language of the statute, a party can appeal the denial of an application to confirm an arbitration award, but cannot appeal an order which vacates an award and directs a rehearing." 209 S.W.3d at 893. Furthermore, the concurrence's argument contradicts every other court's construal of the statute. *See Thrivent*, 251 S.W.3d at 622-23; *J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836, 839-40 (Tex. App.—Fort Worth 2002, pet. denied)*; Poole v. USAA Cas. Ins. Co.*, No. 14-99-00740-CV, No. 14-99-01056-CV, 2000 Tex. App. LEXIS 6825, at *3-*4 (Tex. App.—Houston [14th Dist.] Oct. 12, 2000, pet. denied) (not designated for publication); *Vondergoltz*, 14 S.W.3d at 331. Finally, this argument is contrary to the prevailing view among state courts outside of Texas as well, which have held that an order vacating an award and directing a rehearing (without denying confirmation) is not final and appealable. *See City of Fort Lauderdale v. Fraternal Order of Police, Lodge No. 31*, 582 So. 2d 162, 162-63 (Fla. Dist. Ct. App. 1991) (holding that a rehearing order is interlocutory and not appealable); *Carner v. Freedman*, 175 So. 2d 70, 71 (Fla. Dist. Ct. App. 1965) (holding that an appeal from an order vacating an award while

directing a rehearing is an appeal "improvidently taken"); *Max Rieke & Bros., Inc. v. Van Deurzen & Assocs., P.A.*, 118 P.3d 704, 706-08 (Kan. Ct. App. 2005) (holding that a rehearing order was not final or appealable); *Crack Team*, 128 S.W.3d at 583 (holding that Missouri's version of 171.098(a)(5) "implicitly bars appeals from orders that direct a rehearing"); *Neb. Dep't of Health and Human Servs. v. Struss*, 623 N.W.2d 308, 314 (Neb. 2001) (finding an order directing a rehearing premature for review); *Boyce v. St. Paul Prop. & Liab. Ins. Co.*, 618 A.2d 962, 969 n.4 (Pa. Super. Ct. 1992) (holding that Pennsylvania's equivalent of 171.098(a)(5) implies that "an appeal cannot be taken from an order vacating an arbitration award *and directing a rehearing*"); *Double Diamond Constr.*, 656 N.W.2d at 746 (holding that "when a rehearing is ordered the decision to vacate is not appealable").

VI. Conclusion

The Court and the concurrence fear that a trial court can avoid confirmation by simply ordering rearbitration until the court likes the result, or one or both parties have given up. I share that concern. But a trial court's rehearing order does not confer jurisdiction where the Legislature has said none exists. Appellate jurisdiction should not hinge on whether the trial court, in conjunction with an order vacating an award and directing rehearing, denies rather than dismisses as moot a motion to confirm. *See Me. Dep't of Transp.*, 581 A.2d at 815 (noting that a trial court "should not even consider a motion to confirm once the court has granted a motion to vacate, because vacating an arbitration award renders determination of a motion to confirm the award moot"). The TAA does not authorize an appeal of an order that directs a rehearing. I would reverse the court of appeals' judgment and dismiss the appeal. Because the Court does otherwise, I

respectfully dissent.

_____

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: March 12, 2010

IN THE SUPREME COURT OF TEXAS

NO. 07-0205

WAFFLE HOUSE, INC., PETITIONER,

v.

CATHIE WILLIAMS, RESPONDENT

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

Argued March 12, 2009

JUSTICE WILLETT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE GUZMAN joined.

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

After being sexually harassed by a coworker, Cathie Williams sued her employer, Waffle House, Inc. for (1) sexual harassment under the Texas Commission on Human Rights Act (TCHRA),[1] and (2) common-law negligent supervision and retention. The jury found for Williams on both claims, and she elected to recover on the common-law claim, which afforded a far greater monetary recovery.

[1] Courts have referred to Chapter 21 of the Labor Code as the Texas Commission on Human Rights Act (TCHRA or CHRA); however, the Commission on Human Rights has been replaced with the Texas Workforce Commission civil rights division. *See* TEX. LAB. CODE § 21.0015. We use "TCHRA," "Chapter 21," and "the Act" interchangeably.

This case poses several issues, including this one of first impression: may a plaintiff recover negligence damages for harassment covered by the TCHRA? Our view is that the TCHRA, the Legislature's specific and tailored anti-harassment remedy, is preemptive when the complained-of negligence is entwined with the complained-of harassment. Here, the alleged negligence is rooted in facts inseparable from those underlying the alleged harassment. We do not believe the Legislature's comprehensive remedial scheme allows aggrieved employees to proceed on dual tracks — one statutory and one common-law, with inconsistent procedures, standards, elements, defenses, and remedies.

A statutory remedy is not always the sole remedy, and the TCHRA does not foreclose an assault-based negligence claim arising from independent facts unrelated to sexual harassment. Harassment need not be physical, and assault need not be sexual. Nor does today's decision bar a tort claim against the harasser/assailant individually. But here, as Williams admits, her two claims against Waffle House stem from the same boorish and objectionable conduct. Where the gravamen of a plaintiff's case is sexual discrimination that lies at the heart of the TCHRA, allowing negligence damages for a TCHRA violation would eclipse the Legislature's prescribed scheme. There is one more reason the TCHRA in this case should be exclusive, not cumulative: an employer's supervision and retention duties are embedded in the broader TCHRA inquiry, which hinges liability in part on whether the employer takes prompt remedial action to halt the harassment.

As there is no common-law tort for sexual harassment in Texas, we reverse the court of appeals' judgment and remand to that court to reach the issues pertinent to Williams' TCHRA claim.

I. Factual and Procedural Background

Williams was a Waffle House waitress from July 2001 to February 2002. Within her first week on the job, she was subjected to offensive sexual comments from Eddie Davis, a cook. Davis sometimes made the comments with his hands in his pants. He would wink at Williams, which she described as unwelcome flirting. Once, after his shift was over, Davis showed Williams a condom and laughed. He often stared at her.

On several occasions, as Williams walked by Davis, he pushed her into counters and into the grill. Once, while Williams was helping customers, Davis came up behind her, held her arms with his body pressed against her, and said, "Isn't she great, isn't she wonderful?" Davis cornered her on several other occasions. When she would reach up to put plates away, Davis would rub against her breasts with his arm. Once, when Williams was in a supply room, Davis, smirking, stood in front of her and blocked her exit. She had to duck under his arm to leave.

Williams complained to store manager Ossie Ajene several times, but the harassment continued. Williams claimed Ajene laughed when she first complained, while Ajene testified that he first heard of Davis' harassment of Williams from another employee, Bobbie Griffith. Ajene talked to Davis, who denied the allegations. Ajene moved Davis to another shift that immediately preceded the shift Williams and Davis had shared. Company policy requires that managers report complaints of harassment by calling a hotline. Ajene never called the hotline. He told Williams he preferred to handle the situation in-house.

After the shift change, Davis' and Williams' shifts occasionally overlapped. Davis would also often stay at the restaurant after his shift ended, to eat or pick up his paycheck. Because

complaints to Ajene had not stopped the harassment, Williams complained to district manager T.J. Marshall. Marshall spoke to Davis, who again denied wrongdoing. Waffle House has a sexual-harassment policy that includes notice to employees of the hotline that allows them to make complaints of discrimination or harassment directly to corporate management. Marshall told Williams to call the hotline. Williams told Marshall she had tried but was having trouble getting through. Marshall then called the hotline for Williams. There was conflicting evidence as to whether he accidentally dialed the workers' compensation hotline or the correct hotline, but regardless no action was take by corporate management as a result of the call.

Williams also complained to Kevin Love, who replaced Ajene as store manager in December 2001. Love told Davis sexual harassment would not be tolerated, and he asked employee Griffith to report any future incidents she witnessed involving Davis and Williams.

District manager Allen Conley replaced Marshall in January 2002. Conley asked Williams to write a letter documenting her claims, which she did in February 2002. Conley did not remember exactly what he did with the letter but claimed he "processed it to somebody." Williams tried to give the letter to Love, but he initially would not accept it. Conley reported the harassment complaint to division manager Kevin Ross. No one in Waffle House corporate management got back to Williams.

Williams quit in February 2002, and claims she was constructively discharged. She filed complaints with the federal Equal Employment Opportunity Commission (EEOC) and the Texas Commission on Human Rights. Both agencies issued right-to-sue notices, in January 2003 and March 2003.

In April 2003, Williams sued Davis and Waffle House in state court, alleging sexual harassment under the TCHRA and common-law battery by Davis. She also asserted a common-law claim against Waffle House for negligent supervision and retention of Davis. Williams nonsuited Davis, and the case proceeded to trial.

On the TCHRA claim, the jury was asked whether Williams was sexually harassed under a hostile-work-environment theory (Question 1), whether Williams was constructively discharged (Question 2), whether the discharge occurred as a result of official action (Question 3), and whether Waffle House was excused under a statutory affirmative defense (Question 4). The jury, in a 10-2 verdict, answered these questions in Williams' favor, but rejected a statutory retaliation claim.

On the common-law claim for negligent supervision and retention, Williams accepts in her briefing that "there is a requirement of a separate, legally compensable tort" committed by coworker Davis. The court of appeals likewise agreed that an element of a claim for negligent supervision and retention is that "the employee committed an actionable tort."[2] Williams contends the underlying tort was not sexual harassment, as there is no common-law tort of sexual harassment,[3] but assault.

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[2] ___S.W.3d ___, ___ (citing *Gonzales v. Willis*, 995 S.W.2d 729, 739 (Tex. App.—San Antonio 1999, no pet.)) (holding that employer cannot be held liable for negligent hiring, retention, training, or supervision of employee unless employee committed an actionable tort), *overruled in part on other grounds by Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447–48 (Tex. 2004); *see also Brown v. Swett & Crawford of Tex., Inc.*, 178 S.W.3d 373, 384 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("To prevail on a claim for negligent hiring or supervision, the plaintiff is required to establish not only that the employer was negligent in hiring or supervising the employee, but also that the employee committed an actionable tort against the plaintiff.").

[3] *See Gonzales*, 995 S.W.2d at 739–40 ("Sexual harassment has never been a common law tort; as a cause of action, it is a statutory creation.") (quoting *Hays v. Patton-Tully Transp. Co.*, 844 F. Supp. 1221, 1223 (W.D. Tenn. 1993)). *Gonzales* further reasoned that "[a] negligent supervision claim cannot be based solely upon an underlying claim of sexual harassment *per se*, because the effect would be to impose liability on employers for failing to prevent a harm that is not a cognizable injury under the common law." *Id.* (quoting *Hays*, 844 F. Supp. at 1223).

The jury was asked whether Davis assaulted Williams (Question 6), and utilized the definition of simple assault under the Penal Code, which provides that an assault occurs if a person "intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative."[4] The jury found an assault by Davis, but in Question 7 refused to find that Waffle House ratified the assault.[5]

The jury, instructed on "negligence," "ordinary care," and "proximate cause" in Question 8, found that Waffle House was negligent in supervising or retaining Davis, or both, and that the negligence proximately caused damage to Williams.

The jury was asked a single question (Question 9) covering compensatory damages under the common-law and statutory claims. It found past compensatory damages, consisting of "emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other noneconomic losses," in the amount of $400,000. It found future compensatory damages of $25,000. After making additional findings of malice or reckless indifference, it awarded punitive damages of $3.46 million.

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[4] TEX. PEN. CODE § 22.01(a)(3). Several courts have observed that the elements of civil and criminal assault under Texas law are the same. *E.g.*, *Umana v. Kroger Tex., L.P.*, 239 S.W.3d 434, 436 (Tex. App.—Dallas 2007, no pet.); *Johnson v. Davis*, 178 S.W.3d 230, 240 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). We also note that, in the civil context, Texas caselaw uses the terms "assault," "battery," and "assault and battery" interchangeably, and we intend no distinctions among these terms.

[5] Had the jury found ratification by Waffle House, Williams presumably would have sought to hold Waffle House vicariously liable for Davis' assault under a common-law ratification theory set out in *Wal-Mart Stores, Inc. v. Itz*, 21 S.W.3d 456, 480–82 (Tex. App.—Austin 2000, pet. denied), and duplicated in Question 7. We express no opinion on this theory of liability.

Williams elected to recover under her common-law claim. The trial court entered a judgment of $425,000 in past and future compensatory damages, $425,000 in punitive damages,[6] interest, and costs. Waffle House filed post-verdict motions, including a motion for new trial on grounds of newly discovered evidence and other grounds. The trial court denied the motions. The court of appeals affirmed the judgment,[7] and Waffle House appealed to this Court.

II. Preemption of the Common-Law Claim

Waffle House contends, in addition to other arguments we do not reach, that Williams' negligent supervision and retention claim should fail as a matter of law because the TCHRA is the exclusive remedy for workplace sexual harassment in this case. We agree.

A. Preservation of Error

Williams argues that Waffle House did not preserve the exclusive-remedy argument in the courts below. The issue was preserved. In the trial court, Waffle House argued in its motions for new trial and for judgment notwithstanding the verdict that Williams' common-law claim failed because Chapter 21 provided the exclusive statutory remedy for the complained-of conduct.[8]

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[6] The punitive damages were capped at the amount of compensatory damages. *See* TEX. CIV. PRAC. & REM. CODE § 41.008(b).

[7] ___ S.W.3d at ___.

[8] For example, in its motion for new trial, Waffle House argued:

> [T]he Texas Commission on Human Rights Act provides a statutory remedy for the same alleged conduct (sexual harassment) that forms the basis for Plaintiff's claim for negligent retention/supervision. *See* TEX. LABOR CODE ANN. § 21.051 (Vernon 1996). As recently recognized by the Texas Supreme Court, a plaintiff is barred from recovery based on a common law tort where a statutory remedy is available for the same conduct that underlies the tort claim. *See Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 445–46 (Tex. 2004). Because the Texas Labor Code provides a statutory remedy for the alleged sexually harassing conduct, Plaintiff's common law claim for negligent retention/supervision is preempted.

"Because the issue presented a pure legal question which did not affect the jury's role as fact finder, the post-verdict motion was sufficient to preserve error."[9] This issue was also raised, if not extensively, in the court of appeals.[10] Waffle House also addresses the issue in this Court, quoting *Gonzales v. Willis*: "if we allowed a sexual harassment finding to supply the basis for recovery on a negligent hiring claim, the statutory procedures and limitations applicable to such claims would be rendered superfluous."[11] The issue is more fully addressed in Waffle House's post-submission brief, which includes a discussion of *City of Waco v. Lopez*,[12] a relevant case decided after the initial briefing to us.

B. Incompatibility of Statutory and Common-Law Causes of Action

On this record, Williams' exclusive remedy against Waffle House is her statutory harassment claim. We have recognized that the legislative creation of a statutory remedy is not presumed to displace common-law remedies. To the contrary, abrogation of common-law claims is disfavored.[13] However, we will construe the enactment of a statutory cause of action as abrogating a common-law claim if there exists "a clear repugnance" between the two causes of action.[14]

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[9] *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 450 (Tex. 2004).

[10] In its opening brief to the court of appeals, Waffle House, citing *Zeltwanger*, argued that "negligent supervision and retention is preempted by statute in an action involving sexual harassment," and also argued that "[a]s a matter of law, a plaintiff cannot recover damages in negligence for statutory sexual harassment."

[11] 995 S.W.2d 729, 740 (Tex. App.—San Antonio 1999, no pet.).

[12] 259 S.W.3d 147 (Tex. 2008).

[13] *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000).

[14] *Id.* (quoting *Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189, 192 (Tex. App.—Fort Worth 1995, writ denied)).

The issue before us is not whether Williams has a cause of action for battery against Davis, her coworker. Although trivial, everyday physical contacts do not necessarily result in a battery,[15] "offensive contacts, or those which are contrary to all good manners, need not be tolerated."[16] Hence, "[t]aking indecent liberties with a person is of course a battery."[17] Neither side questions the jury's finding that Davis assaulted Williams.

The issue before us, however, is not whether Williams has a viable tort claim against a *coworker*. The issue is whether a common-law negligence action should lie against her *employer* for allowing the coworker's tortious or criminal conduct to occur, or whether, instead, a statutory regime comprehensively addressing employer-employee relations in this context should exclusively govern. We have recognized generally that employers "have a duty to use ordinary care in providing a safe work place."[18] However, Texas courts have also held that the exclusive statutory workers' compensation scheme sometimes provides the remedy against an employer for the assault on[19] or

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[15] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 42 (5th ed. 1984) ("[I]n a crowded world, a certain amount of personal contact is inevitable, and must be accepted. Absent expression to the contrary, consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life . . . ."); RESTATEMENT (SECOND) OF TORTS § 19 cmt. a (1965) (stating that in order for a contact to be "offensive" and thereby actionable as a battery, "it must be one which would offend the ordinary person . . . . It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.").

[16] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 42 (5th ed. 1984).

[17] *Id.* at 42 n.36.

[18] *Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex. 1996).

[19] *Nasser v. Sec. Ins. Co.*, 724 S.W.2d 17, 17–18 (Tex. 1987) (involving assault on restaurant employee by customer); *see also Urdiales v. Concord Techs. Del., Inc.*, 120 S.W.3d 400, 402, 405 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (involving assault on employee by supervisor); *Ins. Co. of N. Am. v. Estep*, 501 S.W.2d 352, 353 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.) (involving assault on employee by another employee); *see also infra* note 65 and accompanying text (regarding exclusivity of workers' compensation remedy).

sexual harassment of[20] an employee. Today's question is whether employer liability for unwanted sexual touching by a coworker (simple assault under Texas law given its "offensive or provocative" nature) is limited to a tailored TCHRA scheme that specifically covers employer liability for sexual harassment. We think the answer should be yes.

Davis did not cause damage "to the physical structure of the body" that would fall within the workers' compensation definition of injury.[21] His conduct was assaultive because of the sexually offensive and provocative nature of his verbal and physical contacts with Williams. Williams could have and did pursue a TCHRA sexual-harassment claim for this behavior. Her common-law claim for negligent supervision and retention was predicated on the same conduct that underlay her TCHRA claim. As Williams acknowledges in her brief: "The offensive threats and offensive touching were both an assault and sexual harassment, as found by the jury."

A common-law claim for sexual harassment does not exist under Texas law.[22] However, a statutory harassment claim exists under the TCHRA. One express purpose of the state Act is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments."[23] Sexual harassment is a recognized cause of action under Title VII and

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[20] *Walls Reg'l Hosp. v. Bomar*, 9 S.W.3d 805, 806 (Tex. 1999) (per curiam).

[21] *See* TEX. LAB. CODE § 401.011(26). We note that, under the "personal animosity" exception to the Workers' Compensation Act, coverage under that Act does not reach "injuries resulting from a dispute which has been transported into the place of employment from the injured employee's private or domestic life, at least where the animosity is not exacerbated by the employment." *Nasser*, 724 S.W.2d at 19. *See also Walls*, 9 S.W.3d at 806–07; TEX. LAB. CODE § 406.032(1)(C). We express no opinion on whether the Workers' Compensation Act would apply to the facts of today's case, an issue not before us.

[22] *See supra* note 3.

[23] TEX. LAB. CODE § 21.001(1). Title VII is codified at 42 U.S.C. §§ 2000e to 2000e-17.

the TCHRA,[24] and Texas courts look to analogous federal law in applying the state Act.[25] There are two general types of sexual harassment: quid pro quo and hostile work environment.[26] Williams alleged the latter.

Like the workers' compensation scheme, a statutory claim of sexual harassment encompasses a unique set of substantive rules and procedures. Williams obtained favorable jury findings on her TCHRA claim, but elected to recover on her common-law claim. She argues she should be able recover for negligent supervision and retention by Waffle House since she proved an underlying assault by Davis and met the other elements of the common-law cause of action.[27] But allowing Williams to recover on her tort claim would collide with the elaborately crafted statutory scheme,

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[24] *See Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

[25] *See Zeltwanger*, 144 S.W.3d at 445–46 (noting that the TCHRA is modeled after Title VII and that "federal case law may be cited as authority in cases relating to the Texas Act"); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001) ("[A]nalogous federal statutes and the cases interpreting them guide our reading of the TCHRA."); *Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 492 (Tex. 1996) (per curiam) ("Because one purpose of the Commission on Human Rights Act is to bring Texas law in line with federal laws addressing discrimination, federal case law may be cited as authority.").

[26] *Zeltwanger*, 144 S.W.3d at 445 n.5.

[27] Waffle House does not challenge the existence of common-law causes of action for negligent retention and supervision of an employee by an employer. We have not ruled definitively on the existence, elements, and scope of such torts and related torts such as negligent training and hiring. *But see Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 790, 796–97 (Tex. 2006) (holding that no evidence supported jury findings that defendant was negligent in hiring and retaining independent contractor); *NationsBank, N.A. v. Dilling*, 922 S.W.2d 950, 953–54 (Tex. 1996) (per curiam) (holding that no evidence supported claim that defendant was negligent in hiring employee); *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477–78 (Tex. 1995) (holding that no evidence supported element of causation, "[a]ssuming without deciding that [defendant] owed the plaintiffs the duty to exercise reasonable care" to investigate, screen, or supervise its volunteer workers). Today's case does not present an occasion to address these issues.

a scheme that, as with the workers' compensation regime,[28] incorporates a legislative attempt to balance various interests and concerns of employees and employers.

The differences between a general common-law claim for negligence and a specific statutory claim for harassment are manifold:

Administrative Review. Unlike a common-law negligence action, a TCHRA action requires an exhaustion of administrative remedies that begins by filing a complaint with the Texas Workforce Commission civil rights division (Commission).[29] Alternative dispute resolution "is encouraged to resolve disputes arising under" the TCHRA,[30] and the Commission and must "endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[31] These procedures are an essential feature of the statutory framework, as we explained in *Schroeder v. Texas Iron Works, Inc.*:

> Construing the CHRA to require exhaustion is consistent with its purpose to provide for the execution of the policies embodied in Title VII. Those policies include administrative procedures involving informal conference, conciliation and persuasion, as well as judicial review of administrative action. Another important policy of Title VII is exhaustion of administrative remedies prior to litigation.[32]

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[28] *See In re Poly-America, L.P.*, 262 S.W.3d 337, 352 (Tex. 2008) ("In creating the Texas Workers' Compensation Act, the Legislature carefully balanced competing interests—of employees subject to the risk of injury, employers, and insurance carriers—in an attempt to design a viable compensation system, all within constitutional limitations.").

[29] TEX. LAB. CODE § 21.201; *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 487 (Tex. 1991), *overruled in part on other grounds by In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 310 (Tex. 2010).

[30] TEX. LAB. CODE § 21.203(a).

[31] *Id.* § 21.207(a).

[32] 813 S.W.2d at 487 (citation omitted).

The administrative phase also requires the Commission to investigate the employee's complaint and make an initial determination as to whether a violation of law occurred.[33] "These extensive investigation and resolution procedures are designed to favor conciliation over litigation . . . ."[34] This meticulous legislative design is circumvented when a plaintiff brings a common-law cause of action for conduct that is actionable under the TCHRA.

Limitations. The common-law and statutory causes of action both have a two-year statute of limitations, but the timetable under the two regimes is different in two respects. First, a TCHRA complainant must first bring an administrative complaint within 180 days of the date the alleged unlawful practice occurred.[35] Second, the two-year period for bringing a court action under the TCHRA runs from the date the administrative complaint is filed,[36] while the general statute of limitations applicable to personal-injury actions requires that suit be brought "not later than two years after the day the cause of action accrues."[37]

Substantive Elements of Claim. To make out a statutory sexual-harassment claim, the employee must prove more than that she found the harassment offensive. The TCHRA contemplates discrimination affecting the "terms, conditions, or privileges of employment."[38] Williams alleged

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[33] TEX. LAB. CODE § 21.204.

[34] *City of Waco v. Lopez*, 259 S.W.3d 147, 154 (Tex. 2008).

[35] TEX. LAB. CODE § 21.202(a).

[36] *Id.* § 21.256.

[37] TEX. CIV. PRAC. & REM. CODE § 16.003(a).

[38] TEX. LAB. CODE § 21.051(1).

and obtained a jury finding that she was constructively discharged. A constructive discharge qualifies as an adverse personnel action under the TCHRA, but requires proof that the employer made the working conditions so intolerable that a reasonable person would feel compelled to resign.[39] Alternatively, the plaintiff can show that she remained in her position and endured a hostile work environment, but must show discriminatory conduct "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[40] An abusive environment can arise "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult.'"[41] Courts look to all the circumstances in determining whether a hostile work environment exists, including the frequency of the discriminatory conduct and whether it unreasonably interfered with the employee's work performance.[42] "All of the sexual hostile environment cases decided by the [United States] Supreme Court have involved patterns or allegations of extensive, longlasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment."[43] Accordingly, "single incidents should not be viewed

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[39] *See Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004); *Green v. Indus. Specialty Contractors, Inc.*, 1 S.W.3d 126, 134 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

[40] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)); *see also Green*, 1 S.W.3d at 131.

[41] *Harris*, 510 U.S. at 21 (quoting *Vinson*, 477 U.S. at 65); *see also City of San Antonio v. Cancel*, 261 S.W.3d 778, 785 (Tex. App.—Amarillo 2008, pet. denied).

[42] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002); *Cancel*, 261 S.W.3d at 785.

[43] *Cancel*, 261 S.W.3d at 785 (quoting *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999)).

in isolation because it is the cumulative effect of all offensive behavior that creates the work environment."[44]

In contrast, the jury in this case could find, under the charge given, negligent supervision or retention by Waffle House if it found, among other elements, an underlying assault by Davis requiring no more than a physical contact that Davis knew would be regarded "as offensive or provocative." The jury was not required to find that Davis' assault created a hostile work environment or imposed such intolerable conditions that a reasonable person would feel compelled to quit.

Affirmative Defense. Courts have developed unique standards for the employer's response to a statutory sexual-harassment complaint:

> For example, federal and Texas courts have recognized an affirmative defense available to employers facing hostile work environment claims when the employer (1) exercised reasonable care to prevent and correct promptly the harassing behavior and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[45]

Remedies. The remedies available under the TCHRA are unique. The Act provides for injunctive remedies with no common-law counterpart, such as affirmative injunctive relief requiring the employee to be promoted, restoring union membership, and requiring on-the-job training.[46] Compensatory and punitive damages are available, but these damages are capped at relatively modest

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[44] *Id.* at 786.

[45] *City of Waco v. Lopez*, 259 S.W.3d 147, 151–52 n.3 (Tex. 2008) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); and *Padilla v. Flying J, Inc.*, 119 S.W.3d 911, 915 (Tex. App.—Dallas 2003, no pet.)); *see also Pa. State Police v. Suders*, 542 U.S. 129, 134 (2004) (setting out two-part employer affirmative defense to hostile work environment constructive discharge claim).

[46] TEX. LAB. CODE § 21.258.

amounts that vary with the number of employees. The cap for the sum of compensatory and punitive damages under Act ranges from $50,000 for employers with fewer than 101 employees to $300,000 for employers with more than 500 employees.[47] The compensatory and punitive damages awarded to Williams, $850,000, well exceeded the maximum of $300,000 in combined compensatory and punitive damages available under the TCHRA in suits against the largest employers. Under the Act, the jury's award of past compensatory damages of $400,000 alone exceeded the statutory cap, making punitive damages unavailable to Williams under the statute.[48]

In sum, the law governing statutory sexual harassment involves a unique set of standards and procedures. If Williams' common-law claim for negligent supervision and retention is allowed to coexist with the statutory claim, the panoply of special rules applicable to TCHRA claims could be circumvented in any case where the alleged sexual harassment included even the slightest physical contact. In any such case, the plaintiff could claim that a physical contact, even if not actionable as statutory sexual harassment, and even if not normally actionable as a common-law battery,[49] was "offensive or provocative" because it occurred in the context and course of the coworker's sexual harassment of the plaintiff. The statutory requirements of exhaustion of administrative remedies and the purposes behind the administrative phase of proceedings, the relatively short statute of limitations, the limits on compensatory and punitive damages, the requirement that the plaintiff

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[47] *Id.* § 21.2585(d).

[48] But while damages are limited as described above, Chapter 21, in contrast to the common law, provides for an award of attorney's fees and expert fees in the court's discretion. *See id.* § 21.259.

[49] *See supra* note 15.

prove an abusive working environment, and all other special rules and procedures governing the statutory sexual-harassment claim could be evaded in any case where any physical contact between the plaintiff and the coworker occurred.

C. *Lopez* and *Zeltwanger*

Our decision is consistent with, though not compelled by, two of our recent decisions. In *City of Waco v. Lopez*,[50] we held that an employee claiming he was terminated in retaliation for complaining of age and race discrimination could not bring a claim under the Whistleblower Act.[51] Instead, we held the TCHRA was his exclusive remedy because it provided a more "specific and tailored" remedy.[52] To hold otherwise, we reasoned, would allow a plaintiff to skirt the TCHRA's detailed substantive and procedural provisions. As in *Lopez*, Williams' common-law claim "falls squarely within the CHRA's ambit,"[53] that Act "implements a comprehensive administrative regime, and affords carefully constructed remedies,"[54] and allowing the alternative remedy "would render the limitations in the CHRA utterly meaningless"[55] and "defeat the CHRA's comprehensive statutory scheme."[56] As with permitting a Whistleblower Act claim, permitting a common-law claim for

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[50] 259 S.W.3d 147 (Tex. 2008).

[51] *Id.* at 149. The Whistleblower Act is found at TEX. GOV'T CODE § 554.001–.010.

[52] *Lopez*, 259 S.W.3d at 156.

[53] *Id.* at 149.

[54] *Id.* at 154.

[55] *Id.*

[56] *Id.*

negligent supervision and retention would allow plaintiffs to pick and choose among "irreconcilable and inconsistent regimes,"[57] one specific and one more general, the result being that "employees would have little incentive to submit to the administrative process the Legislature considered necessary to help remedy discrimination in the workplace. Such a result would frustrate clear legislative intent."[58] While *Lopez* considered whether another statutory remedy would thwart the TCHRA, similar concerns exist if a plaintiff is permitted to pursue a common-law remedy in lieu of the Legislature's tailored and balanced statutory scheme.

In *Hoffman-La Roche Inc. v. Zeltwanger*, we held that a common-law claim for intentional infliction of emotional distress was not available to an employee complaining of sexual harassment by a supervisor.[59] We held that if "the gravamen of the plaintiff's complaint is for sexual harassment, the plaintiff must proceed solely under a statutory claim unless there are additional facts, unrelated to sexual harassment, to support an independent tort claim for intentional infliction of emotional distress."[60] We concluded that the plaintiff's common-law tort claim was not "independent of her sexual harassment claim,"[61] and that "[b]ecause the CHRA provides a remedy

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[57] *Id.*

[58] *Id.* at 155.

[59] 144 S.W.3d 438, 441 (Tex. 2004).

[60] *Id.*

[61] *Id.* at 450.

for the same emotional damages caused by essentially the same actions, there is no remedial gap in this case and thus no support for the award of damages under the intentional-infliction claim."[62]

Zeltwanger is consistent with our decision today. Williams' common-law claim is not "unrelated to" or "independent of" her statutory claim; they are both based on the same course of conduct. The unwanted sexual touching that underlies her negligence claim was assaultive because Williams regarded it as sexually inappropriate, provocative, and offensive — that is, because it amounted to sexual harassment made unlawful by the TCHRA.

Zeltwanger recognized that the tort of intentional infliction of emotional distress was judicially created as a "gap-filler" tort to provide a remedy where other traditional remedies are not available.[63] However, essential reasoning of *Zeltwanger* is equally applicable here. The Court was unwilling to allow a duplicative common-law tort recovery because it would undermine the limitations placed on the legislative remedy directed at the same conduct:

> [T]he tort should not be extended to thwart legislative limitations on statutory claims for mental anguish and punitive damages. By combining her sexual harassment claim with the intentional-infliction tort, Zeltwanger has circumvented, by more than thirty-fold, the legislative determination of the maximum amount that a defendant should pay for this type of conduct. In creating the new tort, we never intended that it be used to evade legislatively-imposed limitations on statutory claims . . . . If the gravamen of a plaintiff's complaint is the type of wrong that the statutory remedy was meant to cover, a plaintiff cannot maintain an intentional infliction claim regardless of whether he or she succeeds on, or even makes, a statutory claim.[64]

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[62] *Id.*

[63] *See id.* at 447.

[64] *Id.* at 447–48.

This reasoning supports today's decision. The gravamen of Williams' complaint is sexual discrimination in the form of a hostile or abusive work environment, a wrong the TCHRA was specifically designed to remedy. Whether viewed from the standpoint of Davis' motivations or his conduct's effect on Williams, the behavior was injurious because it was sexual harassment.

Lopez and *Zeltwanger* do not mandate today's result, but their essential teachings are entirely consistent with it.

D. The "Election of Remedies" Provision

The Workers Compensation Act discussed briefly above expressly provides that its remedies for injured workers are exclusive.[65] The exclusivity of the statutory remedy is not as clear-cut in today's case because the TCHRA lacks an express exclusivity provision. However, the exclusivity of the statutory scheme can fairly be implied.[66]

The TCHRA does have a provision styled "Election of Remedies," which states:

> A person who has initiated an action in a court of competent jurisdiction or who has an action pending before an administrative agency under other law or an order or ordinance of a political subdivision of this state based on an act that would be an unlawful employment practice under this chapter may not file a complaint under this subchapter [governing administrative proceedings] for the same grievance.[67]

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[65] TEX. LAB. CODE §§ 406.034(a), 408.001(a).

[66] *See Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000) (citing *Bruce v. Jim Walter Homes, Inc.*, 943 S.W.2d 121, 122–23 (Tex. App.—San Antonio 1997, writ denied), for proposition that "a statute may be interpreted as abrogating a common-law principle only when its express terms or necessary implications clearly indicate the Legislature's intent to do so"; and quoting *Coppedge v. Colonial Sav. & Loan Ass'n*, 721 S.W.2d 933, 938 (Tex. App.—Dallas 1986, writ ref'd n.r.e.), for proposition that repeal of a common-law remedy "by implication is disfavored and requires a clear repugnance between the common-law and statutory causes of action").

[67] TEX. LAB. CODE § 21.211.

This provision does not mandate that all common-law causes of action, no matter how inconsistent with the statutory remedy, are preserved. First, the title of the section carries no weight, as a heading "does not limit or expand the meaning of a statute."[68] Second, the provision does not state that all alternative common-law remedies are preserved; it purports to limit relief under the statute rather than preserving or extending relief available under the common law.[69] Third, as we recognized in *Lopez*, the provision must be read against the backdrop of extensive and overlapping state and federal anti-discrimination statutes. Its obvious purpose, read in this context, is to provide that if a plaintiff files a federal cause of action under Title VII or another federal anti-discrimination statute, or brings a local grievance as expressly allowed under the TCHRA,[70] she cannot bring a duplicative claim under the TCHRA. As *Lopez* explained:

> In the realm of employment discrimination litigation—where federal, state, and local governments individually declare their opposition to unlawful discrimination—Section 21.211 merely means a plaintiff cannot file an administrative complaint with the CHRA after having already (1) filed a lawsuit under a federal or local anti-discrimination measure covering the same conduct or (2) begun administrative proceedings with the EEOC or local enforcement entities based on the same conduct. This provision does not manifest a legislative intent that retaliation suits premised on discriminatory conduct by a public employer—and thus undeniably covered by the CHRA—can be maintained under the Whistleblower Act instead. Such an interpretation would undermine the CHRA's express purposes. The election of remedies language simply means that a claimant can pursue a remedy for

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[68] TEX. GOV'T CODE § 311.024.

[69] In this regard, the provision is different from the cumulative remedies provision of the Deceptive Trade Practices-Consumer Protection Act (DTPA). Williams cites the DTPA as an example of a statute that does not preclude common-law remedies, but that Act's cumulative remedies provision expressly states that its provisions "are not exclusive" and that DTPA remedies "are in addition to any other procedures or remedies provided for in any other law." TEX. BUS. & COM. CODE § 17.43.

[70] Subchapter D of Chapter 21, TEX. LAB. CODE §§ 21.151–.156, provides for local enforcement of practices made unlawful by Chapter 21.

> discrimination under federal law or under grievance-redress systems in existence at the local level, but pursuing either of these options precludes later initiating a CHRA complaint.[71]

Hence, Section 21.211 does not authorize all common-law causes of action covering the same conduct addressed by the TCHRA, including those that would undermine the Act or render it a dead letter.

E. An Employer's Retention/Supervision Duty is Already Embedded Into the Broader TCHRA Analysis

In sexual-harassment cases, an employer is entitled to an affirmative defense if it takes prompt remedial action to stop the alleged harassment. Specifically, Waffle House is entitled to a defense if (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) Williams unreasonably failed to take advantage of any preventive or corrective opportunities provided by Waffle House or to avoid harm otherwise.[72] The jury rejected this statutory affirmative defense. Thus, the target of Williams' common-law negligence claim — the efficacy of Waffle House's response to her harassment allegations and whether the company erred in supervising and retaining Davis after Williams lodged her complaints — is already part of what determines Waffle House's statutory liability under the TCHRA.

In this regard, we disagree with the dissent that Williams' negligence claim can legally and factually be separated from her TCHRA claim so as to support a separate common-law cause of action. As detailed above, Davis' conduct was injurious to Williams because it was sexual

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[71] *City of Waco v. Lopez*, 259 S.W.3d 147, 155 (Tex. 2008).

[72] *See supra* note 45 and accompanying text.

harassment, not because it caused any independent physical or other injury. The alleged negligence was Waffle House's failure to prevent Davis' harassment, which counted as assault as defined in the jury charge if Williams regarded it as sexually offensive or provocative. Every act of unwanted touching by Davis was also an act of sexual harassment; that is how he intended it, and that is how Williams regarded it. Hence, all the complained-of conduct falls within the TCHRA's prohibition of gender-based discrimination.[73] It must be stressed that the dissent agrees with the Court on an essential principle: "the TCHRA is preemptive as to behavior that constitutes sexual harassment."[74] This record shows precisely such behavior — sexually crude touching and comments — not physical contact rooted in separate, non-harassment facts.

Williams repeatedly concedes the intertwined nature of her claims. For example, in responding to Waffle House's motion for new trial, Williams sets out the evidence supporting her negligence claim by relying on evidence of Waffle House's failure to adequately respond to Davis' harassing behavior.[75] In closing argument, Williams' counsel treated the negligence question as

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[73] *See* TEX. LAB. CODE § 21.051(1). As federal and state caselaw make clear, sexual harassment is a form of unlawful workplace discrimination under Chapter 21 and Title VII. *See supra* notes 23–26 and accompanying text.

[74] ___ S.W.3d at ___.

[75] Williams argued that the evidence in support of the negligent supervision and retention claim included the following evidence (with record citations omitted):

> Every single one of the Managers and District Managers at Waffle House testified that Cathie Williams reported being sexually harassed by Eddie Davis. The[y] also testified that they knew Eddie Davis needed to be stopped, that if you don't stop a harasser he will continue harassing, that if a harasser is working on shifts where there is no management around it could be a dangerous situation for the other employees, that victims of sex harassment can be severely damaged . . . . [Ajene] never documented anything about the sexual harassment complaints and even though he conceded that the things Cathie said were "possible," he did not take any action to discipline Eddie Davis as a result of the sexual harassment. . . . Ajene took no effective action to stop the harassment or prevent retaliation. In fact, District Manager Conley testified that conduct like Ajene's would put Cathie Williams in

integrally related to the TCHRA claim: "Well again, that's the same thing. . . . And, yes, when you keep a harasser on, you are allowing them to continue to harass and to retaliate, so the answer to Question Number 8 is yes." Again, Williams' brief acknowledges: "The offensive threats and offensive touching were both an assault and sexual harassment, as found by the jury."

In short, another reason to view Williams' TCHRA claim as exclusive rather than cumulative is that the reasonableness of Waffle House's corrective action to curb the harassment is already baked into the TCHRA analysis and a key part of the controlling statutory framework.

F. The Common-Law Claim Fails

A claim that an employer negligently supervised and retained an employee who sexually harassed a coworker transmutes TCHRA-covered harassment into a common-law tort. Sexual harassment as a legal claim is a statutory creation of legislators, not a common-law creation of judges. As Williams' tort claim is grounded on sexual harassment, it would impose liability for failing to prevent a harm not cognizable under Texas common law. Further, recognizing a common-law cause of action in this context would negate the Legislature's carefully balanced and detailed statutory regime applicable to sexual-harassment claims, and effectively repeal the TCHRA in sexual-harassment cases where physical contact occurs. For these and other reasons discussed above, we conclude that Williams' common-law claim for negligent supervision and retention must

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> danger as a result of inaction in a sexually hostile environment. . . . At one time, Cathie tried to give her Manager, Kevin Love, a letter that she had been told to write that gave details about the sex harassment and Mr. Love refused to accept it or even read it. . . . Waffle House knew what would happen to a sex harassment victim that they didn't help. Ms. Martha Hensen admitted on the witness stand that if a victim of sexual harassment reports the harassment and gets no response, that leaves the victim just continuing to be a victim with no help or assistance.

yield to the Legislature's statutory framework for sexual-harassment claims. Williams' remedy, if any, lies there.

III. Exclusion of Evidence

Waffle House complains that the trial court erred in excluding trial and deposition testimony of Williams' coworker Bobbie Griffith. Griffith testified that Williams told her she had an open marriage and had engaged in extramarital relations with two men who had been in the restaurant. Griffith also testified that Williams had made "overtures" to a female Waffle House employee. The trial court excluded this evidence as unduly prejudicial.

The exclusion of evidence is reversible error if the complaining party shows that the trial court committed error that probably caused the rendition of an improper judgment.[76] Waffle House does not persuade us that the trial court erred in excluding Griffith's testimony. Diverting the trial's focus to an investigation of Williams' general sexual proclivities was potentially highly prejudicial.[77] The court of appeals correctly observed that while evidence of a plaintiff's sexually provocative speech is not always inadmissible, the trial court "must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind."[78]

There was no proof Davis was aware of Williams' above-described behavior as revealed to Griffith. Waffle House responds that even if Davis was unaware of this information, it was still

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[76] *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex. 2009).

[77] *See Whitmire v. State*, 183 S.W.3d 522, 529 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) ("Texas courts have held that evidence of sexual behavior outside of what society deems acceptable is inherently inflammatory.").

[78] ___ S.W.3d at ___ (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986)).

relevant to the issue of whether Davis' conduct toward Williams was unwelcome so as to constitute harassment, and to the issue of damages. We agree with Williams that her interest, if any, in other men or women bears little relevance to whether she welcomed Davis' advances. Griffith confirmed that Williams had complained about Davis' behavior and that Griffith believed Williams was sincerely upset by Davis and fearful of him.

The trial court has discretion to determine whether the probative value of proffered evidence is substantially outweighed by the danger of unfair prejudice.[79] The trial court did not abuse its discretion in excluding Griffith's testimony.

IV. Newly-Discovered Evidence

Waffle House complains that the trial court erred in denying its motion for new trial on grounds of newly-discovered evidence. Former supervisor Lisa Stone read about the trial in a newspaper and contacted Waffle House. Stone submitted an affidavit stating that Williams spoke frankly about her sexual conduct and had propositioned a customer, and that Williams, who was married, had discussed having sex with an ex-boyfriend and implied she was having sex with another acquaintance.

A party seeking a new trial on grounds of newly-discovered evidence must demonstrate to the trial court that (1) the evidence has come to its knowledge since the trial, (2) its failure to discover the evidence sooner was not due to lack of diligence, (3) the evidence is not cumulative,

[79] TEX. R. EVID. 403.

and (4) the evidence is so material it would probably produce a different result if a new trial were granted.[80] Denial of a motion for new trial is reviewed for abuse of discretion.[81]

As with the excluded testimony of Griffith, Waffle House contends that Stone's recollections could have been offered to disprove Williams' claim that Davis' conduct was unwelcome. Waffle House does not show that the trial court would have even been inclined to admit Stone's testimony. Presumably, the court would have excluded this evidence for the same reasons it excluded Griffith's testimony. As with Griffith's proffered testimony, evidence of Williams' general sexual proclivities as described by Stone was prejudicial, and its probative value as to whether Williams welcomed sexual advances from Davis strikes us as marginal. The trial court did not abuse its discretion in denying the motion for new trial.

V. Conclusion

The TCHRA confers both the right to be free from sexual harassment and the remedy to combat it. Where the gravamen of a plaintiff's case is TCHRA-covered harassment, the Act forecloses common-law theories predicated on the same underlying sexual-harassment facts. The root of Williams' negligence claim is that Waffle House kept around a known harasser, but this claim does not arise from separate, non-harassment conduct; it is premised on the same conduct that the TCHRA deems unlawful.

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[80] *Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex. 1983), *overruled in part on other grounds by Moritz v. Preiss*, 121 S.W.3d 715, 721 (Tex. 2003).

[81] *Dir., State Employees Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994).

As the complained-of acts constitute actionable harassment under the TCHRA, they cannot moonlight as the basis for a negligence claim, a claim that presents far different standards, procedures, elements, defenses, and remedies. It is untenable that the Legislature would craft an elaborate anti-harassment regime so easily circumvented. The court of appeals erred in affirming the trial-court judgment on Williams' common-law claim.

Waffle House argued in the court of appeals that the TCHRA should also fail for various reasons if the common-law claim were reversed. The court of appeals did not reach the issues concerning the statutory claim,[82] nor were these issues briefed to us. Accordingly, the court of appeals' judgment is reversed, and the case is remanded to that court to address the statutory sexual-harassment issues raised by Waffle House.

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Don R. Willett
Justice

OPINION DELIVERED: June 11, 2010

[82] *See* ___ S.W.3d at ___ ("We therefore do not address Waffle House's second issue of whether Williams's alternative trial theories can support the judgment.").

IN THE SUPREME COURT OF TEXAS

NO. 07-0205

WAFFLE HOUSE INC., PETITIONER,

v.

CATHIE WILLIAMS, RESPONDENT

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

Argued March 12, 2009

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

Sexual harassment is not a tort recognized under the common law, therefore I agree with the Court that such behavior cannot support a claim for negligent supervision. But assaultive behavior surely can, whether or not it has sexual overtones. The Court's denial of common law protection for a subset of assault that is sexually motivated adds insult to injury. In my view the Texas Commission on Human Rights Act (TCHRA) preempts negligent-supervision claims based on harassment, but it does not preempt assault-based claims merely because the perpetrator sexually harassed the victim too. That assault-based negligence claims remain viable, however, does not mean they may be used to siphon claims otherwise actionable under the TCHRA. Negligence damages cannot arise from conduct constituting sexual harassment, and evidentiary support for assault-based awards must be measured accordingly. In the case before us the trial court should have

given the jury a limiting instruction to this effect, although error on this point was not preserved. Nevertheless, the evidence is legally insufficient to support all of the negligence damages the jury awarded, therefore, I would remand to the court of appeals for a proper review that excludes evidence of TCHRA-prohibited conduct. Because the scope of the Court's remand is more limited, I respectfully dissent.

I.

This case calls for us to decide whether an employee may maintain against her employer both a statutory cause of action for sexual harassment under the TCHRA and a common law claim for negligent supervision stemming from a co-worker's assault. The Court concludes that the TCHRA is the exclusive remedy for sexual harassment in the workplace, and that Cathie Williams's negligent-supervision claim is preempted because it is merely a repackaged version of her harassment claim. I agree with the former proposition, but not the latter.

Texas common law does not recognize a claim for sexual harassment. *See Gonzales v. Willis*, 995 S.W.2d 729, 739 (Tex App.—San Antonio 1999, no pet.) ("'Sexual harassment has never been a common law tort; as a cause of action, it is a statutory creation.'") (quoting *Hays v. Patton-Tully Transp. Co.*, 844 F. Supp. 1221, 1223 (W.D. Tenn. 1993)). Accordingly, a tort claim will not lie for an employer's negligent supervision of a sexual harasser. *Id.* at 739–40. It is against this backdrop that the Legislature enacted the TCHRA, with the purpose of "execut[ing] the policies of Title VII of the Civil Rights Act of 1964." TEX. LAB. CODE § 21.001(1). The TCHRA prohibits employer discrimination directed at the "terms, conditions, or privileges of employment" because of race, color, disability, religion, sex, national origin or age. TEX. LAB. CODE § 21.051(1). Sexual

harassment is a form of sex discrimination prohibited by Title VII and the TCHRA. *See Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

The TCHRA is a carefully crafted scheme designed to protect against the type of behavior Williams principally complains about, and to hold employers accountable. *See Zeltwanger*, 144 S.W.3d at 446. Allowing evidence of sexual harassment to support a negligent-supervision claim would threaten to swallow the statutory scheme. Thus, I agree with the Court that the TCHRA is preemptive as to behavior that constitutes sexual harassment. I likewise agree that a plaintiff may not avoid the TCHRA's preemptive effect by siphoning sexual-harassment evidence into an assault-based claim for negligent supervision. But it does not follow that a victim of assault should be denied common law redress for injury the assault caused when the perpetrator sexually harasses her as well. While an employer is not an insurer of its employees' safety at work, the common law clearly imposes a duty on employers to provide a safe work place. *Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex. 1996). Accordingly, a claim for negligent supervision should lie if an employee's assaultive behavior is endangering another, whether or not that behavior has sexual overtones. An assault is an assault, whether it is sexually motivated or not.

Consider the effect of the Court's construct: 1. An employer fails to take reasonable action after Employee A repeatedly slams Employee B into the wall. Employee B may sue for assault-based negligent supervision. 2. An employer fails to take reasonable action after Employee A gropes Employee B before repeatedly slamming her into the wall. The TCHRA is Employee B's exclusive remedy. The Court's decision exposes an employer who tolerates a bully's assaultive

conduct to greater liability under the common law than an employer who tolerates the same behavior accompanied by the indignity of sexual abuse. Surely in its statutory attempt to afford greater workplace protection from sexual harassment the Legislature did not intend to curtail relief for victims of assault.

II.

We have long held that statutes must not be construed to abolish common law claims unless the statutory language clearly says so. *See Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000); *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969). The text of the TCHRA contains no indication that the remedies it provides are exclusive or preempt the common law. *See* TEX. LAB. CODE § 21.001. Nor does the statute imply that the TCHRA's administrative review system precludes common law causes of action. Moreover, there is no text-based support for the exclusivity effect the Court reads into the TCHRA's election-of-remedies provision. *See* TEX. LAB. CODE § 21.211. That the provision precludes simultaneous claims in different forums based upon employment practices the TCHRA declares unlawful would seem to permit, not preclude, common law claims like assault that the TCHRA does not cover.

Neither does our decision in *City of Waco v. Lopez* support the Court's holding today. 259 S.W.3d 147 (Tex. 2008). *Lopez* presented the issue whether one statute preempted another, and was resolved by application of the code-construction rule that a specific statute controls over a more general one that is irreconcilable. *Id*. at 153–54. This case, on the other hand, concerns implied statutory preemption of a common law claim, something our jurisprudence disfavors absent "clear repugnance" between the two. *Cash Am.*, 35 S.W.3d at 16 (quoting *Holmans v. Transource*

Polymers, Inc., 914 S.W.2d 189, 192 (Tex. App.—Fort Worth 1995, writ denied)). There is no repugnance between the TCHRA and an assault-based claim of negligent supervision.

Our decision in *Hoffmann-La Roche, Inc. v. Zeltwanger* is similarly inapplicable, as it was based not on the preemptive effect of a statutory scheme over the common law but on the "gap-filler" nature of the intentional-infliction-of-emotional-distress ("IIED") tort. *Zeltwanger,* 144 S.W.3d at 447 (noting that the tort of IIED exists only to "'supplement existing forms of recovery by providing a cause of action for egregious conduct' that might otherwise go unremedied") (quoting *Standard Fruit and Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998)). Because in *Zeltwanger* the TCHRA covered the same emotional damages caused by essentially the same conduct, we held that there was no remedial gap to fill. *Id.* Here, by contrast, Williams's negligence claim is based on assault, a well-established common law tort.

The TCHRA and a claim for common law assault are simply aimed at different wrongs. The purpose of the TCHRA's ban on sexual harassment is to eliminate employment discrimination and establish equal employment conditions and opportunities for both sexes in the workplace. *See* TEX. LAB. CODE § 21.001. The common law tort of assault, on the other hand, exists to redress personal injury caused by offensive physical contact or the threat of imminent bodily injury. *See Hall v. Sonic Drive-In of Angleton, Inc.*, 177 S.W.3d 636, 650 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). There is no indication that the Legislature intended the TCHRA to redress harm that results from assault, and it is difficult to square the protective goals of the legislation with the preemption of assault-based claims depending upon whether an assault is sexually motivated.

III.

Williams agrees that her negligent-supervision claim against Waffle House must necessarily stem from Davis's tortious conduct in assaulting her. In holding Williams's negligent-supervision claim preempted, the Court focuses solely on a single element of the assault definition in the jury charge — whether the person committing the alleged assault causes physical contact with another "when [the person] knows or should reasonably believe that the other will regard the contact as offensive or provocative." But the charge also defined assault to include "intentionally or knowingly threaten[ing] another with imminent bodily injury." The evidence must be measured against the complete definition the jury was given.

The record in this case contains evidence that Davis engaged in conduct designed to intimidate Williams and cause her to fear for her safety. Williams testified that Davis physically abused her on numerous occasions, pushing her into the counters, the grill, and into the dish table on multiple occasions. On another occasion, he cornered her alone in an unlit storeroom by blocking her exit. Williams testified that she did not confront Davis directly because she "was scared of him," and a Waffle House district manager acknowledged that Davis may have presented an actual danger to Williams. Based on the charge and the evidence presented, the jury could have found that Davis's conduct went beyond "boorish," as the Court terms it, and constituted assault entirely apart from his ongoing sexual harassment. Because Williams's assault-based negligence claim was supported by independent facts unrelated to sexual harassment, I would hold that the TCHRA does not preempt it.

IV.

Even though the TCHRA does not preempt Williams's assault-based negligence claim, however, she may not recover damages in negligence for conduct that the TCHRA deems unlawful. In other words, Williams may not recover negligence damages for TCHRA-prohibited activity. Accordingly, the jury should have been instructed that damages in negligence cannot arise from conduct that amounts to statutory sexual harassment, and the trial court erred in failing to give the jury a proper limiting instruction. *See Gonzales*, 995 S.W.2d at 738–39. However, I agree with the court of appeals that Waffle House failed to preserve error on this point. ___ S.W.3d ___.

Nevertheless, because damages for sexual harassment fall within the TCHRA's exclusive purview, the court of appeals erred in considering TCHRA-prohibited conduct in its evidentiary review of the assault-based negligence award. ___ S.W.3d ___. Although there is some evidence to support Williams's claim that she was damaged by Davis's assaultive conduct, the evidence is legally insufficient to support all of the damages the jury awarded. *See Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007). Accordingly, I would remand the case to the court of appeals to conduct a proper sufficiency review of the negligence award and, if appropriate, consider remittitur of damages that arose from TCHRA-prohibited activity. *Id.* If a proper remittitur cannot be determined, then the case should be remanded for a new trial should Williams not elect her TCHRA remedy. *Id.* Because the scope of the Court's remand is limited to review of Williams's TCHRA claims, I respectfully dissent.

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Harriet O'Neill
Justice

OPINION DELIVERED: June 11, 2010

IN THE SUPREME COURT OF TEXAS

NO. 07-0340

SPIR STAR AG, PETITIONER,

v.

LOUIS KIMICH, RESPONDENT

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

Argued December 10, 2008

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

A foreign manufacturer sold its products in Texas through a Texas distributor. We must decide whether the use of that distributorship insulates the manufacturer from the reach of a Texas court when one of the products injures a Texas citizen. We hold that a manufacturer is subject to specific personal jurisdiction in Texas when it intentionally targets Texas as the marketplace for its products, and that using a distributor-intermediary for that purpose provides no haven from the jurisdiction of a Texas court. Because, in this case, personal jurisdiction comports with traditional notions of fair play and substantial justice, we affirm the court of appeals' judgment.

I. Factual and Procedural Background

Spir Star AG ("AG"), a German corporation headquarted in Rimbach, Germany, manufactures high-pressure hoses and fittings for sale throughout the world. AG is owned by three

German citizens: Werner Büchner, Gerhard Strobach, and Walter de Graaf. In 1995, AG decided that Houston would be the optimal location for a distributorship because the Texas coastal region's numerous refineries were well suited for AG's energy-related products. AG's executives traveled to Houston, leased office space, and established a Texas distributorship, Spir Star Inc., now Spir Star Limited ("Limited"). AG's directors gave Limited permission to use the trademarked "Spir Star" name free of charge. Although it sells products other than AG's, Limited is AG's exclusive distributor in Texas and North America.

AG manufactures hoses that are used primarily in the energy industry. Each month, Limited purchases a maritime container full of AG's products, which are then shipped to the port of Houston. Limited assembles the hoses using AG-provided training and tools and sells them to customers in Texas and elsewhere. Title to the hoses passes to Limited in Europe. The Texas distributorship accounts for thirty-five percent of AG's annual sales, although Limited and AG do not share profits or finances with each other.

De Graaf, AG's president, is also the president of Limited. He splits his time between Houston and Germany, and regularly conducts AG's business in Texas. De Graaf and AG's other two officers own seventy-five percent of Limited; twenty-five percent is owned by Limited employees.

In 2003, an AG high-pressure hose ruptured and seriously injured Louis Kimich. AG had sold the hose to Limited, which in turn sold it to Kimich's employer. Kimich sued his employer and the premises owner, and later added claims against AG and Limited.[1]

AG filed a special appearance, which the trial court and the court of appeals denied. ___ S.W.3d ___. We granted AG's petition for review, 51 Tex. Sup. Ct. J. 1403, 1416 (Sept. 26, 2008), and now affirm.

II. Applicable Law

To render a binding judgment, a court must have both subject matter jurisdiction over the controversy and personal jurisdiction over the parties. *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). Whether a court has personal jurisdiction over a defendant is determined as a matter of law, which appellate courts review de novo. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). When, as here, a trial court does not issue findings of fact or conclusions of law to support its special-appearance determination, we presume that all factual disputes were resolved in favor of the trial court's ruling. *Id.*

Texas courts have personal jurisdiction over a nonresident defendant when (1) the Texas long-arm statute provides for it, and (2) the exercise of jurisdiction is consistent with federal and state due process guarantees. *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 806 (Tex. 2002). Our long-arm statute reaches "'as far as the federal constitutional requirements for due process will allow.'" *Id.* (quoting *Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C.*,

[1] Limited has not challenged jurisdiction.

815 S.W.2d 223, 226 (Tex. 1991)). Consequently, the statute's requirements are satisfied if exercising jurisdiction comports with federal due process limitations. *Id.*

If a defendant has never invoked the protections that a forum offers its residents, or has no purposeful contact with it, the forum court's jurisdiction is confined. Personal jurisdiction over nonresident defendants is constitutional only when: (1) the defendant has established minimum contacts with the forum state, and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 167 (Tex. 2007). The catchphrase "traditional notions of fair play and substantial justice," first used in *Milliken v. Meyer*, 311 U.S. 457, 463-64 (1940), has its origins in a 1917 decision that referred to both "fair play" and "substantial justice" when the Supreme Court considered whether service by publication comported with the due process clause. *See McDonald v. Mabee*, 243 U.S. 90, 91-92 (1917) (reversing a judgment of the Supreme Court of Texas). Since that time, we have incorporated the phrase into our own jurisprudence, beginning with *O'Brien v. Lanpar Co.*, 399 S.W.2d 340, 342 (Tex. 1966) (quoting *Int'l Shoe*, 326 U.S. at 316). The phrase remains a hallmark of personal jurisdiction today. *See, e.g., Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009); *PHC-Minden*, 235 S.W.3d at 166; *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007).

Although this "fair play" and "substantial justice" test is well known to appellate courts, the expression is imprecise. It gains meaning, however, when viewed in light of the "minimum contacts" a defendant has with the forum. *Int'l Shoe*, 326 U.S. at 316. Significant contacts suggest that the defendant has taken advantage of forum-related benefits, while minor ones imply that the

forum itself was beside the point. When a nonresident defendant has purposefully availed itself of the privilege of conducting business in a foreign jurisdiction, it is both fair and just to subject that defendant to the authority of that forum's courts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1984).

A defendant's contacts with a forum can give rise to either specific or general jurisdiction. *CSR*, 925 S.W.2d at 595. General jurisdiction exists when a defendant's contacts are continuous and systematic, even if the cause of action did not arise from activities performed in the forum state. *Id*. Here, the court of appeals concluded that AG's continuous and systematic contacts with Texas established general jurisdiction. ___ S.W.3d at ___. We do not reach that issue, however, because we conclude instead that the trial court had specific jurisdiction over AG.

III. AG satisfies the "additional conduct" standard required for specific jurisdiction.

A court has specific jurisdiction over a defendant if its alleged liability arises from or is related to an activity conducted within the forum. *CSR*, 925 S.W.2d at 595. Unlike general jurisdiction, which requires a "more demanding minimum contacts analysis," *id*. at 595, specific jurisdiction "may be asserted when the defendant's forum contacts are isolated or sporadic, but the plaintiff's cause of action arises out of those contacts with the state." 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1067.5 (3d ed. 2002). In such cases, "we focus on the 'relationship among the defendant, the forum[,] and the litigation.'" *Moki Mac*, 221 S.W.3d at 575-76 (quoting *Guardian Royal*, 815 S.W.2d at 228). Specific jurisdiction is appropriate when (1) the defendant's contacts with the forum state are purposeful, and (2) the cause of action arises from or relates to the defendant's contacts. *See Retamco*, 278 S.W.3d at 338.

The "touchstone of jurisdictional due process [is] 'purposeful availment.'" *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005). Purposeful availment requires a defendant to seek some "benefit, advantage, or profit by 'availing' itself of the jurisdiction." *Id.* at 785. Thus, sellers who reach beyond one state and create continuing relationships with residents of another state are subject to the specific jurisdiction of the latter in suits arising from those activities. *Moki Mac*, 221 S.W.3d at 575.

Notably, however, a seller's awareness "'that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.'" *CSR*, 925 S.W.2d at 595 (quoting *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987) (plurality opinion)). Instead, our precedent generally follows Justice O'Connor's plurality opinion in *Asahi*, which requires some "additional conduct"—beyond merely placing the product in the stream of commerce—that indicates "an intent or purpose to serve the market in the forum State." *Asahi*, 480 U.S. at 112; *Moki Mac*, 221 S.W.3d at 577; *Michiana*, 168 S.W.3d at 786. Examples of this additional conduct include: (1) "designing the product for the market in the forum State," (2) "advertising in the forum State," (3) "establishing channels for providing regular advice to customers in the forum State," and (4) "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi*, 480 U.S. at 112; *see also Moki Mac*, 221 S.W.3d at 577; *Michiana*, 168 S.W.3d at 786; *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 201 (Tex. 1985). In this case, Kimich argues that AG's substantial sales plus utilization of Limited as its distributor meets this standard.

AG relies on a different line of cases that reject jurisdiction "[w]hen a nonresident defendant purposefully structures transactions to avoid the benefits and protections of a forum's laws." *Am. Type Culture*, 83 S.W.3d at 808. Twice recently we have rejected attempts to sue foreign subsidiaries in Texas based on a parent corporation's contacts, holding that jurisdiction over one does not automatically establish jurisdiction over the other. *PHC-Minden*, 235 S.W.3d at 172; *see also BMC Software*, 83 S.W.3d at 800. Instead, to "fuse" two corporations for jurisdictional purposes, a parent must "control[] the internal business operations and affairs of the subsidiary" to an extent beyond its role as an investor. *PHC-Minden*, 235 S.W.3d at 175.

AG argues the same principles apply here, even though this case involves a foreign corporation's use of a Texas distributorship rather than a parent/subsidiary relationship. The issue is not, however, whether Limited's actions in Texas can be imputed to AG. Rather, our concern is with AG's own conduct directed toward marketing its products in Texas.

When an out-of-state manufacturer like AG specifically targets Texas as a market for its products, that manufacturer is subject to a product liability suit in Texas based on a product sold here, even if the sales are conducted through a Texas distributor or affiliate. *See Asahi*, 480 U.S. at 112 ("Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, . . . marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."). In such cases, it is not the actions of the Texas intermediary that count, but the actions of the foreign manufacturer who markets and distributes the product to profit from the Texas economy. As the United States Supreme Court stated in *World-Wide Volkswagen Corp. v. Woodson*, purposeful availment of local markets may be either

direct (through one's own offices and employees) or indirect (through affiliates or independent distributors):

> [I]f the sale of a product of a manufacturer . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer . . . to serve *directly or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.

World-Wide Volkswagen, 444 U.S. 286, 297 (1980) (emphasis added).

There are several limitations inherent in this rule. First, it is limited to the specific jurisdiction context, because stream-of-commerce analysis "is relevant only to the exercise of specific jurisdiction; it provides no basis for exercising general jurisdiction over a nonresident defendant." *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 788 (7th Cir. 2003); *accord D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 106 (3rd Cir. 2009); *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 380 (5th Cir. 2002); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 612 (8th Cir. 1994); *Moki Mac*, 221 S.W.3d at 579; Joseph S. Pevsner and Gregory W. Curry, *Down the Block But Outside Jurisdiction: Personal Jurisdiction in a Modern World*, 29 TEX. TECH L. REV. 977, 991 (1998). If sales alone created general jurisdiction, a foreign manufacturer like AG could be sued in Texas for labor practices occurring in Germany even though they had nothing to do with Texas.

Second, specific jurisdiction is limited to claims that "arise out of or relate to" a nonresident's forum contacts. *Burger King*, 471 U.S. at 472; *Retamco*, 278 S.W.3d at 338. In such cases, there must be a "substantial connection" between the defendant's contacts and the operative facts of the litigation. *See Moki Mac*, 221 S.W.3d at 585. So when a nonresident's only contacts with Texas

involve indirect sales through a distributor or subsidiary, specific jurisdiction is limited to claims arising out of those sales. *See, e.g., Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 216 (5th Cir. 2000) ("Appellants are correct in noting that we have not, in our decisions dealing with the stream-of-commerce theory, entirely foreclosed its application to cases not involving product liability claims. We need not decide here whether the theory is, or is not applicable to a broader range of cases.").

Third, not every product claim against a foreign manufacturer is included; there must be a substantial connection. That similar products were sold in Texas would not create a substantial connection as to products that were not. Similarly, a nonresident that buys a Texas distributor might have no substantial connection with sales that occurred before that purchase. *See Commonwealth Gen. Corp. v. York*, 177 S.W.3d 923, 924 (Tex. 2005).

Finally, the manufacturer must have intended to serve the Texas market. *CSR*, 925 S.W.2d at 596. While use of a Texas distributor may satisfy this requirement, there may be situations in which it does not. A Texas distributorship may increase the manufacturer's bottom line because it is more efficient or has greater access to economies of scale, and not because it is intended to serve Texas consumers. *Cf. Asahi*, 480 U.S. at 112 ("Additional conduct" may include "marketing the product through a distributor *who has agreed to serve as the sales agent in the forum State.*" (emphasis added)).

Many transactions can be structured to avoid any benefit from or availment of Texas law—but not all. A nonresident manufacturer does not avoid Texas law merely by forming a Texas affiliate or utilizing a Texas distributor to sell its products in Texas markets. Just as manufacturers

cannot escape liability for defective products by selling them through a subsidiary or distributor, neither can they avoid jurisdiction related to such claims by the same means.

The question is whether AG has purposefully directed acts towards Texas or purposefully availed itself of the benefits and protections of Texas law. We conclude that it has.

A. AG marketed its products exclusively through Limited, a Texas distributor.

AG argues that its individual owners—rather than AG itself—established Limited. Even if that were true, by "marketing [its] product through a distributor who has agreed to serve as the sales agent in the forum state," AG has met *Asahi*'s "additional conduct standard." *Asahi*, 480 U.S. at 112.

AG also contends that, because it receives none of Limited's profits and relinquishes title to the hoses before they reach Texas, AG does not benefit from Limited's Texas connections. But AG reaps substantial economic gain through its sales to Limited, its largest distributor by far, responsible for over one-third of AG's annual sales. *See Moki Mac*, 221 S.W.3d at 578 (finding purposeful availment because of foreign corporation's "additional conduct through which it aimed to get extensive business in or from this state"). Indeed, specific jurisdiction over foreign manufacturers is often premised on sales by independent distributors. *See, e.g., Bridgeport Music, Inc. v. Still N The Water Publ'g*, 327 F.3d 472, 483-84 (6th Cir. 2003) (finding specific jurisdiction under "additional conduct" standard based in part on nationwide distribution agreement with independent distributor); *Kuenzle v. HTM Sport-Und Freizeitgeräte AG*, 102 F.3d 453, 458 (10th Cir. 1996) (noting that "[t]he actions of an independent distributor may not insulate a foreign company from specific jurisdiction"); *Tobin v. Astra Pharm. Prods., Inc*., 993 F.2d 528, 533-34 (6th Cir. 1993)

(holding that foreign drug manufacturer who marketed its product in Kentucky through independent distributor was nonetheless subject to personal jurisdiction in forum under *Asahi*'s "additional conduct" standard); *see also Pennzoil Prods. Co. v. Colleli & Assocs.,* 149 F.3d 197, 206-07 (3d Cir. 1998) (applying "additional conduct" standard and finding specific jurisdiction in Pennsylvania over Ohio chemical producer who sold products to independent Ohio oil well producers that then sold oil to Pennsylvania refineries).

Thus, it is not persuasive that title to the hoses passed in Europe, rather than in Texas. *See Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 282 (3d Cir. 1994) (noting that "a foreign manufacturer or seller [which] rids itself of title by a sale F.O.B. a foreign port [does not] insulate [itself] from jurisdiction if there is the other type of activity" indicating purposeful availment); *Gulf Consol. Servs., Inc. v. Corinth Pipeworks, S.A.*, 898 F.2d 1071, 1073 (5th Cir. 1990) (observing that "the simple fact that a sales transaction is consummated outside that jurisdiction does not prevent the sale from forming the basis of jurisdiction"); *Benitez-Allende v. Alcan Aluminio Do Brasil, S.A.*, 857 F.2d 26, 30 (1st Cir. 1988) (holding that title passing in Brazil "is beside the point" in a specific jurisdiction analysis); Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 213 (2005).

B. AG intended to serve the Texas market, and Kimich's claim arose from AG's purposeful direction of acts towards Texas.

Not only did AG market its products through a distributor in the forum state, AG directly targeted the Texas market. In *CSR*, we held that there was no specific jurisdiction over CSR, a

foreign asbestos supplier whose product wound up in Texas: CSR's knowledge that its buyer, a pipe manufacturer, had a plant in Texas was not determinative because that manufacturer also had plants in at least four other states, and CSR's awareness that the stream of commerce may sweep the product into Texas "'[did] not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.'" *CSR*, 925 S.W.2d at 595 (quoting *Asahi*, 480 U.S. at 112). Instead, we held that "there must be some indication that CSR intended to serve the Texas market." *Id.* at 595.

This is consistent with federal authority holding that no specific jurisdiction exists over a manufacturer whose product just happens to end up in the forum state. For example, the Seventh Circuit Court of Appeals recently held that a Danish jack manufacturer was not subject to specific jurisdiction in Indiana, because there was no evidence that the manufacturer had "an awareness or expectation that some of its products would be purchased in Indiana":

> In *World-Wide Volkswagen*, the Supreme Court held that personal jurisdiction was lacking because, in part, there was no evidence in the record that any products that the defendants distributed (in that case, automobiles) were ever sold to retail customers in the forum state. Similarly in this case, Jennings produced no evidence that any of AC Hydraulic's products (including the jack at issue in this suit) were ever sold in Indiana. Jennings claims that an Indiana company purchased the jack, but even if we were to accept this unsubstantiated allegation as evidence, Jennings does not tell us in what state or from whom this company purchased the jack. Additionally, Jennings established that AC Hydraulic sells some of its products to two distributors in Florida, but she did not present any volume information for these sales or provide us with information about where the distributors resell the products, so the scope of any alleged distribution in the rest of the United States, and whether any AC Hydraulic products have been distributed in Indiana, cannot be determined. The bottom line is that, relying on the sparse evidence that Jennings presented, we do not know how the jack in question got to Indiana, or if any other AC Hydraulic products have ever been sold there. It is possible that the "unilateral activity" of a third party, *rather than the defendant's distribution scheme*, landed the jack in

> Indiana, which is the very scenario that doomed the plaintiffs' case in *World-Wide Volkswagen*.

Jennings v. AC Hydraulic A/S, 383 F.3d 546, 550-51 (7th Cir. 2004) (internal citations omitted)(emphasis added);[2] *see also Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992) (finding no specific jurisdiction over foreign corporation because there was "no evidence that [corporation] intended to serve the market in Maine").

Contrast those cases with the situation here. AG's board of directors created Limited because AG wanted to take advantage of "the biggest economy in the world." Strobach testified that "the whole board . . . decided that [Houston would be the best place for a distributor] because we knew that—we thought that would be the greatest need, because of the immediate vicinity of all the refineries." Strobach traveled to Houston because "we wanted to establish an office in Houston." The Board's selection of a Houston office preceded by a few days the arrival of Walter De Graaf, president of both AG and Limited and an employee of each, who signed the documents that created Limited. De Graaf spends half the year working in Houston and is paid by both AG and Limited while there; his contract with AG authorizes him to act on its behalf no matter where he is.

After deciding to establish Limited, AG authorized Limited to use the "Spir Star" name, and Limited became AG's exclusive distributor in Texas and throughout North America. According to one of AG's directors, Limited has been "very successful indeed," and it is AG's largest customer by far. AG has sold millions of dollars worth of hoses to Limited; each month, AG sells Limited a

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[2] The court did not resolve whether Justice O'Connor's or Justice Brennan's *Asahi* standard should be applied, because the plaintiff failed to make even a threshold showing that AC Hydraulic had an awareness or expectation that some of its products would be purchased in Indiana. *Jennings*, 383 F.3d at 551 n.2.

maritime container full of reels of hose, which are shipped to the port of Houston. AG supplies Limited with crimping and assembly tools and written assembly standards, and AG personnel train Limited's employees in hose assembly.

AG's website, authored by one of its employees, states that:

> In order to cover the world-wide market and provide quick service to our customers, office [sic] were opened in the following countries: SPIR STAR France, S.A.R.L. 1991 in Haguenau/France, SPIR STAR Inc. [Limited] 1995 in Housten [sic]/Texas (U.S.A.) and SPIR STAR Asia Pty. Ltd. 1999 in Singapore.

Limited's website, which is written from AG's perspective, states that "the decision was made that the company should expand its activities outside of Europe" and that "we ventured across the Atlantic and founded SPIR STAR, Ltd. in Houston, Texas." The same website touts Limited as "the main link for our growing market share in North and South America." Under the heading "Spir Star Companies," four entities are listed: AG, Limited, Spir Star France, and Spir Star Asia, PTE Ltd. De Graaf, AG's president, testified that he reviewed the content of both websites prior to their publication. The trial court could have believed, as Kimich argues, that AG, acting through its directors and officers, created Limited or that the website statements were admissions by AG. Or the trial court simply could have determined that AG "marketed [its] product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi*, 480 U.S. at 112. If the foregoing evidence does not indicate "an intent or purpose to serve the market in [Texas]," it is difficult to imagine what would. *Cf. id.* (finding no specific jurisdiction in California because "respondents have not demonstrated any action by Asahi to purposefully avail itself of the California market").

Finally, Kimich's claim arose from AG's Texas contacts. *See World-Wide Volkswagen*, 444 U.S. at 297 ("[I]f the sale of a product of a manufacturer . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer . . . to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 374 (5th Cir. 1987) ("When the contact stems from a product, sold or manufactured by the foreign defendant, which has caused harm in the forum state, the court has [specific] jurisdiction" provided defendant purposefully availed itself of the privilege of conducting activities within the forum); *cf. Hicks v. Kawasaki Heavy Indus.*, 452 F. Supp. 130, 134 (M.D. Pa. 1978)(noting that "there exists a direct relationship between the cause of action and [Kawasaki's] contacts with the state," as motorcycle sold by foreign manufacturer to distributor "is alleged to have caused injury in the state to a resident of the state"), *cited in Asahi*, 480 U.S. at 112-13.

IV. Exercising jurisdiction over AG comports with traditional notions of fair play and substantial justice.

Because AG's Texas contacts support specific jurisdiction, we must now determine whether jurisdiction is consistent with traditional notions of fair play and substantial justice. *Retamco*, 278 S.W.3d at 341. "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." *Guardian Royal*, 815 S.W.2d at 231 (citing *Burger King*, 471 U.S. at 477). To evaluate this component, we must consider AG's contacts in light of: (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 or international judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several nations or states in furthering fundamental substantive social policies.[3] *Id.* at 231. To defeat jurisdiction, AG must present "'a compelling case that the presence of some consideration would render jurisdiction unreasonable'"—something AG has not done. *See id.* (quoting *Burger King*, 471 U.S. at 477).

Requiring AG to defend Kimich's claim in Texas would not pose an undue burden for the company. The fact that AG is headquartered in Germany cannot, by itself, defeat jurisdiction. *See id.* at 231 ("Nor is distance alone ordinarily sufficient to defeat jurisdiction: 'modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.'" (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957))). Houston is familiar territory for AG's leadership: its president spends six months of the year there (and can carry on AG's business while there),[4] two of AG's directors traveled to Houston

[3] There is some confusion about a court's need to evaluate the fourth and fifth considerations in cases involving a foreign defendant. In *Guardian Royal*, we held that in cases involving a foreign defendant rather than two "coequal sovereigns in our federal system, we need not consider the interstate judicial system's interest in obtaining the most efficient resolution of controversies or the shared interest of the several states in furthering fundamental substantive social policies," *Guardian Royal*, 815 S.W.2d at 232 n.17, considerations that would be relevant in a dispute among residents of differing states. While this is true, we failed to explain that in such cases courts must instead consider the interests of "other *nations* whose interests are affected by the assertion of jurisdiction." *Asahi*, 480 U.S. at 115. Here, the court of appeals examined the international interest in obtaining the most efficient resolution of controversies but failed to consider the shared interest of the several nations in furthering fundamental substantive social policies. ___ S.W.3d at ___ ("We will not address the fifth factor as only one state is involved in this dispute."). This disparate holding gives us jurisdiction over this interlocutory appeal. TEX. GOV'T CODE § 22.225 (c),(e) (noting that one court "holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants").

[4] De Graaf has established a residence in Houston and obtained a "green card" in 2000.

to establish Limited, and one of them returned—at AG's expense—to celebrate Limited's fifth anniversary. *Cf. id.* at 232-33 (finding jurisdiction unreasonable because, among other things, the English defendant was unaffiliated with any American companies). Three of AG's directors collectively own seventy-five percent of Limited, which will be litigating in Houston.

Moreover, Texas has a significant interest in exercising jurisdiction over controversies arising from injuries a Texas resident sustains from products that are purposefully brought into the state and purchased by Texas companies. *Cf. Asahi*, 480 U.S. at 114 ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished."); *Guardian*, 815 S.W.2d at 233 ("[S]ince Guardian Royal and U.S. Fire are neither Texas consumers nor insureds, Texas' interest in adjudicating the dispute . . . is considerably diminished."). Not only would Kimich face an undue burden were he forced to litigate his product liability claim against AG in Germany, but because the claims against Limited will be heard in Texas, it would be more efficient to adjudicate the entire case in the same place. *See Retamco*, 278 S.W.3d at 341 ("[The plaintiff] has an interest in resolving this controversy in Texas because that is where the litigation began."). We recognize "the unique and onerous burden placed on a party called to defend a suit in a foreign legal system." *CSR*, 925 S.W.2d at 595 (citing *Asahi*, 480 U.S. at 114). In this case, that burden is minimal and is outweighed by Kimich's and Texas's interests in adjudicating the dispute here. *See Asahi*, 480 U.S. at 114. Asserting personal jurisdiction over AG comports with traditional notions of fair play and substantial justice.

V. Conclusion

Under the appropriate standard of review, our task ends when, as here, some evidence supports the trial court's denial of AG's special appearance. *BMC*, 83 S.W.3d at 794-95. AG did not merely set its products afloat in a stream of commerce that happened to carry them to Texas. AG "marketed [its] product through a distributor who has agreed to serve as [its] sales agent in [Texas]," *Asahi*, 480 U.S. at 112, and AG undoubtedly "intended to serve the Texas market," *CSR*, 925 S.W.2d at 595. Further, AG's potential liability arises out of its contacts with Texas, and exercising personal jurisdiction over AG does not offend traditional notions of fair play and substantial justice. The court of appeals and the trial court correctly concluded that Texas courts have personal jurisdiction over this claim against AG. We affirm the court of appeals' judgment. TEX. R. APP. P. 60.2(a).

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: March 12, 2010

IN THE SUPREME COURT OF TEXAS

NO. 07-0404

EXXON MOBIL CORP., PETITIONER,

v.

DAN GILL, ET AL., RESPONDENTS

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

PER CURIAM

JUSTICE O'NEILL and JUSTICE GUZMAN did not participate in the decision.

For several years, Exxon Mobil Corp. offered service station dealers individual rebates based upon a dealer's sales volume and hours of operation. Three Texas dealers, Dan Gill, Howard Granby, and Patrick Morrow ("the Dealers"), sued Exxon in the county court at law of Nueces County on behalf of all Exxon dealers in the nation, complaining that unbeknownst to them, Exxon added the cost of the rebate programs back into the wholesale price Exxon charged them for gasoline. The Dealers initially moved to certify a nationwide class, but after this Court's decision in *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657 (Tex. 2004), they sought certification of only a statewide class, and plaintiffs' counsel refiled the claims for all other Exxon dealers in the United States in federal court. The federal court rendered summary judgment for Exxon. *Flagler Auto., Inc. v. Exxon Mobil Corp.*, 582 F. Supp. 2d 367 (E.D.N.Y. 2008). Meanwhile, the Texas trial

court certified a class of all Texas dealers, and the court of appeals affirmed. 221 S.W.3d 841 (Tex. App.–Corpus Christi-Edinburg 2007). Because the lower courts did not correctly construe and apply our decision in *Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429, 434-436 (Tex. 2004), we reverse and remand the case to the trial court.

"Courts must perform a rigorous analysis before ruling on class certification to determine whether all prerequisites to certification have been met." *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000) (citation and internal quotation marks omitted). In so doing, courts "may look beyond the pleadings." *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 404 (Tex. 2000). "Because class determinations generally involve considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action, the trial court must be able to make a reasoned determination of the certification issues." *Id*. (citation and internal quotation marks omitted). And while "[d]eciding the merits of the suit in order to determine . . . its maintainability as a class action is not appropriate," *Beeson*, 22 S.W.3d at 404 (citations omitted), "the substantive law . . . must be taken into consideration in determining whether the purported class can meet the certification prerequisites under [Texas Rule of Civil Procedure] 42," *Union Pac. Res. Group, Inc. v. Hankins*, 111 S.W.3d 69, 72-73 (Tex. 2003).

The parties do not dispute that each dealer's sales agreement with Exxon contained essentially the same open-price provision, obligating the dealer to pay Exxon its "established" price or price "in effect" at the time of the loading of the delivery vehicle (referred to as the DTW or DTT price, short for dealer tank wagon or dealer tank truck). Such provisions are permitted by section

2.305 of the Uniform Commercial Code, in Texas, TEX. BUS. & COM. CODE § 2.305, which states in pertinent part:

> (a) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery . . . .
>
> (b) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

Comment 3 creates a safe harbor within (b), advising that "in the normal case a 'posted price' or a future seller's or buyer's 'given price,' 'price in effect,' 'market price,' or the like satisfies the good faith requirement." TEX. BUS. & COM. CODE § 2.305 cmt. 3. *See Romo v. Austin Nat'l Bank*, 615 S.W.2d 168, 171 n.2 (Tex. 1981) ("Although the official comments to the Code were not enacted by the Legislature, they serve as a valuable aid in construing the statutory language." (citations omitted)).

The Dealers do not contend that they were charged anything other than the DTW or DTT price, or that the prices charged were commercially unreasonable in amount or discriminatory. Rather, they complain that Exxon promised that the rebate programs would provide dealers real economic benefits but recouped the rebates by factoring them back into prices without disclosing what it was doing. Exxon admits that it took rebate costs into account in setting prices but disputes whether the costs were fully recouped and how much dealers knew.

The trial court certified a class asserting three claims: (1) breach of the sales agreements; (2) breach of section 2.305's duty of good faith; and (3) breach of rebate promises. *See* 221 S.W.3d 841, 848. The court of appeals viewed the first two as "the same" — for breach of the open-price

provisions, *id*. at 851 — but saw the third claim as separate — "for breach of the promise to provide economic benefits under the rebate programs," *id*. at 852. The court of appeals construed all three as claims for breach of contract and rejected Exxon's argument that the Dealers really alleged fraud. *Id*. at 849 ("The claims are . . . contract claims, not tort claims, as Exxon suggests."); *id*. ("plaintiffs have not asserted a cause of action for fraud"); *id*. at 853 ("this is a contract case"). The Dealers also tell us in their brief that "Exxon is simply wrong when it argues that this breach-of-contract case . . . is a fraud case."

The Dealers have a compelling reason to confine their claim to breach of contract: generally speaking, to recover for fraud or other misrepresentation, plaintiffs must offer evidence that they relied on the defendant's misconduct. *See Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 (Tex. 2002). Such evidence is often different for each individual, depending on how and what each was told, what each knew of the matter, and how each reacted, thus precluding the predominance of common issues required to maintain a class action under Rule 42(b)(3). *See id*. at 693-694. To recover for breach of contract, proof of reliance is not required.

Accepting the Dealers' assertion that theirs is a contract action only, we see no distinction in their claims. They do not allege that Exxon's promises regarding the rebates were a separate contract or modified the sales agreements. They do not assert an independent breach-of-contract action based on any promises made by Exxon. Their complaint that they never received the rebate benefits Exxon promised is simply the basis for their claim that Exxon did not act in good faith and therefore breached the open-price provisions. Thus, we have before us a single claim for breach of

the open-price provisions, and the issue is whether the trial court acted properly in certifying it as a class action.

As noted above, comment 3 to section 2.305 provides that a seller who charges a "price in effect" or the like, as Exxon did, acts in good faith "in the normal case." TEX. BUS. & COM. CODE § 2.305 cmt. 3. In *Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429 (Tex. 2004), we explained that "the normal case" is generally one that does not involve discriminatory pricing and that:

> Beyond prohibiting discriminatory pricing, the [UCC] drafters wished to minimize judicial intrusion into the setting of prices under open-price-term contracts. They understood that requiring sellers in open-price industries, such as the oil and gas industry, to justify the reasonableness [of] their prices in order to satisfy section 2.305 would mean that in every case the seller is going to be in a lawsuit and that every sales contract would become a public utility rate case. The drafters reasonably foresaw that almost any price could be attacked unless it benefitted from a strong presumption. Thus, they adopted a safe harbor, Comment 3's posted price presumption, to preserve the practice of using sellers' standard prices while seeking to avoid discriminatory prices.

Id. at 435 (citation and internal quotation marks omitted). To avoid having "a jury . . . determine in every section 2.305(b) case whether there was any improper motive animating the price-setter, even if the prices ultimately charged were undisputedly within the range of those charged throughout the industry," we concluded that the required good faith must be measured objectively, with reference to commercial realities, rather than subjectively, based on the person's motives or alleged dishonesty. *Id*. at 435-436 (citation and internal quotation marks omitted).

HRN involved allegations by service station dealers that Shell Oil Co. had violated its open-price contracts, like those involved in the present case, by dishonestly setting prices so high that dealers could not remain competitive in the market, thereby forcing them out of business to be

replaced by company-owned stations more profitable to Shell. *Id*. at 432. But the dealers did not claim that the prices charged were commercially unreasonable or discriminatory. Their struggles to compete effectively did not make the case "abnormal" for purposes of comment 3's safe harbor. *Id*. at 437-438.

The trial court in the present case acknowledged that under *HRN*, "a party merely challenging the commercial reasonableness of an open-price without other factors must show price discrimination," but it distinguished *HRN* because of the Dealers' "specific claims of dishonesty in fact based on Exxon's promise of a rebate and acts allegedly taken to remove the benefit promised." We do not see the distinction. The dealers' claims of dishonesty in *HRN* — that Shell was setting prices to drive them out of business — were just as specific, and certainly as reprehensible, as those asserted by the Dealers in the present case. Here, as in *HRN*, there is no claim that the open prices charged were commercially unreasonable in amount or discriminatory. The Dealers here point to nothing in the contracts that prohibited Exxon from taking rebate costs into account in setting prices.

The court of appeals distinguished *HRN* because this case involves "specific promises of economic remuneration for keeping stores open specified hours and selling specified volumes of gasoline." 221 S.W.3d at 852. But as we have already noted, the Dealers do not assert a cause of action for breach of such promises. They disavow any claim of fraud, and they do not assert that any promises Exxon made to them constituted a contract or modified their sales agreements. The Dealers' only claim is for breach of the open-price provisions, and the question is whether Exxon's alleged failure to disclose that it was setting prices to recoup rebate costs may violate section 2.305's

good faith requirement when Shell's alleged practice of setting prices to drive dealers out of business did not. The answer is no.

Thus, it appears that the Dealers' claim lacks merit. As noted at the outset, a federal district court has already reached this very conclusion in an identical case on behalf of all Exxon dealers in the United States outside Texas. *Flagler Auto., Inc. v. Exxon Mobil Corp.*, 582 F. Supp. 2d 367 (E.D.N.Y. 2008). The federal Eleventh Circuit has held the same in a similar case involving a different oil company and rebate, *Autry Petroleum Co. v. BP Prods. N. Am., Inc.*, 2009 U.S. App. LEXIS 13978, 2009 WL 1833864 (11th Cir. 2009) (per curiam). In *Autry*, as here, dealers complained that the oil company had factored the cost of a rebate program back into the prices charged. Citing *HRN*, the court in *Autry* concluded: "The good-faith safe harbor provided in UCC [§ 2-305(2)] would be undermined — and the certainty a safe harbor provides would be frustrated — if, without more, an allegation of subjective bad faith trumped the normal case presumption of good faith." *Id*. at *6.

The Dealers point to an earlier Eleventh Circuit case, *Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003), yet another case involving claims by service station dealers that an oil company breached "open price" provisions. In that case, the company promised to discount its pricing to offset credit transaction charges but later withdrew the offset without notice. The court approved class action treatment. But *Allapattah* was different, the court later explained in *Autry*, because there, "Exxon made specific, express promises about the way it would adjust its prices," agreeing that rebate costs would not be added back in. *Autry*, at *5-6. The Dealers in this

case make no such allegation. To the contrary, they allege that Exxon factored rebate costs into prices "secretly," without disclosing what it was doing.

The trial court and court of appeals misconstrued our decision in *HRN* and misapplied it to this case. When a class has been certified based on a significant misunderstanding of the law, we have concluded that "remand to the trial court is appropriate so that it may determine the effect . . . on the requirements for class certification." *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 778 (Tex. 2005). Accordingly, the trial court's class certification order is vacated and the case is remanded to that court for further proceedings.

Opinion delivered: November 20, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0485

CITY OF WACO, TEXAS, PETITIONER,

v.

LARRY KELLEY, RESPONDENT

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

Argued April 2, 2008

JUSTICE JOHNSON delivered the opinion of the Court.

Under the City of Waco's civil service system, a police officer may appeal involuntary discipline to either the Civil Service Commission or a third party hearing examiner. In this case, an assistant chief was disciplined by being indefinitely suspended, which is the equivalent of being dismissed from the department. A hearing examiner found that the charges against him were true but determined that the discipline was excessive. The hearing examiner reduced the suspension to 180 days, reinstated the assistant chief to the police force at a reduced rank, and ordered that he be made whole as to his lost wages and benefits. We hold that the examiner exceeded his jurisdiction in part. We reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

I. Background

The City of Waco has adopted Chapter 143 of the Local Government Code (the Civil Service Act, or Act) and thereby provides a civil service system for its police department.[1] TEX. LOC. GOV'T CODE § 143.004;[2] WACO, TEX., CODE OF ORDINANCES § 18-96 (2009). The Act provides that all police officers are "classified" employees and have civil service protection, except for the head of the department and any persons the department head appoints to positions categorized as being immediately below the department head. TEX. LOC. GOV'T CODE § 143.021(b).

Larry Kelley was a veteran officer with the Waco Police Department and was serving as commander in 1999 when he was appointed assistant chief of police. Assistant chief is the personnel category immediately below that of the chief, who is the department head. While serving as assistant chief, Kelley was arrested in Austin and charged with driving while intoxicated. Waco's Chief of Police, Alberto Melis, determined that Kelley's conduct violated Waco's civil service rules. Kelley offered to accept voluntary discipline of being returned to the position of commander, serving a ninety-day suspension, and performing service by addressing the younger police officers. Chief Melis rejected Kelley's offer and suspended him indefinitely. The Act specifies that an indefinite suspension is equivalent to dismissal from the department. *Id.* § 143.052(b).

Pursuant to procedures mandated by Subchapter D of the Act, which is entitled "Disciplinary Actions," Chief Melis filed a written statement with Waco's Fire Fighters' and Police Officers' Civil

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[1] The Act provides that civil service systems may be provided for fire fighters and police officers. We reference police officers for convenience and ease of reference.

[2] Statutory references will be to the Local Government Code unless otherwise noted.

Service Commission setting out his reasons for suspending Kelley. *See id.* § 143.052(c). Melis specified that Kelley's suspension was based on Section 143.051(7), which provides that a police officer may be removed or suspended for drinking intoxicants while on duty or for intoxication while off duty, and Section 143.051(12), which provides for the removal or suspension of an officer for violation of an applicable fire or police department rule or special order.

Even though Kelley was not a classified employee because he was an assistant chief, the Act provided him the same appellate rights and privileges as a classified officer. *Id.* § 143.014(h). He was therefore entitled to appeal either to the commission or to an independent third party hearing examiner. *Id.* § 143.057(a). Kelley appealed to a hearing examiner. The hearing examiner found that the charges against Kelley were true but concluded that the discipline imposed was excessive. The examiner ordered Kelley reinstated at the rank of sergeant[3] and ordered his indefinite suspension reduced to a temporary suspension of 180 days. The examiner also directed that Kelley be "made whole subject to the normal principles of mitigation."

The City appealed to the district court. It alleged that the hearing examiner exceeded his jurisdiction by considering evidence not presented at the hearing, reducing the length of Kelley's suspension from indefinite to temporary, demoting him, and awarding back pay and benefits. *See id.* § 143.057(j) (stating that a district court may hear an appeal of a hearing examiner's award "on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction"). Kelley denied the City's claims. By counter-appeal, he requested reconsideration of the hearing examiner's

[3] Officers in Waco's police department are ranked, in descending order, as chief (the department head), assistant chief, commander, sergeant and officer. The hearing examiner specifically rejected demoting Kelley only one step to commander or three steps to officer.

denial of his motion to have the suspension declared void because the City failed to follow specific procedures under the Act when suspending him. He moved for dismissal of the City's appeal for lack of jurisdiction and filed a motion for summary judgment in which he asserted there was no evidence the hearing examiner exceeded his jurisdiction. The district court denied Kelley's motion to dismiss and counter-appeal, granted his motion for summary judgment, and awarded him $12,500 in attorney's fees. The City appealed.

The court of appeals dismissed the case for lack of jurisdiction. The court reasoned that the trial court had no jurisdiction because "the [C]ity has no right of appeal from [the] hearing examiner's decision—only [a] firefighter or police officer can appeal." No. 10-03-00214-CV, 2004 WL 2481383, at *1 (Tex. App.—Waco Oct. 29, 2004) (mem. op.), *rev'd per curiam*, 197 S.W.3d 324 (Tex. 2006). After the court of appeals rendered its decision, we held that municipalities have the right to appeal an independent hearing examiner's decision. *City of Houston v. Clark*, 197 S.W.3d 314, 324-25 (Tex. 2006). Referencing *Clark*, we reversed and remanded Kelley's case to the court of appeals for further proceedings. *City of Waco v. Kelley*, 197 S.W.3d 324, 325 (Tex. 2006). On remand, the court of appeals held that the hearing examiner did not exceed his jurisdiction by reducing the length of Kelley's suspension or by awarding him back pay and benefits[4] and that the district court properly awarded Kelley attorney's fees. 226 S.W.3d 672, 681. The court of appeals also held that the hearing examiner exceeded his jurisdiction by ordering Kelley's

[4] The court of appeals noted that the parties considered the hearing examiner's directive that Kelley be "made whole" to order only that he be paid wages and benefits for the period of time after his 180-day suspension ended. 226 S.W.3d 672, 680. The parties do not take a position on the issue in this court.

demotion to sergeant and ordered Kelley reinstated at his prior classified position of commander. *Id.*

We granted the City's petition for review. By six issues, the City challenges the court of appeals' judgment on the bases that when a hearing examiner finds the charges against an indefinitely suspended officer are true, the hearing examiner has authority under the Act only to affirm the suspension and permanently dismiss the officer; even if the hearing examiner has jurisdiction to reduce an indefinite suspension and thereby effectively reinstate the officer to the department, the examiner has no authority to order a suspension for 180 days or order back pay and benefits; and attorney's fees are not recoverable in an appeal from a hearing examiner's award. We begin by addressing the hearing examiner's jurisdiction.

II. Jurisdiction of a Hearing Examiner

A. The Act Provides Jurisdiction

In *City of Pasadena v. Smith*, 292 S.W.3d 14 (Tex. 2009), decided after the court of appeals' decision in this case, we considered jurisdictional boundaries in appeals from disciplinary suspensions under the Act. There, the hearing examiner summarily ruled against the city because the department head was not present to testify when the hearing began. *Id.* at 16. In analyzing the examiner's actions, we noted that the deadlines, procedures, and limitations the Act provides as to the Civil Service Commission apply equally to hearing examiners. *Id.* at 20. Those deadlines, procedures, and limitations necessarily provide standards by which the actions of examiners must be measured; otherwise, the Act could raise concerns that it impermissibly delegates legislative authority:

> 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* [*v. Andrews*, 972 S.W.2d 729 (Tex. 1998)]. It is one thing for a hearing examiner to determine whether conduct for which an officer 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.

Id. at 18-19.

We held that a hearing examiner is not authorized to make rules, but must follow those prescribed by the Legislature and that the Act both confers and limits the power of a hearing examiner. *Id.* at 20; *see* TEX. LOC. GOV'T CODE § 143.010(g). We acknowledged the difficulty of stating a test for determining when a hearing examiner exceeds his jurisdiction: "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." *City of Pasadena*, 292 S.W.3d at 21. Because the hearing examiner in *City of Pasadena* refused to hear evidence and did not make his decision based on evidence submitted during the hearing as the Act requires, he exceeded his jurisdiction. *Id.* at 20-21.

Because the City of Waco does not argue that the Act impermissibly delegates legislative authority, we will focus on whether the hearing examiner exceeded his jurisdiction by ordering either relief not authorized by the Act or relief contrary to that authorized by the Act. *See id.* at 21. Making that determination requires us to consider what actions the Act authorized the hearing examiner to take and to measure the examiner's actions against those authorized actions. In construing the statute to determine what relief it authorizes, we keep in mind that our objective is

to determine and give effect to the Legislature's intent. *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008). 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 plain meaning of words used in the statute unless the context necessarily requires a different construction, a different construction is expressly provided by statute, or such an interpretation would lead to absurd or nonsensical results. *See Hernandez v. Ebrom*, 289 S.W.3d 316, 321 (Tex. 2009); *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999). Thus, we also must examine the Legislature's words in context of the statute as a whole and not consider words or parts of the statute in isolation. *Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009). Our review is de novo. *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003) ("We review matters of statutory construction de novo."); *see also Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003) ("We review the trial court's summary judgment de novo.").

B. Appeal of a Suspension

If a classified officer is involuntarily suspended, the officer may appeal the suspension to either the commission or an independent third party hearing examiner. TEX. LOC. GOV'T CODE § 143.057(a). If appeal is to a hearing examiner, the examiner has the same duties and powers as the commission. *Id.* § 143.057(f). The ultimate decision options of the commission—and hearing examiner—are specified in Section 143.053:

> (e) In its decision, the commission shall state whether the suspended fire fighter or police officer is:
>
> (1) permanently dismissed from the fire or police department;

(2) temporarily suspended from the department; or
(3) restored to the person's former position or status in the department's classified service.

(f) If the commission finds that the period of disciplinary suspension should be reduced, the commission may order a reduction in the period of suspension.

Id. § 143.053(e)-(f).

Officers appointed and serving in positions immediately below the department head, as Kelley was, do not have civil service protection. *Id.* § 143.021(b). Nevertheless, if an officer serving in such a position is indefinitely suspended, the Act affords that officer the same rights to a hearing that a classified officer would have:

(h) If a person appointed under this section is charged with an offense in violation of civil service rules and *indefinitely suspended* by the department head, the person has the same rights and privileges of a hearing before the commission *in the same manner and under the same conditions as a classified employee*. If the commission, a hearing examiner, or a court of competent jurisdiction finds the charges to be untrue or unfounded, the person shall immediately be restored to the same classification, or its equivalent, that the person held before appointment. The person has all the rights and privileges of the prior position according to seniority, and shall be repaid for any lost wages.

Id. § 143.014(h) (emphasis added). In addition to providing for the right to a hearing, Section 143.014(h) specifies what decision the hearing examiner must render if charges against the officer are found to be untrue: the officer must be "restored" to the same or an equivalent classification as the position the officer held before being appointed to the position just below department head. The section thus provides the limit of a hearing officer's jurisdiction if the examiner finds the charges to be untrue, but it does not specify what decisions can be rendered if the charges are found to be true. In contrast, Sections 143.053(e) and (f) specify the decisions that a hearing examiner may

render and necessarily establish the hearing examiner's jurisdiction when the charges against an officer are found to be true. First, the suspended officer may be dismissed from the department. *Id.* § 143.053(e)(1). Second, the officer may be temporarily suspended. *Id.* § 143.053(e)(2). Third, the officer may be restored to the officer's former position or status in the department's classified service. *Id.* § 143.053(e)(3). The Act specifies that if the examiner finds the period of disciplinary suspension should be reduced, the examiner may reduce it. *Id.* § 143.053(f). Further, if the examiner's decision is that the officer is not to be suspended or dismissed, then the only choice left to the examiner is for the officer to be "restored" to the officer's former position or status in the department's classified service, and the officer is entitled to wages and benefits for the actual time lost as a result of the suspension. *Id.*

III. Analysis

A. Reduction of Indefinite Suspension

We first consider the parts of the hearing examiner's order reducing Kelley's suspension from indefinite to 180 days. By reducing the suspension, the hearing examiner effectively reinstated Kelley to the police force.

The City argues that because Kelley was an assistant chief, Section 143.014(h) did not provide authority for the examiner to temporarily suspend or demote him after finding the charges against him were true; rather, the examiner was required to uphold the indefinite suspension. Kelley responds that the City is precluded from arguing that Section 143.014 prohibits a hearing examiner from reducing an assistant chief's suspension because Chief Melis failed to cite Section 143.014 in his written statement as a basis for the discipline. *See id.* § 143.052 (c), (e) (requiring a department

head who suspends an officer to file a written statement with the commission giving the reasons for the suspension, identifying each civil service rule allegedly violated, and describing the acts alleged to have violated each rule identified). He further asserts that the Legislature could not have reasonably intended to provide a hearing examiner with *no* authority to alter a suspension if the charges are determined to be true.

1. Chief Melis's Written Statement

After suspending an officer, a department head must provide a written statement to the commission and the officer giving the reasons for the suspension. *Id.* § 143.052(c). The statement must point out each civil service rule allegedly violated and describe each infraction. *Id.* § 143.052(e) The statement must also inform the officer of the right to appeal and that the right to appeal a hearing examiner's decision to a district court is limited. *Id.* §§ 143.052(d), 143.057(a). If the officer appeals, "the department head is restricted to the department head's original written statement and charges, which may not be amended." *Id.* § 143.053(c). Nothing in the Act requires the department head's statement to specify what authority a hearing examiner has or what sections of the Act provide the hearing examiner with authority. Further, if Section 143.014(h) limits a hearing examiner's jurisdiction, that jurisdiction cannot be expanded by a City's failure or refusal to cite the section. *See City of Pasadena*, 292 S.W.3d at 21 ("[T]he 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."). Accordingly, when Section 143.014(h) applies, a hearing examiner cannot refuse to comply with it because it was not cited in the department head's written statement. Chief Melis's failure to cite Section 143.014(h) did not preclude the City's argument that

because Kelley was an assistant chief, Section 143.014(h) did not provide authority for the examiner to temporarily suspend or demote him after finding the charges against him were true.

2. Examiner Jurisdiction When the Charges are True

Had the hearing examiner found the charges against Kelley to be untrue, Section 143.014(h) required that Kelley be restored to his previous classification of commander. The logical corollary to that provision, according to the City, is that if the charges are found to be true, then the only permissible remedy must be to uphold whatever suspension was imposed. Kelley counters that the trial court and court of appeals correctly determined Section 143.014 is applicable only if the hearing examiner finds the charges to be untrue, while Section 143.053, providing for appeal of a disciplinary suspension, specifies a hearing examiner's authority if the charges are found to be true. We agree with Kelley.

Section 143.014(h) does not address what a hearing examiner may do if the charges are found to be true. While the Act provides that persons such as Kelley do not have civil service protection, it provides that if such a person is indefinitely suspended, "the person has the same rights and privileges of a hearing before the commission *in the same manner and under the same conditions as a classified employee*." TEX. LOC. GOV'T CODE § 143.014(h) (emphasis added). When a classified employee appeals an indefinite suspension and the charges are found to be true, the Act affords a hearing examiner options as far as the discipline to be imposed. *Id.* § 143.053(e), (g). Nothing in the plain language of Section 143.014(h) or its context in the Act indicates that these options are not available when an assistant chief appeals. Further, the fact that the Legislature specifically restricted a hearing examiner's authority in the case of an assistant chief if the charges

are found to be untrue, but not when the charges are found to be true, indicates that the exclusion of such a restriction was intentional. *See Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 193 n.20 (Tex. 2007).

We conclude that Section 143.014(h) did not limit the hearing examiner's options with respect to disciplinary actions when he found the charges against Kelley to be true.

The City further argues that if Section 143.053 applies in this case, it limits a hearing examiner's options to permanently dismissing an indefinitely suspended officer if the charges are found to be true because a hearing examiner has no authority to reduce an indefinite suspension to a temporary suspension. The City relies on language in Section 143.053 that a hearing examiner "shall" state which specific provision applies in rendering the decision. TEX. LOC. GOV'T CODE § 143.053(e). It urges that because the context does not necessarily require a different construction and a different construction is not expressly provided for in the statute, the Legislature's use of the word "shall" imposes a duty on the examiner. *See* TEX. GOV'T CODE § 311.016(2). The City also argues that because Section 143.053(e) uses "or" in regard to a hearing examiner's disciplinary options, a hearing examiner has no authority to combine disciplinary actions so the officer is both temporarily suspended *and* restored. TEX. LOC. GOV'T CODE § 143.053(e). Under the City's proposed construction, a hearing examiner has no authority to reduce an indefinite suspension to a temporary suspension because such action necessarily involves restoring an officer *and* imposing a temporary suspension. For reasons explained below, we disagree with the City's logic, although we ultimately agree that the Act does not authorize an officer to be both suspended and "restored."

Subchapter D of the Act authorizes two types of discipline: (1) voluntary discipline which an officer may agree to and accept and (2) involuntary discipline which may be imposed by the department head without regard to whether the officer agrees that discipline is warranted or that the discipline imposed is appropriate. Voluntary discipline includes demotion, *see* Section 143.054(e), suspension for a period of sixteen to ninety days, *see* Section 143.052(g), and uncompensated duty. *See id.* § 143.055(c). However, the Act provides for only one type of involuntary discipline that may be imposed by the department head: suspension for "a reasonable period not to exceed 15 calendar days or for an indefinite period." *Id.* § 143.052(b); *see also id.* § 143.054(a), (c) (providing that a department head can recommend to the commission that an officer be involuntarily demoted, but it is the commission that decides whether to demote the officer). A suspended officer does not receive pay and does not accrue other benefits during a suspension. *Id.* § 143.055(e).

The Act tightly structures disciplinary procedures, outcomes, and appeal processes. Involuntary discipline of an officer by the department head may be only for violation of a civil service rule. *Id.* § 143.052(b). If the department head does not consider an offense serious enough to warrant imposing indefinite suspension—dismissal from the department—the only other option for involuntary discipline that the department head may impose is temporary suspension without pay for fifteen days or less. If an officer appeals from an involuntary disciplinary suspension, then the examiner hearing the appeal may suspend the officer only if the officer is found to have violated a civil service rule and only if the specific charges against the officer are found to be true. *Id.* § 143.053(g). The Act clearly defines the limits of two of the three decisions a hearing examiner is authorized to make: permanent dismissal or restoration to the officer's former classified position or

status with back pay and benefits. *Id.* § 143.053(e). The boundaries of the third decision authorized—temporary suspension without pay—are not so easily discerned. *Id.* § 143.053(e)(2).

If Section 143.053(e)(2), which authorizes an examiner to impose a temporary suspension, is read in isolation, it does not impose any limit on the length of a temporary suspension an examiner is authorized to impose: "In its decision, the [hearing examiner] shall state whether the suspended fire fighter or police officer is . . . temporarily suspended from the department." *Id.* § 143.053(e). But Section 143.053(e)(2) must be construed in context with the remainder of Subchapter D, and particularly with Section 143.052. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004) ("We must read the statute as a whole and not just isolated portions."). Section 143.052(b) allows the department head to impose an involuntary suspension of fifteen days or less. TEX. LOC. GOV'T CODE § 143.052(b). We see no language indicating the Legislature intended to allow an independent third party hearing examiner to impose a longer temporary disciplinary suspension than the department head could impose, other than the language of Section 143.053(e)(2) itself. And we do not believe construing the statute to grant such authority would yield the reasonable result the Legislature is presumed to intend. *See* TEX. GOV'T CODE § 311.021(3). For example, in this case the hearing examiner imposed a temporary suspension of 180 days. That is twelve times the length of the fifteen-day maximum involuntary suspension Chief Melis could have imposed on Kelley, and twice the ninety-day length of the maximum suspension on which the Act would have allowed Chief Melis and Kelley to agree. It takes little imagination to envision how

suspending officers for lengthy and unpredictable time periods[5] could disrupt operations and schedules of police departments; not to mention the difficulties that allowing unfettered leeway to third party hearing examiners pose to department discipline and morale. Moreover, interpreting Section 143.053(e)(2) to allow suspensions without any time limits invites challenge of the Act as an improper delegation of legislative authority. *See City of Pasadena*, 292 S.W.3d at 18-19 (explaining that if a statute "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").

We conclude that the Legislature intended Section 143.053(e)(2) to authorize a hearing examiner to temporarily suspend an officer for a period of fifteen days or less. Thus, when the charges against officers are found to be true, Section 143.053(e) limits a hearing examiner's jurisdiction to imposing dismissal from the department, imposing a temporary suspension of fifteen days or less, or restoring the officer's former position or status in the department's classified service together with wages and benefits lost as a result of the suspension.

We next address the City's contention that the Act does not authorize a hearing examiner to reduce an indefinite suspension because this would allow a hearing examiner to both temporarily suspend and restore an officer. As indicated above, we disagree.

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[5] For example, in *City of Laredo v. Leal*, 161 S.W.3d 558, 561 (Tex. App.—San Antonio 2004, pet. denied), a hearing examiner reduced an indefinite suspension to a 644-day temporary suspension.

First, in the section entitled "Disciplinary Suspensions," the Act provides that a department head may suspend an officer for up to fifteen days or for an indefinite period. TEX. LOC. GOV'T CODE § 143.052(b). Although an indefinite suspension is equivalent to a dismissal from the department, under the Act it is nevertheless a "suspension," and the Act does not differentiate between an indefinite suspension and a suspension of fifteen days or less. *See id.* §§ 143.052, 143.053 (setting out the procedures related to a disciplinary suspension). The Act requires the hearing examiner to state whether a suspended officer is dismissed, temporarily suspended, or restored. *Id.* § 143.053(e). A dismissal has the same result as an indefinite suspension, yet the department head's authority for maximum discipline is labeled an indefinite suspension, not a dismissal. We presume the Legislature intended the different descriptions for the same substantive result to indicate a difference between the two situations. *See Kappus v. Kappus*, 284 S.W.3d 831, 835 (Tex. 2009) ("We presume the Legislature chose its words carefully and intentionally."). That is accomplished by interpreting the phrase "indefinite suspension" to mean what it says it is: a suspension. The hearing examiner is specifically authorized to reduce a period of suspension, and the statute does not limit that authority to particular types or lengths of suspension.

Further, this Court has previously held that a civil service commission[6] could reduce an indefinite suspension to a temporary one. *Patton v. City of Grand Prairie*, 686 S.W.2d 108, 109 (Tex. 1985); *see also Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956-57 (Tex. 1984) ("The Commission is charged by law with discretion to set the penalty where

[6] We are mindful of, but need not address in this case, the differing nondelegation concerns between the commission and independent third party hearing examiners.

it finds that the charges made by the Department Head are true."). The City asserts that the holding in *Patton* is no longer valid because after *Patton* was decided the civil service laws were amended, and such an option is no longer available. We do not agree. The Act applicable in *Patton* was Texas Revised Civil Statutes Article 1269m. Act of May15, 1947, 50th Leg., R.S., ch. 325, 1947 Tex. Gen. Laws 550, *amended by* Act of May 3, 1951, 52d Leg., R.S., ch. 298, § 1, sec. 16, 1951Tex. Gen. Laws 470, *repealed by* Act of May 1, 1987, 70th Leg., ch. 149, § 49(1), 1987 Tex. Gen. Laws 707, 1307. Section 16 pertained only to indefinite suspensions while Section 20 pertained to disciplinary suspensions of up to fifteen days. Section 16 allowed for an appeal from an indefinite suspension. Like the current statutory language, its language required the commission's decision to state whether an officer "shall" be permanently or temporarily dismissed or restored. The section allowed for the commission to reduce an indefinite suspension to a temporary suspension. *Patton*, 686 S.W.2d at 109. In 1983 when the Legislature amended the Act, it combined indefinite suspensions and temporary suspensions into one section and, in similar fashion to the current statute, did not differentiate between appeals from indefinite and temporary suspensions. Act of May 30, 1983, 68th Leg., R.S., ch. 420, §§ 7-9, sec. 16, 1983 Tex. Gen. Laws 2246, 2260-68 (repealed 1987). The statute again specified that in its decision the commission "shall" state whether the officer was permanently dismissed, temporarily suspended, or restored. Act of May 30, 1983, 68th Leg., R.S., ch. 420, § 7, sec. 16, 1983 Tex. Gen. Laws 2246, 2261 (repealed 1987). The Act was later nonsubstantively recodified to the current version at issue here. Act of May 1, 1987, 70th Leg., R.S., ch. 149, sec. 1, 1987 Tex. Gen. Laws 707, 910 - 917 (current version at TEX. LOC. GOV'T CODE § 143.053). Nothing in the current language of the statute or the legislative history indicates

legislative intent to change the disciplinary options that were originally available to the commission in cases of indefinite suspensions.

On the other hand, we agree with the City that the Act differentiates between a suspension and a restoration. A suspended officer cannot be paid or accrue benefits: "A police officer may not earn or accrue any wage, salary, or benefit arising from length of service while the person is suspended or performing uncompensated duty." TEX. LOC. GOV'T CODE § 143.055(e). When Section 143.053(f) is read in context with Section 143.055(e) and both are given meaning, the Legislature's intent when using the term "restored" in Section 143.053 becomes clearer. It references situations in which an officer is returned to duty without any suspension, and the return to duty is without any loss of pay or benefits:

> If the commission finds that the period of disciplinary suspension should be reduced, the commission may order a reduction in the period of suspension. If the suspended fire fighter or police officer is restored to the position or class of service from which the person was suspended, the fire fighter or police officer is entitled to:
>
> > (1) full compensation for the actual time lost as a result of the suspension at the rate of pay provided for the position or class of service from which the person was suspended; and
> > (2) restoration of or credit for any other benefits lost as a result of the suspension, including sick leave, vacation leave, and service credit in a retirement system.

Id. § 143.053(f). Thus, the Act does not authorize a hearing examiner to both "restore" an officer while at the same time suspending the officer, even if the officer's suspension is reduced from that imposed by the department head.

In sum, the examiner did not exceed his jurisdiction by reducing Kelley's indefinite suspension. However, the temporary suspension imposed on Kelley was for 180 days. The Act does

not authorize a hearing examiner to impose a temporary suspension of more than fifteen days, and the hearing examiner exceeded his jurisdiction by ordering a 180-day suspension.

B. Back Pay and Benefits

The City also asserts that the hearing examiner exceeded his authority by awarding Kelley back pay and benefits by directing that Kelley be "made whole subject to the normal principles of mitigation." The City argues that for persons who are categorized as directly beneath the department head, a back pay award under Section 143.014(h) is only authorized if the hearing examiner finds the charges to be untrue. As we have previously noted, however, Section 143.014(h) does not address a hearing examiner's authority when the charges are found to be true, as they were in this case, so it is inapplicable.

The City next asserts that the hearing examiner had no authority to award Kelley back pay or lost benefits because back pay and benefits may only be awarded to an officer who is restored to the officer's previous rank or status, and Kelley was not. We agree that Section 143.053(f)(1) requires a restored officer to be compensated for the time lost as a result of the suspension: "If the suspended fire fighter or police officer is restored . . . [the] officer is entitled to: (1) full compensation for the actual time lost as a result of the suspension . . . and (2) restoration of or credit for any other benefits lost as a result of the suspension . . . ." *Id.* The Act does not reference compensation for officers whose suspensions are reduced by a hearing examiner, but who are nevertheless disciplined by being suspended for some period of time. And the Act specifically limits an officer's compensation while suspended: "A police officer may not earn or accrue any wage, salary, or benefit . . . while the person is suspended . . . ." *Id.* § 143.055(e). Thus, the hearing

examiner exceeded his jurisdiction by ordering back pay and benefits to the extent they were awarded for any time during which Kelley was suspended, but to the extent the hearing examiner's decision awarded Kelley back pay and benefits for the period after his temporary suspension, the examiner did not abuse his discretion.

C. Demotion

The Act specifies that involuntary demotion can be recommended by the department head but must be accomplished by the commission. *Id.* § 143.054. Section 143.057 allows an officer to appeal a recommendation for demotion to a hearing examiner instead of the commission, but there is no provision in the statute authorizing a hearing examiner to demote an officer when the department head has not recommended a demotion.

The Act authorizes a hearing examiner to make a ruling comparable to demotion when charges against a person classified immediately below the department head are found to be untrue and the person must be restored to the last classified position. *Id.* § 143.014. But that action is not in the nature of a disciplinary demotion; it is in the nature of a "restoration" which requires the officer to be paid or credited for any wages and other benefits lost as a result of the suspension. *See id.* §§ 143.014(h), 143.053(f). Further, that action is specifically mandated by the Act. The procedure for demoting an officer in other situations is also specifically spelled out by the Act. The Act provides that the department head must recommend a demotion in writing to the commission. *Id.* § 143.054. The recommendation letter must include the reasons for the demotion and be furnished to the affected officer, and the commission shall give the officer written notice to appear for a public hearing. *Id.*

Here, Kelley was demoted to sergeant absent Chief Melis's recommendation and as part of discipline imposed by the examiner. That action was not authorized by the Act. The court of appeals concluded that the hearing examiner exceeded his jurisdiction by demoting Kelley. The parties agree with the court of appeals, and so do we.

IV. Court Proceedings

A. The Record on Appeal

Kelley points out that a non-prevailing party seeking to modify or vacate the examiner's award bears the burden to bring a complete record on appeal that establishes its basis for relief. He urges that because the City failed to provide a transcript of the first day of the hearing as part of the record on appeal, the award of the hearing examiner must be affirmed. However, our conclusion that the City is entitled to relief is based on the fact that the hearing examiner exceeded his jurisdiction by the relief he granted. Our decision does not depend on evidence presented at the hearing or how it was conducted; it depends on the examiner's award. The presence or absence of part of the hearing transcript is not material to our decision, so we need not and do not address this contention.

B. Attorney's Fees

Because we determine that (1) the hearing examiner exceeded his jurisdiction, (2) the court of appeals erred in failing to reverse the trial court's summary judgment in favor of Kelley, and (3) the case is to be remanded, we ordinarily would not reach and address the City's challenge to the trial court's award of attorney's fees and the court of appeals' judgment affirming the award. But because the matter is to be remanded for further proceedings, it is appropriate for us to address the question. *See Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997) ("Although resolution of this

issue is not essential to our disposition of this case, we address it to provide the trial court with guidance in the retrial . . . .").

The City contends attorney's fees are recoverable only pursuant to statute or contract and the trial court had no authority to award attorney's fees to Kelley. We agree.

Section 143.015 of the Act provides that an officer may appeal a commission decision to district court. TEX. LOC. GOV'T CODE § 143.015. Section 143.057(j) provides for appeal of a hearing examiner's decision to district court. *Id.* § 143.057(j). The two appeal provisions are not linked, and the appeal procedures and review authority granted the district court in the two types of appeals are different. For example, appeal from a commission decision is for trial de novo, *see* section 143.015(b), while appeal from a hearing examiner's decision is limited to grounds that the examiner was without jurisdiction, exceeded his jurisdiction, or that the examiner's order was procured by fraud, collusion, or other unlawful means. *Id.* § 143.057(j). Section 143.015(c) specifies that in an appeal from a commission decision, the court may award attorney's fees to the prevailing party. *Id.* § 143.015(c). Kelley does not refer us to any part of the statute authorizing the trial court to award attorney's fees in an appeal from a hearing examiner's decision, and we find none. Absent statutory authority for the trial court to award attorney's fees, we hold the trial court erred in awarding them to Kelley and the court of appeals erred in affirming the award.

V. Relief

The City asserts that because the hearing examiner exceeded his jurisdiction, the court of appeals should have vacated the award. Even though the court of appeals agreed that the hearing examiner exceeded his jurisdiction by demoting Kelley to sergeant, the court parsed the remaining

parts of the examiner's decision and upheld other parts of the decision that it determined complied with the Act. 226 S.W.3d at 681. We disagree with that approach.

As we noted in *City of Pasadena*, 292 S.W.3d at 19, the statutory language in Section 143.057(j), allowing for an appeal from a hearing examiner's decision, is similar to the language regarding appeals in the Texas General Arbitration Act. In an appeal from an arbitration award, if a portion of the award is invalid, the other portion will be unaffected only if the two parts are so distinct and independent that the valid part will truly express the judgment of the arbitrator. *Gulf Oil Corp. v. Guidry*, 327 S.W.2d 406, 409 (Tex. 1959). But if an invalid portion is not severable and distinct so that the remaining valid part of the award truly expresses the arbitrator's judgment, the entire award is void. *Id.* We believe the same reasoning applies to an appeal from a hearing examiner's decision. If a portion of the hearing examiner's decision is void because the examiner exceeded his jurisdiction, as he did in this case, the entire decision is invalid unless the invalid portion is severable and distinct so that the valid portion still truly expresses the examiner's judgment. Here, we have no doubt that the invalidity of Kelley's 180-day suspension and demotion are not so independent from the remainder of the examiner's decision that the remainder of the decision truly expresses the examiner's judgment. The examiner's written decision makes it clear that he believed Kelley should be disciplined. If the hearing examiner's decision to set aside Kelley's indefinite suspension is upheld but Kelley's demotion and suspension are set aside, the result would be that Kelley suffered no discipline at all. That would not truly reflect the judgment of the examiner, so the entire decision must be vacated.

The City asserts that under *Kirkwood v. Corsicana*, 871 S.W.2d 544 (Tex. App.—Waco 1994, no writ), a new hearing should not be ordered because the hearing examiner no longer has jurisdiction. In *Kirkwood*, the court of appeals held that pursuant to Texas Local Government Code Section 143.053(b), a trial court's order remanding a matter to the commission for further proceedings was invalid because the commission did not have jurisdiction to take action on the matter more than thirty days after the commission received the officer's appeal. *See id.* at 546-47; *see also* TEX. LOC. GOV'T CODE § 143.053(b) (providing that the commission shall hold a hearing and render a decision in writing within thirty days after the date it receives an officer's notice of appeal). Because this case involves an appeal from a hearing examiner's decision, Section 143.053 and *Kirkwood* are inapplicable. Section 143.057(h) provides a thirty-day time requirement for a hearing examiner to render a decision, but it also says "[t]he hearing examiner's inability to meet the time requirements imposed by this section does not affect the hearing examiner's jurisdiction . . . ." TEX. LOC. GOV'T CODE § 143.057(h). Therefore, a hearing examiner does not lose jurisdiction after thirty days, and remand for a new hearing is not precluded by that section, even if we were to apply *Kirkwood*'s reasoning. *See In re Dep't of Family & Protective Servs.*, 273 S.W.3d 637, 642 (Tex. 2009).

Further, when a commission decision is appealed to a district court, Section 143.015(b) specifies that the appeal is de novo and the district court "may grant the appropriate legal or equitable relief necessary to carry out the purposes of this chapter." TEX. LOC. GOV'T CODE § 143.015(b). Appeals from the decision of a hearing examiner are different. In an appeal from a hearing examiner's decision, the district court may hear an appeal only on the grounds that the 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). The statute does not specify that in considering an appeal from a hearing examiner's decision the district court may grant appropriate legal or equitable relief as it does for an appeal from a commission decision; the statute simply does not address what type of relief may be granted. But it is clear that the Legislature intended for the hearing examiner's decision to be determinative of the officer's appeal, so in some instances the only reasonable relief is a new hearing. For example, if the examiner's decision was procured by fraud, collusion, or other unlawful means, then it is hard to see any proper relief other than the decision being vacated and a new hearing ordered. And as this case demonstrates, when part of the examiner's decision exceeds his jurisdiction, the true judgment of the hearing examiner might be negated by enforcing only part of the decision. Such results are not reasonable in light of the Act as a whole, and we do not attribute unreasonable intentions to the Legislature. *See* TEX. GOV'T CODE § 311.021(3). Accordingly, the appropriate remedy in situations such as this is for the hearing examiner's decision to be vacated and a rehearing to take place.

VI. Conclusion

The judgment of the court of appeals is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion.

Phil Johnson
Justice

OPINION DELIVERED: February 19, 2010

IN THE SUPREME COURT OF TEXAS

NO. 07-0520

ED VANEGAS, JIMMY D. HALMAN, SAM ARMSTRONG, ALEX CARBAJAL, ROGER FARRINGTON, CURTIS HUFF, AND TITO BETANCUR, PETITIONERS,

v.

AMERICAN ENERGY SERVICES, NIEWOEHNER PARTNERSHIP, L.P., RCH/HSJ/CCM/MCPI, L.P., AUTRY STEPHENS, JOHN CARNETT, BRACK BLACKWOOD, AND DENNIE MARTIN, RESPONDENTS

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

Argued October 15, 2008

JUSTICE GREEN delivered the opinion of the Court.

In this case, we are asked to decide the enforceability of an employer's alleged promise to pay five percent of the proceeds of a sale or merger of the company to employees who are still employed at the time of the sale or merger. The employer, American Energy Services (AES), argues that because these were at-will employees, any promise was illusory and therefore not enforceable—the company could have avoided the promise by firing the employees at any time. The employees respond that the promise represented a unilateral contract, and by staying on with the company until AES Acquisition, Inc. acquired AES several years later, they performed on the

contract, making it enforceable. We agree with the employees; continuing their employment with the company until it was sold would constitute performance under such a unilateral contract, making the promise enforceable, regardless of whether that promise may have been considered illusory at the time it was made. We therefore reverse the court of appeals' judgment and remand the case to the trial court to consider the merits.

I

AES was formed in the summer of 1996. AES hired the petitioners in this case (collectively, the employees) that same year. The employees allege that in an operational meeting in June 1997, they voiced concerns to John Carnett, a vice president of AES, about the continued viability of the company. The employees complained that the company required them to work long hours with antiquated equipment. The employees allege that, in an effort to provide an incentive for them to stay with the company, Carnett promised the employees, who were at-will and therefore free to leave the company at any time, that "in the event of sale or merger of AES, the original [eight] employees remaining with AES at that time would get 5% of the value of any sale or merger of AES." AES Acquisition, Inc. acquired AES in 2001. Seven of the eight original employees were still with AES at the time of the acquisition. Those remaining employees demanded their proceeds, and when the company refused to pay, the employees sued, claiming AES breached the oral agreement.

AES moved for summary judgment on two grounds: that the agreement was illusory and therefore not enforceable, and that it violated the statute of frauds.[1] The employees responded that

[1] AES has since expressly abandoned its statute of frauds defense. *See* TEX. BUS. & COM. CODE § 26.01(b)(6).

the promise represented a unilateral contract, and by remaining employed for the stated period, the employees performed, thereby making the promise enforceable. The trial court granted AES's motion for summary judgment, and the employees appealed. The court of appeals affirmed, holding that the alleged unilateral contract failed because it was not supported by at least one non-illusory promise, citing this Court's decision in *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642, 644–45 (Tex. 1994). 224 S.W.3d 544, 550 (Tex. App.—Eastland 2007). The employees petitioned this Court for review, which we granted. 51 Tex. Sup. Ct. J. 771 (Apr. 18, 2008).

II

AES argues, and the court of appeals held, that our holdings in *Light*, 883 S.W.2d at 664-45, and *Sheshunoff v. Johnson*, 209 S.W.3d 644 (Tex. 2006), dictate the result in this case. 224 S.W.3d at 553. In *Light*, we stated:

> Consideration for a promise, by either the employee or the employer in an at-will employment, cannot be dependent on a period of continued employment. Such a promise would be illusory because it fails to bind the promisor who always retains the option of discontinuing employment in lieu of performance. When illusory promises are all that support a purported bilateral contract, there is no contract.

883 S.W.2d at 644–45 (citation omitted). AES and the court of appeals also relied on two footnotes from that opinion to support their position. In footnote five, we stated that "[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." *Id.* at 645 n.5. And in footnote six, we noted "[i]f 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." *Id.* at 645 n.6.

Light involved an employee's challenge to a covenant not to compete. *Id.* at 643. Approximately two years after being hired, Light, an at-will employee, executed a covenant not to compete with her employer. *Id.* Relying on the Covenants Not to Compete Act, TEX. BUS. & COM. CODE § 15.50(a), the employer, United Telespectrum, sought to enforce the covenant against Light after she left the company. *Id.* The Act provides that "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." TEX. BUS. & COM. CODE § 15.50. We held that "[a]lthough Light and United did have an otherwise enforceable agreement between them, the covenant was not ancillary to or a part of that otherwise enforceable agreement." *Light*, 883 S.W.2d at 643. We concluded that the agreement included only three non-illusory promises: "(1) United's promise to provide 'initial . . . specialized training' to Light; (2) Light's promise to provide 14 days' notice to United to terminate employment; (3) Light's promise to provide an inventory of all United property upon termination." *Id.* at 646. We held that Light's promise not to compete with her employer upon termination was not enforceable because it was not "ancillary to or a part of" the non-illusory promises; that is, the covenant not to compete was "not designed to enforce any of Light's return promises in the otherwise enforceable agreement." *Id.* at 647. We concluded that because Light's promise failed to meet the requirements of the Act, the covenant not to compete was not enforceable. *Id.* at 647–48.

We revisited the issue of illusory promises in covenants not to compete in *Sheshunoff*. In that case, an employer again sought to rely on the Covenants Not to Compete Act to enforce a covenant against a former employee. 209 S.W.3d at 646. We reaffirmed our previous holding in *Light* that covenants not to compete in bilateral contracts must be supported by "mutual non-illusory promises."

Id. at 649. We observed that unlike the employee in *Light*, Sheshunoff did receive promised confidential information in exchange for his promise not to disclose that information following termination. *Id.* We noted, though, that under footnote six of *Light*, this agreement would still be considered invalid because Sheshunoff was an at-will employee, and his employer could have fired him before providing him with the confidential information; therefore, the agreement was not enforceable at the time it was made, but rather it was only enforceable once they provided this information to him. *Id.* at 650. We overruled that portion of *Light*'s holding, noting that this was not the intent of the Act: "[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." *Id.* at 650–51.

Citing our holdings in *Light* and *Sheshunoff*, the court of appeals stated that "[a] unilateral contract may be formed when one of the parties makes only an illusory promise but the other party makes a non-illusory promise. The non-illusory promise can serve as the offer for a unilateral contract, which the promisor who made the illusory promise can accept by performance." 224 S.W.3d at 549 (citing *Sheshunoff*, 209 S.W.3d at 650, and *Light*, 883 S.W.2d at 645 n.6). We agree with that statement, but the court of appeals erroneously applied those holdings to the current case.

The issue turns on the distinction between bilateral and unilateral contracts. "A bilateral contract is one in which there are mutual promises between two parties to the contract, each party being both a promisor and a promisee." *Hutchings v. Slemons*, 174 S.W.2d 487, 489 (Tex. 1943) (quoting RESTATEMENT (FIRST) OF CONTRACTS § 12). A unilateral contract, on the other hand, is "created by the promisor promising a benefit if the promisee performs. The contract becomes

enforceable when the promisee performs." *Plano Surgery Ctr. v. New You Weight Mgmt. Ctr.*, 265 S.W.3d 496, 503 (Tex. App.—Dallas 2008, no pet.); *see also Light*, 883 S.W.2d at 645 n.6; 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1.17 (4th ed. 2007) ("A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance or forbearance."). Both *Sheshunoff* and *Light* concerned *bilateral* contracts in which employers made promises in exchange for employees' promises not to compete with their companies after termination. *Sheshunoff*, 209 S.W.3d at 649 ("ASM promised to disclose confidential information and to provide specialized training under the Agreement, and Johnson promised not to disclose confidential information."); *Light*, 883 S.W.2d at 645 ("When illusory promises are all that support a purported *bilateral* contract, there is no contract.") (emphasis added). The court of appeals' explanation of these cases—describing an exchange of promises where one party makes an illusory promise and the other a non-illusory promise—describes the attempted formation of a *bilateral* contract, not a unilateral contract. 224 S.W.3d at 549. Our discussion in footnote six of *Light* was confined to situations where a non-illusory promise could salvage an otherwise ineffective bilateral contract by transforming it into a unilateral contract, enforceable upon performance. This was not a blanket pronouncement about unilateral contracts in general.[2]

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[2] In fact, *Williston on Contracts* disapproves of the use of the term "unilateral contract" to describe an agreement in which one of the promises in a bilateral contract fails:

> [T]he term unilateral contract should be reserved for cases in which a legal obligation has been created, but only one party to the obligation has made a promise. When there is no obligation, the transaction may be a unilateral promise or a unilateral offer, but it cannot properly be called a unilateral contract. Thus, for example, when the promisor seeks a return promise and obtains an illusory promise, his or her own undertaking may properly be characterized as unilateral; but since no enforceable obligation exists, it is not properly called a unilateral contract.

1 WILLISTON ON CONTRACTS § 1.17.

The court of appeals held that even if AES promised to pay the employees the five percent, that promise was illusory at the time it was made because the employees were at-will, and AES could have fired all of them prior to the acquisition. 224 S.W.3d at 549. But whether the promise was illusory at the time it was made is irrelevant; what matters is whether the promise became enforceable by the time of the breach. *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 [Covenants Not to Compete] Act. . . . There is no sound reason why a unilateral contract made enforceable by performance should fail under the Act."); *see also* 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 6.2 (1995) ("[U]nilateral contract analysis is applicable to the employer's promise to pay a bonus or pension to an employee in case the latter continues to serve for a stated period."). Almost all unilateral contracts begin as illusory promises. Take, for instance, the classic textbook example of a unilateral contract: "I will pay you $50 if you paint my house." The offer to pay the individual to paint the house can be withdrawn at any point prior to performance. But once the individual accepts the offer by performing, the promise to pay the $50 becomes binding. The employees allege that AES made an offer to split five percent of the proceeds of the sale or merger of the company among any remaining original employees. Assuming that allegation is true, the seven remaining employees accepted this offer by remaining employed for the requested period of time. *See City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005) (holding that, in reviewing a 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"). At that point, AES's promise became binding. AES then

breached its agreement with the employees when it refused to pay the employees their five percent share.

Furthermore, the court of appeals' holding would potentially jeopardize all pension plans, vacation leave, and other forms of compensation made to at-will employees that are based on a particular term of service. *Corbin on Contracts* observed as much in discussing the court of appeals' opinion in this case:

> The court's analysis may attempt to prove too much. The argument that a promise to grant a raise to a terminable-at-will employee is necessarily illusory raises the question, why is an employer's original promise to pay a certain wage to an at-will employee enforceable when the employee performs? The court's analysis would suggest that the employer's promise was never enforceable. If an at-will employee is hired at a promised compensation and performs for some period, the court's analysis would suggest that the promised rate of compensation was never enforceable.

1 JOHN E. MURRAY, JR. & TIMOTHY MURRAY, CORBIN ON CONTRACTS § 1.17 (Supp. Fall 2009). We agree that the court of appeals' opinion could have far-reaching adverse effects on well-established forms of compensation.

The fact that the employees were at-will and were already being compensated in the form of their salaries in exchange for remaining employed also does not make the promise to pay the bonus any less enforceable.

> It is now recognized that these are not pure gratuities but compensation for services rendered. The employer's promise is not enforceable when made, but the employee can accept the offer by continuing to serve as requested, even though the employee makes no promise. There is no mutuality of obligation, but there is consideration in the form of service rendered. The employee's one consideration, rendition of services, supports all of the employer's promises, to pay the salary and to pay the bonus.

2 CORBIN ON CONTRACTS § 6.2; *see also* Elizabeth T. Tsai, Annotation, *Promise By Employer to Pay Bonus as Creating Valid and Enforceable Contract*, 43 A.L.R.3d 503 (1972) (listing cases from

several states upholding validity of employers' promises to pay bonuses in exchange for employees' future service). By remaining with the company, the employees gave valuable consideration. *See* 1 WILLISTON ON CONTRACTS § 1.17 ("The performance or forbearance constitutes both acceptance of a promisor's offer and consideration."). Therefore, any promise to pay sale or merger proceeds became an enforceable unilateral contract when the employees performed.

III

AES allegedly promised to pay any remaining original employees five percent of the proceeds when AES was sold. Assuming AES did make such an offer, the seven remaining employees accepted the offer by staying with AES until the sale. Regardless of whether the promise was illusory at the time it was made, the promise became enforceable upon the employees' performance. The court of appeals erred in holding otherwise. Accordingly, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion. TEX. R. APP. P. 60.2(d).

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Paul W. Green
Justice

OPINION DELIVERED: December 18, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0541

TXI TRANSPORTATION COMPANY, ET AL., PETITIONERS,

v.

RANDY HUGHES, ET AL., RESPONDENTS

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

Argued October 16, 2008

JUSTICE MEDINA delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE GREEN, JUSTICE WILLETT, and JUSTICE GUZMAN joined, and in Part III of which JUSTICE WAINWRIGHT joined.

JUSTICE WAINWRIGHT filed an opinion concurring in part and dissenting in part.

JUSTICE JOHNSON did not participate in the decision.

In this wrongful death and survival action, stemming from a multi-fatality vehicular accident, we consider the reliability of an accident reconstruction expert's testimony, the legal sufficiency of the evidence supporting the verdict, and whether the admission of evidence concerning the illegal immigrant status of one of the parties to the accident was harmful error. The court of appeals, in a divided decision, concluded that the expert's testimony was reliable and therefore legally sufficient to support the plaintiffs' verdict. 224 S.W.3d 870, 888. The court also held that the driver's illegal status was relevant impeachment evidence or, alternatively, its admission was harmless error. *Id*.

at 897. We agree that the trial court did not abuse its discretion in admitting the expert's testimony. However, we do not agree that evidence of the driver's illegal status was either relevant or harmless. Accordingly, we reverse the court of appeals's judgment and remand the cause for a new trial.

I. The Litigation

Several members of the Hughes family were killed when their vehicle collided with an eighteen wheel tractor-trailer rig heavily loaded with gravel. The accident occurred outside the city of Paradise on Highway 114, a two-lane highway. At the time of the accident, Kimberly Hughes was driving west toward Paradise with four other family members in her GMC Yukon. Ricardo Rodriguez, who was driving the gravel truck for TXI Transportation Company ("TXI"), was traveling east in the opposite direction. For reasons in dispute, the Yukon crossed the center line into the eastbound lane, collided with the gravel truck and careened down the length of its trailer. At the gravel truck's tail end, the Yukon spun sideways into the path of an eastbound Ford pickup. The resulting collision killed everyone in the Yukon except Hughes's infant grandson.

Hughes's husband and other family members sued Rodriguez and his employer, TXI, for the deaths. After a seven-day trial, a jury found that Rodriguez's and TXI's negligence proximately caused the accident, and awarded compensatory and exemplary damages. The trial court rendered judgment on the verdict. The court of appeals set aside the award of exemplary damages, but otherwise affirmed the judgment against Rodriguez and TXI.[1] 224 S.W.3d at 881.

[1] Aurelio Melendez, who owned the gravel truck and leased it to TXI, was also sued and found liable by the jury under a negligent-entrustment theory. The court of appeals reversed the judgment against Melendez, and Hughes has not appealed that decision. 224 S.W.3d at 917–18.

What caused the Yukon to cross the center line into Rodriguez's eastbound lane was the critical issue at trial. Both sides relied on accident-reconstruction experts to explain their respective theories. Hughes's accident-reconstruction expert opined that the gravel truck crossed the center line first, forcing Hughes to steer defensively into the eastbound lane where the collision occurred.

TXI sought to exclude Hughes's expert, objecting that his opinion was unreliable. TXI also objected to evidence regarding Rodriguez's status as an illegal immigrant on grounds of relevance and prejudice. Because the trial court overruled both objections, the jury learned Rodriguez had previously been deported and had made several misrepresentations regarding his immigration status to obtain his Texas commercial driver's license and his employment with TXI. The dissent in the court of appeals concluded that the trial court had erred by admitting the expert testimony of Hughes's accident reconstructionist and the evidence of Rodriguez's illegal immigrant status. *Id*. at 922 (Gardner, J. dissenting). We granted TXI's petition for review to consider these issues.

II. The Accident-Reconstruction Expert

TXI argues the trial court erred by overruling its timely objection to Hughes's reconstruction expert, Dr. Kurt Marshek, whom it contends expressed an unreliable opinion that Rodriguez caused the accident by crossing the center line first.

A. The Standard of Review

For an expert's testimony to be admissible, the expert witness must be qualified to testify about "scientific, technical, or other specialized knowledge," TEX. R. EVID. 702, and the testimony must be relevant and based upon a reliable foundation. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 628 (Tex. 2002). An expert's testimony is relevant when it assists the jury in determining an

issue or in understanding other evidence. TEX. R. EVID. 702. But, expert testimony based on an unreliable foundation or flawed methodology is unreliable and does not satisfy Rule 702's relevancy requirement. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556–57 (Tex. 1995) (discussing TEX. R. EVID. 702).

When the reliability of an expert's testimony is challenged, courts "'should ensure that the [expert's] opinion comports with the applicable professional standards.'" *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001)(quoting *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 725–26 (Tex. 1998)). To aid in that determination, we have suggested several factors to consider when assessing the admissibility of expert testimony under Rule 702.[2] We have emphasized, however, that these factors are non-exclusive, and that they do not fit every scenario. *Gammill*, 972 S.W.2d at 726. They are particularly difficult to apply in vehicular accident cases involving accident reconstruction testimony. *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 39 (Tex. 2007) (citing *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 802 (Tex. 2006)); *see also Gammill*, 972 S.W.2d at 727. Nevertheless, the court, as gatekeeper, "must determine how the reliability of particular testimony is to be assessed." *Gammill*, 972 S.W.2d at 726. Rather than focus entirely on the reliability of the underlying technique used to generate the challenged opinion, as in *Robinson*, we have found it appropriate in cases like this to analyze whether the expert's opinion actually fits the facts of the case. *Volkswagen of Am., Inc. v. Ramirez,* 159 S.W. 3d 897, 904–05

[2] These factors include the following: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557.

(Tex. 2004). In other words, we determine whether there are any significant analytical gaps in the expert's opinion that undermine its reliability. *Id.*

B. The Expert's Testimony

Dr. Kurt Marshek, an emeritus professor of mechanical engineering at the University of Texas, testified for Hughes. In preparing for his testimony, Marshek reviewed the police accident report and photographs from the accident scene, visited and took measurements at the accident site, specifically measured the gouge and scrape marks created by the accident, ran skid tests with an exemplar vehicle and measuring device to determine the roadway's coefficient of friction, inspected and photographed the Yukon, collected data on the Yukon's speed and braking during the five seconds before impact from the vehicle's "black box," performed a time-distance analysis, and reviewed the accident scene witnesses' statements and depositions. Employing this data, Marshek rendered drawings of the accident site to illustrate his theory of the accident. Marshek's theory was that Rodriguez left his lane of travel, crossed over the center line into the westbound lane, and partially re-entered his eastbound lane before the initial impact with the Yukon. Marshek further concluded Kimberly Hughes steered sharply left into the eastbound lane to avoid Rodriguez's gravel truck, which then at least partially occupied her lane, resulting in the collision in Rodriguez's eastbound lane.[3]

[3] Marshek testified that he calculated the relative positions of the vehicles and approximately where the Yukon was on the road when Hughes made her decision to turn left by using the vehicles's speeds and a standard perception time factor. Marshek theorized the gravel truck was still moving into the westbound lane when Hughes made her evasive steering decision, and he also noted a large ditch to Hughes's right.

Using the physical evidence, Marshek described his version of the initial collision and each vehicle's subsequent movements. The first impact occurred with the gravel truck's second axle, creating downward pressure on the Yukon's tire and forcing the rim to carve a gouge in the eastbound lane six inches from the center line. Reddish paint and rubber marks on the gravel truck's tires revealed where the Yukon made contact with the tires at the second, third, fourth, and fifth axles. Rim and axle damage to the second and fourth axles demonstrated more substantial contact. After the initial collision, the gravel truck's significant mass dictated the Yukon's direction, forcing the Yukon's rear end to move clockwise and adopt the gravel truck's trailer's angle. While following this angle, the Yukon's front left rim first gouged and then scraped the concrete at an angle to the center line. After hitting the fourth axle, the Yukon's left rear rim moved back toward the centerline creating a scrape mark. As it cleared the trailer's end, the Yukon was fully in its westbound lane, moving slightly sideways before it re-entered the eastbound lane, colliding with the Ford pickup. Meanwhile, the gravel truck applied its brakes 128 feet after the point of impact, leaving tire marks on the road until the truck rested 486 feet away.

C. TXI's Reliability Complaints

TXI complains Marshek's testimony is no evidence that Rodriguez proximately caused the collision. Marshek was the only witness to suggest the gravel truck crossed the center line, but TXI assails his testimony, arguing that (1) Marshek incorrectly assumed that the gouge mark pinpointed the place on the road where the Yukon collided with the gravel truck's second axle; (2) Marshek incorrectly assumed the gouge mark indicated the angle of the gravel truck at the moment the Yukon struck it; (3) Marshek calculated the gravel truck's position based on an imprecise witness time

estimate contrary to proper protocol; and (4) Marshek selectively relied on eyewitness line-of-sight testimony.

TXI claims Marshek's theory—that the Yukon's collision with the second axle created the gouge mark—lacks any factual foundation.[4] However, some facts do support Marshek's theory. The gravel truck's second and fourth axles were the most heavily damaged, and thus may signify the most likely collision points capable of creating the gouge. Marshek acknowledged that the severe damage to the fourth axle could indicate where the Yukon gouged the road, but rejected the possibility based on the additional scrape marks present in the eastbound lane after the gouge. Marshek matched these scrapes with subsequent impacts at the third and fourth axles. While disputing other points, all experts agreed the Yukon began moving counterclockwise back into the westbound lane after colliding with the fourth axle. As Marshek testified, had the fourth axle collision caused the gouge, there would have been no further event in the eastbound lane to create the additional scrape marks before the Yukon re-entered the westbound lane.

TXI also claims Marshek admitted during cross-examination that the gouge mark did not signify the initial collision with the second axle. Marshek testified that the Yukon would have traveled eleven feet after colliding with the second axle, assuming it took one-eighth of a second for its wheel damage to create the gouge mark. However, Marshek estimated that the actual time from initial impact to the rim gouging the pavement would normally be one-tenth to one-twentieth of a

[4] TXI's accident reconstruction expert and Marshek dispute whether the Yukon's rim created a gouge mark when the left front tire impacted with the gravel truck's tire at the second or fourth axle. The difference is significant because only a gouge produced by the impact at the second axle would be consistent with the gravel truck crossing the center line and causing the accident.

second, and that here the impact between the Yukon and second axle created "extra drag" with the larger truck tire applying a downward force on the Yukon's wheel, inhibiting its lateral movement. Thus, contrary to TXI's claim, Marshek did not concede that the gouge mark would have been made eleven feet from the point of initial impact with the second axle.

TXI next argues Marshek's conclusion that the gouge mark reflects the gravel truck's angle during the collision with its second axle is unreliable because Marshek did not rule out the possibility the gouge mark might have been created during subsequent impacts with the gravel truck's tires and axles. An expert's failure to rule out alternative causes of an incident may render his opinion unreliable. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997). However, that is not the case here. Marshek pointed to scrape marks and other physical evidence to conclude the gouge mark occurred during the collision with the gravel truck's second axle, which effectively eliminated other causes of the gouge mark. He also testified the additional scrapes were created by the Yukon and angled in roughly the same direction as the gouge mark.

Marshek's gouge-mark-angle theory finds support in the physical evidence. As Marshek explained, the Yukon weighs one-sixteenth of the gravel truck, making the collision analogous to a fly hitting a boulder. The gravel truck's weight was distributed along the trailer, so when the Yukon impacted the gravel truck's tires and axles it conformed to the trailer's angle, gouging and scraping the road at an angle to the center line. Further, Marshek found additional support in the angle of the gravel truck's brake marks. He testified the direction and length were consistent with the gouge mark angle and consistent with the gravel truck re-entering its eastbound lane. Moreover, Marshek tried to line up the gouge mark and the brake marks using the assumption that the gravel

truck remained in its eastbound lane. He concluded the brake marks would not line up unless Rodriguez executed a dangerous steering maneuver likely resulting in a rollover or spillage that did not occur.

TXI also contends Marshek incorrectly estimated the gravel truck's position by distorting Rodriguez's testimony and ignoring accepted accident reconstruction protocol. Rodriguez testified that he turned the gravel truck to the right in an attempt to avoid the collision, but his estimates of how long he turned varied from "probably one second or less" to "two or three seconds, I think." TXI argues Marshek distorts Rodriguez's testimony by relying on these statements, yet rejecting Rodriguez's assertion that he never crossed the center line. Further, it contends Marshek violated accident reconstruction protocol by relying primarily on Rodriguez's time estimates instead of physical data.

Marshek's reliance on Rodriguez's statements does not distort Rodriguez's testimony. In *City of Keller v. Wilson*, we said that "evidence cannot be taken out of context in a way that makes it seem to support a verdict when in fact it never did." 168 S.W.3d 802, 812 (Tex. 2005)(citing *Bostrom Seating, Inc. v. Crane Carrier Co.*, 140 S.W.3d 681, 684–85 (Tex. 2004)). We provided an example: "If a witness's statement 'I did not do that' is contrary to the jury's verdict, a reviewing court may need to disregard the whole statement, but cannot rewrite it by disregarding the middle word alone." *City of Keller,* 168 S.W.3d at 812. Rodriguez made two statements: (1) he did not move out of his lane, and (2) he turned right immediately before the collision. Rather than cherry-picking parts of Rodriguez's testimony or twisting its meaning, Marshek simply illustrated a possible inconsistency in Rodriguez's testimony based on his review of the physical evidence.

Marshek's use of Rodriguez's testimony also did not violate accepted accident reconstruction protocol. According to TXI's testifying expert, John Painter, an accident reconstruction specialist uses witness statements to help fill gaps after the specialist analyzes the physical data. Painter acknowledged eyewitness statements assist in reconstructing an accident, but implied such statements cannot be an expert's primary data source. As discussed above, Marshek based the gravel truck's position on the physical evidence—the gouge mark angle, the subsequent scrapes' angles, and the gravel truck's brake marks—using Rodriguez's testimony solely to bolster his theory. Although his time estimates changed, Rodriguez consistently maintained that he turned to the right before the collision. Given the gravel truck's speed, Marshek concluded that even with only one second of movement (Rodriguez's lowest estimate), Rodriguez would have started the turn from the Yukon's lane.

TXI similarly complains Marshek distorts another witness's testimony by crediting the witness's statement that he did not see the Yukon until it passed the gravel truck's trailer while ignoring the same witness's assertion that he never saw the gravel truck cross the center line.[5] However, Marshek discussed the witness's testimony only in response to questions regarding

[5] This witness was a passenger in the Ford pickup that was following the gravel truck and ultimately collided with the Yukon. According to Painter, TXI's expert who performed a line-of-sight analysis of the accident scene, the witness would have seen the Yukon before it careened off the rear of the gravel truck's trailer. The witness testified, however, that he did not see the collision and did not see the Yukon until it came off the trailer. By his own estimate, the witness was about 300 yards behind the gravel truck. The witness also qualified his testimony about the gravel truck not crossing the center line by saying "[n]ot to my knowledge" multiple times. In *City of Keller*, we said "courts must view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." 168 S.W.3d at 807. Under this standard, the jury could reasonably have disregarded this witness's testimony because it was inconclusive.

Painter's line-of-sight analysis.[6] When asked whether the possibility that the gravel truck re-entering the eastbound lane blocked the witness's view of the Yukon until it cleared the truck's trailer supported Marshek's theory, he responded, "Yes, it would." However, Marshek did not ground his theory upon the witness's testimony, but instead based it on other evidence.

Lastly, TXI asserts that Marshek conceded his theory to be speculation when he admitted that "nobody knows what the steering was . . . it's all total speculation." Read in context, however, this comment was directed at Painter's use of a computer simulation, and its inability to consider the vehicles' specific steering angles. Rodriguez testified that he turned to the right immediately before the collision, and Marshek confirmed that angle from the physical evidence and Rodriguez's testimony.

D. Conclusion

Expert testimony is unreliable when "'there is simply too great an analytical gap between the data and the opinion proffered.'" *Ledesma*, 242 S.W.3d at 39 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). Expert testimony is also unreliable if it is not grounded in scientific methods and procedures, but is rather based upon subjective belief or unsupported speculation. *Coastal Transp. Co. v. Crown Cent. Petrol. Corp.*, 136 S.W.3d 227, 232 (Tex. 2004). Expert testimony lacking a proper foundation is incompetent, *City of Keller*, 168 S.W.3d at 813, and its admission is an abuse of discretion. *Cooper Tire*, 204 S.W.3d at 800. A court's ultimate task, however, is not to determine whether an expert's conclusions are correct, but rather whether the analysis the expert

[6] Because the witness testified he was watching the gravel truck and that he did not see the Yukon until it cleared the trailer, his testimony suggests the gravel truck was over the center line, blocking his view of the impacts.

used to reach those conclusions is reliable and therefore admissible. *Zwahr*, 88 S.W.3d at 629 (citing *Gammill*, 972 S.W.2d at 728).

Reliability may be demonstrated by the connection of the expert's theory to the underlying facts and data in the case. Two recent cases illustrate the point. *Compare Ledesma*, 242 S.W.3d at 40–41 (concluding that a complaint about an expert's testimony went to its weight, not its admissibility) *with Ramirez*,159 S.W.3d at 906 (concluding an expert's testimony was unreliable because it was based on a subjective interpretation of the facts rather than scientific analysis). Both cases involved auto accidents allegedly caused by the failure of a defective mechanical part. The question in both cases was whether the failure of the part caused the accident or resulted from it.

In *Ledesma*, a metallurgical and mechanical engineer testified extensively about his theory of how a u-bolt came to be under-torqued on the rear leaf spring and axle assembly of a Ford truck. 242 S.W.3d at 37 –38. He further explained how this defect caused the axle assembly to come apart which, in turn, caused the drive shaft to separate from the transmission. *Id.* at 37. The expert supported his theory with observations and measurements from the physical evidence and the manufacturer's own specifications. *Id.* at 37–38. Although there was some question as to when the part failed, the expert pointed to other physical evidence to support his theory regarding the u-bolt's failure as the triggering event for the accident. *Id.* at 38. We concluded that the manufacturer's complaints about the expert testimony ultimately went to its weight and not its admissibility. *Id.* at 40–41.

In *Ramirez*, the expert's theory was that a bearing defect in the left rear wheel assembly of a Volkswagen Passat caused a loss of control when that wheel became detached from its axle. 159

S.W.3d at 904. Although detached from the stub axle, the wheel was found under the rear wheel well after the accident. *Id.* at 902. Critical to the expert's theory was the assumption that the detached wheel remained pocketed in the wheel well throughout a turbulent and high-speed accident sequence, involving a grass and concrete median and another vehicle. *Id*. at 904. The expert proposed the "laws of physics" explained his assumption, but did not connect his theory to any physical evidence in the case or to any tests or calculations prepared to substantiate his theory. *Id.* at 904–06. We concluded the expert's testimony was unreliable because it was "not supported by objective scientific analysis" but rather rested upon the expert's "subjective interpretation of the facts." *Id*. at 906. As we have repeatedly said, "'a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.'" *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009) (quoting *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999)).

Marshek's testimony here, however, was neither conclusory nor subjective. His observations, measurements, and calculations were, as in *Ledesma*, tied to the physical evidence in the case which likewise provided support for his conclusions and theory. Marshek's expert testimony thus meets our standard for reliability, and the trial court therefore did not abuse its discretion by admitting the testimony.

III. The Illegal Immigrant Issue

TXI next argues that it was error to admit evidence of Rodriguez's immigration status and his misrepresentation of that status in order to live and work in this country. TXI complains that Rodriguez's status as an illegal immigrant was irrelevant to any issue in the case. TXI asserts instead that Rodriguez's status was impermissibly used to inflame the jury and impeach Rodriguez's

credibility. In sum, TXI submits that repeated questions on this subject prejudiced its defense and effectively denied it a fair trial.

Hughes argues, however, that Rodriguez's misrepresentations about his qualifications and experience as a commercial truck driver were relevant to claims of negligent hiring and negligent entrustment. In particular, he relies on the Federal Motor Carrier Safety Regulation Act (FMCSRA), which defines mandatory employment checks motor carriers must make when hiring new drivers. Under these regulations, a carrier must ensure that prospective drivers have a commercial license, have a working knowledge of English, and possess the training or experience to safely operate a commercial vehicle. 49 C.F.R. §§ 383.23, 391.11(b)(2)–(7), 391.15.

A. The Negligent-Hiring/Negligent-Entrustment Claim

In a negligent-hiring or negligent-entrustment claim, a plaintiff must show that the risk that caused the entrustment or hiring to be negligent also proximately caused plaintiff's injuries. *See Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 796 (Tex. 2006) (stating "[n]egligence in hiring requires that the employer's 'failure to investigate, screen, or supervise its [hirees] proximately caused the injuries the plaintiffs allege'"(quoting *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995))); *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596–97 (Tex. 1987). To sustain such a claim based on a failure to screen, a plaintiff must show that anything found in a background check "would cause a reasonable employer to not hire" the employee, or would be sufficient to put the employer "on notice that hiring [the employee] would create a risk of harm to the public." *Fifth Club,* 196 S.W.3d at 796–97. The plaintiff must also prove that the risk that caused the entrustment or hiring to be negligent caused the accident at issue.

Schneider, 744 S.W.2d at 597. Therefore, a plaintiff will not succeed on a negligent entrustment or hiring claim where an investigation would not have revealed the risk. *See, e.g.*, *Doe,* 907 S.W.2d at 477 (finding the failure to prove negligent hiring as a matter of law because screening would not have indicated a specific risk); *Fifth Club*, 196 S.W.3d at 796 (noting a background check might only have shown that the employee was violating terms of employment with another employer, but not the employee's proclivity for violence).

We have said a claim for negligent hiring or entrustment cannot lie if "[t]he risk that caused the entrustment to be negligent did not cause the collision," *Schneider*, 744 S.W.2d at 597, and if a "defendant's negligence did no more than furnish a condition which made the injury possible." *Doe*, 907 S.W.2d at 477. Here, Rodriguez's immigration status did not cause the collision, and was not relevant to the negligent entrustment or hiring claims—even if TXI's failure to screen, and thus its failure to discover his inability to work in the United States, "furnished [the] condition" that made the accident possible. *Id.* We agree with the court of appeals "that neither Rodriguez's status as an illegal alien or his use of a fake Social Security number to obtain a commercial driver's license created a foreseeable risk that Rodriguez would negligently drive the gravel truck." 224 S.W.3d at 914.

B. Use of Immigration Status as Impeachment Evidence

The court of appeals concluded, however, that the evidence of Rodriguez's immigration status was nevertheless admissible "to impeach his contrary trial testimony." 224 S.W.3d at 897. This impeachment apparently related to Rodriguez's trial testimony that he never lied to get a driver's license and did not know whether he had a legal right to work in the United States. *Id.* at 897

n.32. Relying on Texas Rule of Evidence 801(e)(2)(A), the court concluded that Rodriguez, as a party, could be impeached "with evidence of his own prior verbal statements." *Id*. at 897. The court further concluded that, because the statements of a party are not hearsay, *see id.,* it was unnecessary to "address complaints that Rodriguez's immigration status was not relevant and was more prejudicial than probative." *Id*. at 897 n.32. We fail to see the connection.

Rule 801(e)(2)(A) provides that a party admission is not hearsay. Whether impeachment evidence is hearsay, however, has nothing to do with the relevancy requirement in Rules 401 and 402, or Rule 403's requirement that evidence should be excluded if its prejudicial effect substantially outweighs any probative value. *See Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 235 (Tex. 2007) (stating that, "subject to other Rules of Evidence that may limit admissibility [citing, among other evidentiary rules, Rules 402 and 403], *any* statement by a party-opponent is admissible against that party"); *Willover v. State*, 70 S.W.3d 841, 846 n.9 (Tex. Crim. App. 2002) (noting that non-hearsay "still must meet other requirements for admissibility, such as relevance"). Thus, the observation that Rodriguez's statements are not hearsay neither establishes their admissibility nor explains why other witnesses were permitted to be questioned about Rodriguez's immigration status, or why extrinsic evidence was admitted on the subject.

C. The Error

Although Rodriguez's statements about his immigration status may have been offered for impeachment as prior inconsistent statements, they were not admissible for at least two different reasons. First, Rodriguez's immigration status was clearly a collateral matter, that is, a matter that was "not relevant to proving a material issue in the case." *Poole v. State*, 974 S.W.2d 892, 905 (Tex.

App.—Austin 1998, pet. ref'd). Rodriguez's immigration status clearly was not a material part of the plaintiffs' case; it was not something the plaintiffs had to prove to prevail. *See Bates v. State*, 587 S.W.2d 121, 133 (Tex. Crim. App. 1979) (stating that the "test as to whether a matter is collateral is whether the cross-examining party would be entitled to prove it as a part of his case"). As a collateral matter—not relating to any of plaintiffs' claims on the merits, and merely serving to contradict Rodriguez on facts irrelevant to issues at trial—it was inadmissible impeachment evidence. *See Ramirez v. State*, 802 S.W.2d 674, 675 (Tex. Crim. App. 1990) (stating parties may not impeach on collateral or immaterial matters); *Delamora v. State*, 128 S.W.3d 344, 363 (Tex. App.—Austin 2004, pet. ref'd) (noting "[a]party may not cross-examine a witness on a collateral matter, then contradict the witness's answer").

The immigration-related evidence was also inadmissible under Texas Rule of Evidence 608(b). This rule provides that "specific instances of the conduct of a witness, for the purpose of attacking . . . the witness's credibility, . . . may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence." TEX. R. EVID. 608(b); *see* TEX. R. EVID. 404(b) (governing admissibility of prior acts). The rule "reflects a general aversion in Texas to the use of specific instances of conduct for impeachment." David A. Schlueter & Robert R. Barton, TEXAS RULES OF EVIDENCE MANUAL § 608.02[3][b] at 537 (8th ed. 2009). For over 150 years, "Texas civil courts have consistently rejected evidence of specific instances of conduct for impeachment purposes, no matter how probative of truthfulness." Cathy Cochran, TEXAS RULES OF EVIDENCE HANDBOOK 597 (7th ed. 2007-08) (citing *Boon v. Weathered's Adm'r*, 23 Tex. 675, 679 (1859) and

other Texas cases). Courts in other jurisdictions have similarly held that a witness's immigration status is not admissible to impugn the witness's character for truthfulness.[7]

The only exception to this general prohibition is for certain criminal convictions. Texas Rule of Evidence 609 permits evidence of a criminal conviction for impeachment purposes if the conviction is not more than ten years old, is a felony or involves moral turpitude, and is more probative than prejudicial. TEX. R. EVID. 609(a). As the dissenting justice in the court of appeals observed, Rodriguez's immigration conviction does not meet this criteria. 224 S.W.3d at 930 (Gardner, J., dissenting). It was therefore error to admit evidence of Rodriguez's immigration status and deportation. The court of appeals nevertheless concluded that, even if it were error to admit this evidence, it was not harmful. 224 S.W.3d at 897.

D. The Harm

The erroneous admission of evidence is harmless unless the error probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1. Probable error is not subject to precise measurement, but it is something less than certitude; it is a matter of judgment drawn from an evaluation of "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.'" *Reliance Steel & Aluminum Co.*

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[7] *See Mischalski v. Ford Motor Co.*, 935 F. Supp. 203, 207–08 (E.D.N.Y. 1996) ("Ford has cited no authority, and the court is aware of none, to support the conclusion that the status of being an illegal alien impugns one's credibility. Thus, by itself, such evidence is not admissible for impeachment purposes."); *First Am. Bank v. W. Dupage Landscaping, Inc.*, No. 00-C-4026, 2005 WL 2284265, at *1 (N.D. Ill. Sept. 19, 2005) ("[T]he court will not allow impeachment of witnesses on the basis of a witness's undocumented status."); *Hernandez v. Paicius*, 134 Cal. Rptr. 2d 756, 761–62 (Cal. Ct. App. 2003) (finding immigration status evidence inadmissible to attack a party's credibility); *Castro-Carvache v. I.N.S.*, 911 F. Supp. 843, 852 (E.D. Pa. 1995) ("[A]n individual's status as an alien, legal or otherwise, however, does not entitle the Board to brand him a liar."); *Figeroa v. I.N.S.*, 886 F.2d 76, 79 (4th Cir. 1989) (accord).

v. Sevcik, 267 S.W.3d 867, 871 (Tex. 2008) (quoting *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 841 (Tex. 1979)).

Although the trial court initially granted a motion in limine on immigration matters, it later reversed that ruling, admitting extensive testimony and extrinsic evidence concerning Rodriguez's immigration status, including that he:

- was an undocumented Mexican alien who had illegally entered the United States on multiple occasions;
- invented a false Social Security number, which he used to apply for a Texas commercial driver's license;
- falsely answered "no" in his deposition when asked if he had ever lied to obtain a Texas driver's license;
- falsely answered "yes" on his TXI employment application when asked if he had the legal right to work in the United States;
- pleaded guilty to and was convicted of a misdemeanor immigration violation, serving four months in jail; and
- was previously deported and ordered not to return to the United States for ten years.

Rodriguez was also Hughes's first called witness, and the first questions posed to him concerned his immigration status. There followed over forty references to Rodriguez's status, including thirty-five to his status as an "illegal immigrant" and seven to his prior deportation. TXI representatives were also cross-examined regarding whether they owed a "duty" to the public to prevent an "illegal" from driving a TXI truck:

- "Do you think he is entitled to drive here if he's illegally here?"
- "And you don't think you owe any duty . . . to the public . . . to the people who are driving up and down [Highway] 114 . . . to decide whether he's illegal or not?"

- "Mr. Rodriguez is still illegal in the United States, is he not? . . . Will anybody ever turn him in, or will he just continue to drive for TXI?"

The investigating DPS trooper was asked whether she knew Rodriguez was "in this country illegally." Additionally, there were thirty-two references to Rodriguez's misconduct in using a "falsified" Social Security number, sixteen references to Rodriguez's commercial driver's license being "invalid" or "fraudulently obtained," and seven references that Rodriguez was a "liar" who had lied on his TXI employment application. A TXI representative was pointedly questioned about whether Rodriguez might also have lied in denying responsibility for the accident:

- "Do you think Mr. Rodriguez lied to . . . enter the United States?"
- "Are you telling this jury that you don't know whether he lied to get into the United States?"
- "Now do you think that Mr. Rodriguez would lie when it relates to driving a rock truck?"
- "Did you ever consider . . . and I want you to face this jury and tell this jury, did you ever consider whether Mr. Rodriguez might have lied about how this accident occurred?"

TXI complains that the repeated references to Rodriguez's immigration problems and alleged misrepresentations were inflammatory and deliberately calculated to cause the jury to disbelieve Rodriguez.

TXI further objected to the trial court's charge, complaining that the broad-form negligence question was misleading in this particular case and that the negligence question should instead include Hughes's theory of the accident's cause—that Rodriguez caused the accident by first crossing over into the opposing lane of traffic. The trial court refused TXI's requested substitutions, which TXI complains was harmful because it allowed Hughes to disguise his real claim—that

Rodriguez was negligent for driving without a right to be in this country and that TXI was negligent for hiring an illegal alien. The dissenting justice in the court of appeals concluded that Hughes's "repeated injection into the case of Rodriguez's nationality, ethnicity, and illegal-immigrant status, including his conviction and deportation, was plainly calculated to inflame the jury against him." 224 S.W.3d at 931 (Gardner, J., dissenting). We agree.

Even assuming the immigration evidence had some relevance, its prejudicial potential substantially outweighed any probative value. Even in instances where immigration status may have limited probative value as to credibility, courts have held that such evidence is properly excluded for undue prejudice under Rule 403.[8] The only context in which courts have widely accepted using such evidence for impeachment is in criminal trials, where a government witness's immigration status may indicate bias, particularly where the witness traded testimony for sanctuary from deportation.[9]

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[8] *See Maldonado v. Allstate Ins. Co.*, 789 So.2d 464, 466, 470 (Fla. Ct. App. 2001) (reversing judgment on jury verdict when immigration status and false Social Security number improperly became "a central feature" of trial; court held that any "limited probative value" on the issue of legal residence in Florida "was thoroughly outweighed by unfair prejudice, confusion of the issues, and misleading of the jury"); *Clemente v. State,* 707 P.2d 818, 829 (Cal. 1985) (holding immigration status, "even if marginally relevant [on damages issues], was highly prejudicial"); *Diaz v. State*, 743 A.2d 1166, 1184 (Del. 1999) (finding that even if a witness's concern about immigration status was relevant to impeach her, the court still must "determine if the probative value of that immigration status . . . is outweighed by any unfair prejudice"); *Klapa v. O&Y Liberty Plaza Co.*, 645 N.Y.S.2d 281, 282 (N.Y. Sup. Ct. 1996) (precluding "evidence which would indicate a plaintiff's immigration status," because "whatever probative value illegal alien evidence may have [as to damage calculations] is far outweighed by its prejudicial impact"); *Gonzalez v. City of Franklin*, 403 N. W.2d 747, 759-60 (Wis. 1987) (affirming exclusion of illegal alien status, which had only "speculative or conjectural" relevance to damage issues but carried "obvious prejudicial effect"); *see also People v. Martin*, No. B164978, 2004 WL 859187, at *6 (Cal. Ct. App. Apr. 22, 2004) ("Although by definition a person illegally in this country has most likely engaged in some type of subterfuge, the connection between that conduct and credibility of testimony is tenuous. . . . At the same time, the prejudice from such evidence is manifest and substantial. There is unequivocally an inherent bias among certain segments of society against illegal immigrants."); *Romero v. Boyd Bros. Transp. Co.*, No. 93-0085-H, 1994 WL 287434, at *2 (W.D. Va. June 14, 1994) ("The danger of a jury unfairly denying Mr. Hurtado relief based on his status alone outweighs the probative value of the evidence that he acted dishonestly in the past.").

[9] *See, e.g.*, *State v. Ferguson*, 796 A.2d 1118, 1130–31 (Conn. 2002); *People v. Turcios*, 593 N.E.2d 907, 918–19 (Ill. App. Ct. 1992).

IV. Conclusion

Hughes faced a difficult conceptual burden. He had to convince a jury that a collision involving on-coming traffic, that unquestionably occurred in the eastbound lane of Highway 114, was the fault of Rodriguez, the eastbound driver. The task was all the more difficult because Rodriguez possessed a clean driving record and commercial driver's licenses from both Texas and Mexico. Hughes had some evidence of how Rodriguez might have been at fault for the collision in his lane, but the issue was hotly contested.

The record indicates that Hughes sought to hedge his theory by calling attention to Rodriguez's illegal immigration status whenever he could. Such appeals to racial and ethnic prejudices, whether "explicit and brazen" or "veiled and subtle," cannot be tolerated because they undermine the very basis of our judicial process. *Tex. Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 864 (Tex. App.—San Antonio 1990, writ denied); *see also Moss v. Sanger*, 12 S.W. 619, 620 (Tex. 1889) ("Cases ought to be tried in a court of justice upon the facts proved; and whether a party be Jew or gentile, white or black, is a matter of indifference."); *Penate v. Berry*, 348 S.W.2d 167, 168-69 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.) (reversing judgment against illegal alien in vehicle collision case because of "numerous remarks" about alien status). We conclude that the trial court erred by admitting evidence impugning Rodriguez's character on the basis of his immigration status. Such error was harmful, not only because its prejudice far outweighed any probative value, but also because it fostered the impression that Rodriguez's employer should be held liable because it hired an illegal immigrant.

For the reasons stated, the judgment of the court of appeals is reversed and the cause is remanded to the trial court for a new trial.

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David M. Medina
Justice

OPINION DELIVERED: March 12, 2010

IN THE SUPREME COURT OF TEXAS

NO. 07-0541

TXI TRANSPORTATION COMPANY, ET AL., PETITIONERS,

v.

RANDY HUGHES, ET AL., RESPONDENTS

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

Argued October 16, 2008

JUSTICE WAINWRIGHT, concurring in part and dissenting in part.

The vehicle accident in this case occurred in the gravel truck's eastbound lane when the westbound Yukon sport utility vehicle crossed the center line of the highway. This is undisputed. All five eyewitnesses in three separate vehicles who spoke to the question, some from better vantages than others, testified that they never saw the gravel truck in the westbound lane. Yet the claimant's expert opined that the gravel truck driver caused the accident. He allegedly crossed into the westbound lane, forced the Yukon to move into the eastbound lane in a defensive maneuver, and then returned to the eastbound lane to cause the collision. The expert reviewed and discussed physical evidence in the form of gouge marks on the road, collision damage to both vehicles, brake mark angles, and speed and braking information from the Yukon's black box. I have serious concerns about the admissibility of the expert's causation testimony because, among other reasons,

the expert has not sufficiently addressed the eyewitness testimony. *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 243 (1993) (holding that expert testimony is not admissible when it is not supported by sufficient facts or when the evidence in the case contradicts or otherwise renders the opinion unreasonable); *see also TXI Transp. Co. v. Hughes*, 224 S.W.3d 870, 923, 927–29 (Tex. App.—Fort Worth, pet. granted) (Gardner, J., dissenting) (addressing the eyewitness testimony and other reasons to exclude the expert's opinion). I respectfully concur in part and dissent in part, joining only Section III of the Court's opinion.

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Dale Wainwright
Justice

OPINION DELIVERED: March 12, 2010

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 Court's judgment and an opinion, in which JUSTICE HECHT joined, and in which JUSTICE WAINWRIGHT, JUSTICE JOHNSON and JUSTICE WILLETT joined as to Parts I & IV.

JUSTICE WAINWRIGHT filed a concurring opinion.

JUSTICE JOHNSON filed a concurring opinion, in which JUSTICE WILLETT joined, and in which JUSTICE HECHT joined as to Parts II and III-A, and in which JUSTICE WAINWRIGHT joined as to Parts I, II, and III-A.

CHIEF JUSTICE JEFFERSON filed an opinion concurring in part and dissenting in part, in which JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE LEHRMANN joined.

JUSTICE GUZMAN filed an opinion concurring in part and dissenting in part.

We grant the motion for rehearing, withdraw our previous opinion and judgment of August 28, 2009, and substitute the following in its place.

In this case we must decide whether a hospital patient's fall, allegedly caused by a defective or unsafe hospital bed, is a health care liability claim under former 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 certain 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 changed its mind and affirmed the trial court's judgment, with one justice dissenting. 229 S.W.3d 396. Because we agree that the underlying cause of action falls under the statutory definition of a health care liability claim, we affirm.

[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, amended by Act of May 18, 1979, 66th Leg., R.S., ch. 596, 1979 Tex. Gen. Laws 1259, amended by Act of May 26, 1989, 71st Leg., R.S., ch. 1027, §§ 27, 28, 1989 Tex. Gen. Laws 4128, 4145, amended by Act of March 21, 1991, 72d Leg., R.S., ch. 14, § 284, 1991 Tex. Gen. Laws 42, 222, amended by Act of May 25, 1993, 73d Leg., R.S., ch. 625, 1993 Tex. Gen. Laws 2347, amended by Act of May 5, 1995, 74th Leg., R.S., ch. 140, 1995 Tex. Gen. Laws 985,amended by Act of June 1, 1997, 75th Leg., R.S., ch. 1228, 1997 Tex. Gen. Laws 4693, amended by Act of June 2, 1997, 75th Leg., R.S., ch. 1396, §§ 44, 45, 1997 Tex. Gen. Laws 5202, 5249, amended by Act of May 13, 1999, 76th Leg., R.S., ch. 242, 1999 Tex. Gen. Laws 1104, repealed by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

I

Irving Marks underwent back surgery at St. Luke's Episcopal Hospital. Seven days later, while still recuperating from his surgery, Marks fell in his hospital room. He alleges that this fall was caused by the footboard on his hospital bed which collapsed as he attempted to use it to push himself from the bed to a standing position.

Marks sued the hospital, alleging that its negligence contributed to cause his fall. He complained that the hospital was negligent in: (1) failing to train and supervise its nursing staff properly, (2) failing to provide him with the assistance 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 ("MLIIA"). *See* TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4) (defining health care liability claim).[2] Under the MLIIA, a health care liability claim must 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 our opinion in *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex.

[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.

2005), another case involving the scope of a health care liability claim under the MLIIA. After full briefing, we granted the hospital's petition without reference to the merits and remanded the case to the court of appeals for its reconsideration in light of *Diversicare*. *St. Luke's Episcopal Hosp. v. Marks,* 193 S.W.3d 575, 575 (Tex. 2006) (per curiam).

Following our remand, a divided court of appeals affirmed the trial court's judgment of dismissal for want of a timely filed expert report, 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 MLIIA. *Id*. at 403 (Jennings, J., dissenting in part). We granted Marks's petition for review to consider the issue.

II

Several of the allegations in Marks's trial court pleadings are similar to those in *Diversicare*, a case in which we concluded that a nursing-home patient's sexual assault by another patient was a health care liability claim under the MLIIA. *Diversicare,* 185 S.W.3d at 842. The allegations there were that the nursing home was negligent in failing to provide sufficient staff and supervision to prevent the assault. *Id.* at 845. The trial court held the claim barred by the MLIIA's two-year statute of limitations and granted summary judgment for the nursing home. *Id.* The court of appeals reversed, however, concluding the suit was not a statutory health care liability claim, but rather a common law negligence claim to which the MLIIA's limitations provision did not apply. *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, holding that the law suit was indeed a health care liability claim as determined by the trial court. *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 reasoned 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.

Marks's first three claims—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—similarly involve patient supervision and staff training. As in *Diversicare*, this type of claim asserts a departure from the accepted standard of health care and is therefore a health care liability claim under the MLIIA.

Marks argues that his hospital bed claim is different, however. He alleges that the hospital was negligent either in the assembly or maintenance of the bed, or both, and that the defectively attached footboard presented an unsafe condition in the nature of a premises liability claim rather

than a health care liability claim. Marks submits that his defective bed claim involves ordinary negligence rather than a departure from accepted standards of health care or safety.

The hospital responds that Marks's hospital bed was an inextricable part of his care and treatment during his inpatient convalescence from back surgery. As such, the hospital submits that any defect in the bed, or any danger it posed to the patient, implicated a departure from accepted standards of health care or safety and was accordingly a health care liability claim under the MLIIA.

The MLIIA 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 which proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract.

TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4). Under this definition, a health care liability claim consists of three elements. First, a physician or a health care provider must be the defendant. Second, the suit must be about the patient's treatment, lack of treatment, or some other departure from accepted standards of medical care or health care or safety. And, third, the defendant's act, omission, or other departure must proximately cause the patient's injury or death. The dispute here is over the second element, that is, whether the hospital's alleged failure to provide its patient a safe bed implicates certain accepted standards embodied in the definition of a health care liability claim.

The statute provides some information about these standards through its definitions of medical care and health care. The MLIIA defines "medical care" as the practice of medicine, including the diagnosis and treatment by a licensed physician, and "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." *Id.* § 1.03(a)(2),(6). These definitions indicate then that physicians provide medical care, and that health care providers, which includes hospitals and their employees, provide other health care services. A "claimed departure from accepted standards of medical care or health care" thus implicates the professional standards of these respective care givers. *See Diversicare*, 185 S.W.3d at 850 (noting that the "health care standard applies the ordinary care of trained and experienced medical professionals to the treatment of patients").

The statute, however, does not define the term "safety" and thus does not provide similar insight into the meaning of a "claimed departure from accepted standards of . . . safety." We noted this in *Diversicare*, while observing that the inclusion of accepted standards of safety nevertheless expanded the statute's scope beyond standards of medical care and health care. *Diversicare*, 185 S.W.3d at 855. How much it expanded the statute's scope we did not say because the claim there involved a departure from accepted standards of health care more so than safety. *Id.* Marks's present claim, however, focuses on the safety element, that is, whether a patient injury caused by an allegedly defective hospital bed represents a "claimed departure from accepted standards of . . . safety" within the statute's definition of a "health care liability claim." *See* TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4) (defining health care liability claim).

III

The nature of the safety-related claims the Legislature intended to include under the MLIIA is a matter of statutory construction, a legal question we review de novo. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000). When construing a statute, words and phrases are read in context and construed 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 unless a contrary intention is apparent from the context, or unless such a construction leads to absurd results. *City of Rockwall v. Hughes,* 246 S.W.3d 621, 625–26 (Tex. 2008). When possible, the Legislature's intent is drawn from the plain meaning of the words chosen, *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006), giving effect to all words so that 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). Our ultimate goal, however, is to understand the Legislature's intent and apply that intent according to the statute's purpose. TEX. GOV'T CODE § 312.005; *see also City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995) (referring to legislative intent as the "polestar of statutory construction").

The Legislature's stated purpose in enacting article 4590i was 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); *see also Aviles v. Aguirre*, 292 S.W.3d 648, 649 (Tex. 2009) (per curiam) (noting that virtually all of the legislative findings expressed in the statute relate to the cost of malpractice insurance). The MLIIA, however, defines a health care liability claim not only in terms of the specific standards of medical care and health care, but also in terms of an apparently more general standard of safety. *Id*. § 103(a)(4).

We do not consider the term "safety" in isolation, however, but in the context of the statute. *City of San Antonio v. Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). Moreover, the principle of ejusdem generis warns against expansive interpretations of broad language that immediately follows narrow and specific terms, and counsels us to construe the broad in light of the narrow. *See Hilco Elec. Coop. v. Midlothian Butane Gas Co.,* 111 S.W.3d 75, 81 (Tex. 2003) (observing that when words of a general nature are used in connection with the designation of particular objects, persons, or things, the meaning of the general words should conform to the more particular designation). The principle is sound advice here as every patient injury in a hospital, regardless of cause, may be said to implicate patient safety in the broad sense of the word.

The Legislature, however, could not have intended that standards of safety encompass all negligent injuries to patients. Such a broad interpretation of the safety standard would render the statute's more specific standards of medical and health care unnecessary, and we do "not read statutory language to be pointless if it is reasonably susceptible of another construction." *City of LaPorte*, 898 S.W.2d at 292 (citing *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987). Moreover, given the object of the statute and the Legislature's express concern, it is apparent that the Legislature did not intend for standards of safety to extend to every negligent injury that might befall a patient. *See* TEX. REV. CIV. STAT. art. 4590i § 1.02(b)(3) (reciting Legislature's intent that the statute operate to control medical malpractice insurance costs without unduly restricting a patient's rights). Applying the principle of ejusdem generis, we conclude that standards of safety must be construed in light of the other standards of medical and health care, standards that are directly related to the patient's care and treatment. We said as much in *Diversicare*.

We noted there 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 (suggesting that unsafe conditions unrelated to the provision of health care might not be a health care liability claim). We further observed that standards of medical care or health care were implicated when the negligent act or omission was 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 MLIIA when the unsafe condition or thing, causing injury to the patient, is an inseparable or integral part of the patient's care or treatment.

The determination of whether a cause of action is a health care liability claim therefore requires an examination of the claim's underlying nature. *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004). As we indicated in *Diversicare*, it is the gravamen of the claim, not the form of the pleadings, that controls this determination. *See Diversicare*, 185 S.W.3d at 854. Whether the underlying claim involves a health care provider's negligent act or omission, or the patient's exposure to some other safety risk, the relationship between the injury causing event and the patient's care or treatment must be substantial and direct for the cause of action to be a health care liability claim under the MLIIA. *See Garland Cmty. Hosp*, 156 S.W.3d at 544 (observing the complaint must concern an act or omission that "is an inseparable part of the rendition of health care services").

Marks alleges that his injury here was caused by the hospital's improper maintenance or assembly of his hospital bed. At its core, this claim alleges the failure of a piece of equipment provided during Marks's inpatient care. Medical equipment specific to a particular patient's care

or treatment is an integral and inseparable part of the health care services provided. When the unsafe or defective condition of that equipment injures the patient, the gravamen of the resulting cause of action is a health care liability claim.

IV

Although we conclude that Marks's claims here involve health care liability, a question remains concerning their dismissal. Marks argues that his complaint 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.

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.[3] After hearing the Hospital's motion to dismiss and Marks's motion for a grace period,

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[3] 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

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 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 "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 up until the time he filed the amended pleading, he "believed that the case presented claims sounding only in ordinary negligence."

In our view, there is no significant difference between the original and the amended pleading. The underlying factual complaint in both concern the same set of circumstances: inadequate care

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shall be considered timely if it is filed before any hearing on a motion by a defendant under Subsection (e) of this section.

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. It is not apparent from Doyle's affidavit 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 grace period under section 13.01(g) and did not err in dismissing Mark's health care liability claims. *See* TEX. REV. CIV. STAT. art. 4590i § 13.01(e)(3) (dismissal is "with prejudice to the claims refiling").

* * *

Because the provision of a safe hospital bed was an inseparable part of the health care services provided during Marks's convalescence from back surgery, we conclude that his cause of action for injuries allegedly caused by the unsafe bed is a health care liability claim under article 4590i. We further agree that the trial court did not abuse its discretion in refusing Marks's request for additional time to file the requisite expert report and accordingly affirm the court of appeals' judgment.

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David M. Medina
Justice

OPINION DELIVERED: August 27, 2010

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, concurring.

I agree with the plurality's opinion to the extent it concludes that a claim for injury arising from the alleged improper operation of a hospital bed provided for the care and recuperation of a back-surgery patient is a health care liability claim. Marks acknowledged this in his filings at the trial court, and the trial judge properly held that his claim was governed by the Medical Liability and Insurance Improve Act (MLIIA).[1] *See* TEX. REV. CIV. STAT. art. 4590i.[2] I therefore join parts I and

[1] Marks's retained physician concluded in his expert report that St. Luke's Episcopal Hospital violated "accepted standards of good nursing care" specifically by failing "to ensure that the footboard was properly secured to the bed."

[2] Medical Liability and Insurance Improvement Act of Texas, 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. The successor statute is applicable to actions filed on or after September 1, 2003. TEX. CIV. PRAC. & REM. CODE ch. 74.

IV of the plurality's opinion and the Court's judgment. I agree with JUSTICE JOHNSON's concurring opinion addressing the "health care" prong of health care liability claims and our precedents, holding that "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" is not permitted. *See Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 854 (Tex. 2005); *see also, e.g., Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543, 545 (Tex. 2004). I therefore join parts I, II, and III.A of JUSTICE JOHNSON's concurring opinion. I do not join part III of the plurality's opinion, part III.B of JUSTICE JOHNSON's concurring opinion or address the dissenters' arguments concerning the "safety" prong of health care liability claims[3] because it is not necessary in this case, as it was not in *Diversicare*, to define the precise scope of "safety" under the MLIIA. *See Diversicare*, 185 S.W.3d at 854–55 (explaining in part III.B.2 of the opinion that an injury to a patient from a rickety staircase or an unlocked window does not implicate the "health care" prong of health care liability claims).

Dale Wainwright
Justice

OPINION DELIVERED: August 27, 2010

[3] *See United States v. Travers*, 514 F.2d 1171, 1174 (2d Cir. 1974) (Friendly, J.) ("Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling . . . .").

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 JOHNSON, joined by JUSTICE WILLETT, and by JUSTICE HECHT as to Parts II and III-A, and by JUSTICE WAINWRIGHT as to Parts I, II, and III-A, concurring.

I fully join parts I and IV of the plurality's opinion and the Court's judgment. I agree with parts II and III of the opinion to the extent the plurality concludes Marks's claim is a health care liability claim because it alleges violations of accepted standards of health care and accepted standards of safety. However, I believe that the plurality too narrowly construes the language "accepted standards of . . . safety." I also believe that Marks's suit should be dismissed for reasons in addition to, and in some instances different from, those given by the plurality.

First, Marks's claim is based on a single incident and is substantively a health care liability claim in its entirety. This Court has consistently maintained that health care liability claims cannot be split into health care and non-health care claims by artful pleading. The claim for negligently

assembling, maintaining, and providing the bed should be dismissed along with Marks's other allegations that unquestionably assert health care liability claims.

Second, the claim for improper assembling, maintaining, and providing the bed is a claim for violating accepted standards of health care regardless of whether those actions also violated safety standards.

Third, the claim for improper assembling, maintaining, and providing the bed is a claim for violating accepted standards of safety regardless of whether the actions also violated accepted health care standards. The plurality reads the statute too narrowly and thus reduces the scope of actions covered by the term "safety" from that prescribed by the statute.

I. Background

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, of his need for an ambulatory assistance device, 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 eight 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.

Marks failed to timely file an expert report and the trial court dismissed his suit. The court of appeals affirmed. 299 S.W.3d 396. One justice dissented on the basis that the claim for negligently assembling, maintaining, and providing the bed was not a health care liability claim. *Id.* at 403 (Jennings, J., dissenting in part).

II. Artful Pleading

This Court, as did the trial court and the court of appeals, concludes that Marks's first three allegations of negligence are health care liability claims under the Medical Liability and Insurance Improvement Act (MLIIA). *See* former TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4).[1] That conclusion requires dismissal of Marks's suit entirely because the fourth allegation—that the bed was negligently assembled, maintained, and provided—is based on the same facts and the same damages as the first three. The Court has previously held that when a cause of action is essentially

[1] 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. While this case was pending, the Legislature repealed the MLIIA, amended parts of the previous article 4590i, and re-codified 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.

a health care liability claim and a timely expert report has not been served, the claim should be dismissed in its entirety regardless of how the claim is pled. That should occur here.

In *Diversicare General Partner, Inc. v. Rubio* the concurring and dissenting justices concluded that the victim of a sexual assault at a nursing home asserted a premises liability claim against the nursing home independent of her health care liability claim. 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."). I would adhere to the Court's holding and reaffirm the language the Court used in *Diversicare* and other cases rejecting claim-splitting by pleadings. Otherwise, the door will be opened to manipulated, inventive, and artful pleadings designed to avoid the MLIIA requirements and limitations.

By failing to address the claim-splitting aspect of this situation, the plurality's opinion may create uncertainty in the bench and bar as to whether claim-splitting is permissible. And such uncertainty almost assuredly will lead to more extended and expensive trial and appellate court proceedings to determine whether a patient's pleadings assert health care liability claims, non-health

care liability claims, or both; and if both, which is which. Extended 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* TEX. REV. CIV. STAT. art. 4590i, § 1.02(b)(2);[2] *see also id.* § 1.02(b)(1).

The Court should make clear it is not abandoning its position that when the substance of a patient's claim for damages 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 pleaded his case, the substantive facts are that his injury arises from a health care liability claim and he should not be allowed to avoid application of the MLIIA by finding another way to plead his claim for damages.

III. Health Care and Safety

The hospital bed furnished to Marks was an integral and inseparable part of the health care he received from St. Luke's. St. Luke's asserts that Marks's suit implicates accepted standards of both health care and safety as referenced by the MLIIA. I agree.

In determining whether the MLIIA encompasses Marks's claims, we use well-established statutory construction rules. 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 is

[2] 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.

"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).

A. Health Care

The MLIIA 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 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). As the plurality notes, 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 . . . 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) (emphasis added); *see Diversicare*, 185 S.W.3d at 847 (describing health care as "broadly defined" under the MLIIA). Applying this broad definition, the Court has 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 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 disputes that Marks's hospital confinement while recovering from the latest of several back surgeries was medically necessary. If his condition made hospitalization medically necessary, then it logically follows that the hospital had to provide him with a hospital bed. And, if a 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. *See Diversicare*, 185 S.W.3d at 849-54.

Marks focuses on the assembling and maintaining of the bed, as opposed to its use in patient care. He argues that his claim for negligent assembly and maintenance is not a health care liability claim because it is based on the breach of an ordinary standard of care, not on a discrete standard of care applicable to the health care industry. His position, as to the bed claim, is that St. Luke's owed him the general duty of care owed by businesses to their invitees.[3]

Although health care providers and patients may well be premises owners or occupiers and invitees, the Legislature has imposed requirements on suits by patients against health care providers

[3] As the Court did in *Diversicare*, I "note the irony" of this position. *Diversicare*, 185 S.W.3d at 853. Marks asserts that the MLIIA should not apply to his claim because the claim is a premises liability claim based on ordinary negligence. But his position, if adopted, would have the effect of lowering the standard of care owed by health care providers to patients in health care facilities. *See id.* at 853-54.

that differ from general requirements for suits by invitees against premises owners or 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.").

Marks's own expert reports affirm that the hospital's provision of the hospital bed was an integral and inseparable part of actions that were "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). 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. Dr. Jeffrey D. 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.

Nurse practitioner Jan 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.

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.

To the extent the plurality says or implies that a claim for a departure from accepted health care standards depends on allegations concerning acts or omissions of hospital workers with specialized health care training—as opposed to hospital workers without specialized training who are nevertheless necessary for a hospital to properly care for patients—I disagree. Marks's Original Petition states the hospital bed was negligently assembled by St. Luke's "employees, agents, servants or nursing staff." 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). 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.

Id. § 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.

There is no need to dissect and inquire into or distinguish between categories of health-care-provider employees based on duties, types of actions performed, and the type of judgment exercised. The literal and plain statutory language includes all officers, employees, or agents of the provider acting in the course and scope of their employment. *Id.* Giving the language its literal meaning does not yield absurd or nonsensical results. *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))). Marks's claim as to the hospital bed is a claim that the hospital violated accepted standards of health care.

B. Safety

I agree with parts II and III of the plurality's opinion to the extent those parts conclude that providing a reasonably safe hospital bed to Marks involved accepted standards of safety. However, I believe the plurality construes the "accepted . . . standards of safety" language too narrowly.

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). The plurality says that under the statute

> standards of safety must be construed in light of the other standards of medical and health care, standards that are directly related to the patient's care and treatment. . . . [A]n accepted standard of safety is implicated under the MLIIA when the unsafe condition or thing, causing injury to the patient, is an inseparable or integral part of the patient's care or treatment.

___ S.W.3d at ___. The statute does not so limit its provision as to safety standards. The plurality's construction constricts the application of the statute by effectively adding language to 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)).

The Court's prior broad construction of the safety standard 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. *See id.* at 847 (describing health care as "broadly defined" under the MLIIA). 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). Statements the plurality makes today depart from the Court's prior reading of the statute, and I would not do so. The MLIIA reflects legislative intent to broadly, not narrowly, cover claims made by patients against their health care providers. If policy considerations support limiting or excluding subcategories of claims 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).

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 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 plurality'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 an additional category of claims. *See 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."). 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 v. Bramlett*, 288 S.W.3d 876, 880 (Tex. 2009); *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 La Porte 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, not confining those claims to be the same as claims already coming within the statute's coverage as health care claims. *Diversicare*, 185 S.W.3d at 855.

IV. Conclusion

I agree that Marks's suit should be dismissed in its entirety. However, I would hold that the entire suit, including the allegations concerning the hospital bed, falls within the MLIIA and is barred for three reasons: (1) the suit is substantively a health care liability claim and part of it cannot be recast into a non-health care claim; (2) the claims are for departures from accepted standards of health care; and (3) the claims are for departures from accepted standards of safety.

_____

Phil Johnson
Justice

OPINION DELIVERED: August 27, 2010

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, joined by JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE LEHRMANN, concurring and dissenting.

Irving Marks was a patient at St. Luke's Hospital, where he was recovering from back surgery. In the middle of the night, Marks attempted to get out of bed. He leaned on the bed's footboard, which came loose and collapsed beneath him, causing him to fall. The Court held in 2009 that Marks's lawsuit to recover for his resulting injuries targeted the negligent assembly and maintenance of the footboard—a premises liability claim. *Marks v. St. Luke's Episcopal Hosp.*, 52 Tex. Sup. Ct. J. 1184, 1185 (Aug. 31, 2009). The Court reasoned that the "safety" prong of the Medical Liability and Insurance Improvement Act (MLIIA)[1] is implicated only if the source of the

[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.

negligence is directly related to medical or health care services involving health care professionals and the exercise of medical or professional judgment. *Id*. at 1186-87. According to the Court, the alleged negligent assembly and maintenance of the bed's footboard was unrelated to professional judgment and was merely incidental to Marks's care. *Id*. at 1189. Because the case involved "ordinary negligence" that did not require for its resolution "the specialized knowledge of a medical expert," the Court rejected the hospital's contention that Marks's allegation was a health care liability claim. *Id*.

The Court changes course today. A plurality repeats our earlier holding that the safety prong is implicated only if the underlying claim directly relates to a patient's care and treatment. Now, however, the Court concludes that the hospital bed is an inseparable part of the treatment Marks received. But the footboard relates to a patient's health care in the same way that the stairs, walls, and utilities do: without access to the room, shelter from the elements, power to adjust the room's temperature and to run medical equipment, doctors would be unable to deliver medical services. Examples like these would easily fit within the definition of a health care liability claim, because they involve claimed departures from accepted standards of safety. The Court has rejected that view, however. In a prior case, I wrote that the Legislature's definition of "safety" forbids a premises liability claim against a health care provider, even if the claim is based on a "structural defect, criminal assault, or careless act." *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 861 (Tex. 2005) (Jefferson, C.J., concurring and dissenting). Had the *Diversicare* Court adopted that approach, the outcome of this case would not be in doubt. But the Court disagreed. It said that a patient may sue if a staircase gives way under her weight—a circumstance that would "give rise to

[a] premises liability claim[]." *Id.* at 854. The Court held that the touchstone for distinguishing between a premises and a health care claim is that the latter involves an act or omission that is "inseparable from the provision of healthcare." *Id.*

Consistency in the law is difficult to achieve, of course, but we should strive to explain any discord our opinions generate. *Diversicare* holds that premises liability claims are viable against health care providers. *Id*. at 855. If that is so, then the Court must explain how a piece of wood at the end of a bed is integral to medical care. The Court's previous opinion describes in great detail why the footboard was *not* integral to St. Luke's delivery of health care services to Marks, and I have attached it as an appendix.

Marks's complaint about how the footboard was maintained has nothing to do with the scope or degree of medical services he received, nor does it involve professional medical judgment about how the bed's configuration might aid in his treatment. The footboard could as easily have been a chair in his room or a bedside table. If Marks leaned on his bedside table as support and it collapsed, would that be a health care liability claim? What if Marks fell down a "rickety staircase" while perambulating for the first time after surgery? The Court offers no explanation as to how the bed's footboard differs from the "rickety staircase" described in *Diversicare*. *See id*. at 854.

The Court can approach this conundrum in one of two ways. The Court can either say that:

> Because the statute does not define "safety," we must assign it its common meaning. Safety is commonly understood to mean 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.

Id. at 860-61 (Jefferson, C.J., concurring and dissenting) (emphasis added) (citations omitted). Had that view prevailed, we would no longer discuss these types of claims in terms of "premises liability."

But the *Diversicare* Court rejected that approach, holding that health care liability claims must "implicate more than inadequate security or negligent maintenance." *Id*. at 854. It said that circumstances may "give rise to premises liability claims in a healthcare setting that may not be properly classified as healthcare liability claims." *Id*. at 854. We applied that conclusion in our first opinion in this case, stating that "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." *Marks*, 52 Tex. Sup. Ct. J. at 1189. The Court identified "several overlapping factors" to guide our determination, including whether the specialized knowledge of a medical expert may be necessary to prove the claim, whether a specialized health care standard applied, and whether the negligent act involved medical judgment related to the patient's care or treatment. *Id*. at 1189.

Nothing in the record or in the Court's new opinion establishes that a doctor's specialized knowledge is relevant here, nor that a the footboard was an integral component of Marks's treatment. Because I do not believe that the bed's footboard was integral to or inseparable from the health care services St. Luke's provided to Marks, I respectfully dissent from the Court's judgment affirming

the court of appeals' judgment on this ground.[2] I would affirm in part and reverse in part the court of appeals' judgment and remand the case to the trial court for further proceedings.

Wallace B. Jefferson
Chief Justice

Opinion Delivered: August 27, 2010

[2] I agree with the Court (as I did previously) that Marks's first three claims (involving negligent supervision, failing to provide Marks with the assistance he needed, and failure to provide a safe environment in which to receive treatment and recover) are health care liability claims and that the trial court did not abuse its discretion in denying Marks a grace period or in dismissing those claims.

APPENDIX

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.[3] 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

[3] *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).[4] 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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[4] 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.[5]

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[5] *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.[6] 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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[6] *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[7] 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.

[7] 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.[8] 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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[8] 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

JUSTICE GUZMAN, concurring and dissenting.

I join CHIEF JUSTICE JEFFERSON'S concurrence and dissent for the reasons he explains, namely that (1) our holding in *Diversicare* requires a health care liability claim to involve an act or omission that is inseparable from the provision of health care, *see Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 854 (Tex. 2005), and (2) the footboard on Marks's hospital bed was not an integral part of St. Luke's delivery of health care services to Marks. I write separately, however, because of an additional concern I have with the Court's judgment. The Medical Liability and Insurance Improvement Act (MLIIA) was enacted to remedy a medical malpractice insurance crisis

in Texas. TEX. REV. CIV. STAT. art. 4590i, § 1.02(a)(5)–(6) (repealed 2003).[1] By sweeping even simple negligence claims under the umbrella of medical malpractice insurance policies, the Court risks broadening the class of claims that medical malpractice insurance companies must cover. This, I fear, will thwart the very purpose of the MLIIA, which is to reduce the cost of medical malpractice insurance in Texas so that patients can have increased access to health care. *See id.* § 1.02(a)(4)–(5).

Health care providers generally carry both a malpractice policy to cover health care liability claims and a general liability policy to cover ordinary negligence. *See Diversicare*, 185 S.W.3d at 862 (O'Neill, J., dissenting) (citing *Cochran v. B.J. Servs. Co. USA*, 302 F.3d 499, 502 (5th Cir. 2002)). As the dissent explained in *Diversicare*, when courts determine that a claim is a health care liability claim, expenses related to that litigation likely will fall under the malpractice policy instead of the general liability policy. *Id.* Thus:

> the adoption of an overly broad interpretation of "health care liability claim" could . . . hinder the Legislature's goal of ensuring that medical malpractice insurance is available at a reasonable cost: if courts sweep even ordinary negligence claims into the ambit of the MLIIA, then malpractice insurers may end up covering more of those claims. Malpractice insurance rates would then continue to rise as those insurance policies are required to cover claims that were not contemplated under the insurance contracts.

Id. at 863.

As CHIEF JUSTICE JEFFERSON notes in his dissent, a variety of fixtures in a hospital enable doctors to provide medical services, many of which are merely incidental to the provision of health

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[1] Medical Liability and Insurance Improvement Act of Texas, 65th Leg., R.S., ch. 817, § 1.02(a)(5)–(6), 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. Similar medical liability legislation is now codified in Chapter 74 of the Texas Civil Practice and Remedies Code.

care services. In holding that even a hospital bed footboard is an integral and inseparable part of the delivery of health care services, it is unclear what acts of ordinary negligence occurring in a health care setting, if any, might still fall within the scope of premises liability rather than health care liability. The Legislature did not intend for the MLIIA to convert an ordinary, nonmedical negligence claim, like the one here, into a health care liability claim. Because the Court's interpretation of the statute contradicts this express intent, I join CHIEF JUSTICE JEFFERSON in concurring and dissenting from the Court's judgment.

_____
Eva M. Guzman
Justice

OPINION DELIVERED: August 27, 2010

IN THE SUPREME COURT OF TEXAS

NO. 07-0786

TEXAS DEPARTMENT OF INSURANCE, PETITIONER,

v.

RECONVEYANCE SERVICES, INC., RESPONDENT

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

PER CURIAM

Reconveyance Services, Inc., sued the Texas Department of Insurance for a declaration that charging additional fees for the services Reconveyance wished to provide in Texas is not prohibited by the Texas Insurance Code. Because we conclude that Reconveyance has pleaded an *ultra vires* action, in light of our decision in *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009), we reverse the court of appeals' judgment and render judgment dismissing Reconveyance's suit for lack of subject-matter jurisdiction.

According to its pleadings before the courts below,[1] Reconveyance is a Washington state corporation that provides what it describes as "post-closing mortgage release services" in several states other than Texas. When a buyer purchases a residential property, the lender's lien on the

[1] Reconveyance has filed neither response nor brief in this Court.

property often is not released by the seller's lender until some time after closing, securing the lender in the event the transaction does not close. Sometimes lenders neglect to file a release of the original seller's mortgage, and that preexisting lien could interfere with the buyer's later attempts to sell the home or refinance. For a fee, Reconveyance would undertake to obtain a release of that prior existing mortgage at the time the buyer initially purchases the home to ensure subsequent marketability of the buyer's title. To market its services to the widest number of Texas consumers, Reconveyance desired to have its services listed by Texas title agents as an optional, paid service available to buyers. Prior to doing so, however, a Reconveyance employee initiated communications with Department employees to determine how the Department would classify Reconveyance's proposed business model.

By way of the Texas Title Insurance Act, the Texas title insurance industry is to be "completely regulate[d]" by the Department. TEX. INS. CODE § 2501.002. By law, the Texas Commissioner of Insurance caps the premiums charged by title agents for three categories of services: title insurance, title examinations, and "closing the transaction." *See id.* § 2501.003(8) (defining premium); *id.* § 2501.006 (defining "closing the transaction"); *id.* § 2703.151 (directing the commissioner to fix and promulgate premium rates). A Department employee's response to Reconveyance's inquiry noted that he understood prior lien release services such as those proposed by Reconveyance to be among the costs to be borne by title agents.[2] The Department employee's response noted that the Department had initiated disciplinary action against at least one title agent

[2] It stands to reason that, because of the statutory cap on premiums for activities associated with closing the transaction, title agents whose fees were already at the statutory maximum could not legally charge an additional fee for Reconveyance's services.

for charging a fee for services similar to Reconveyance's. Title agents refused to list Reconveyance's service as an optional service to home buyers without Department approval, limiting Reconveyance's potential customer base.

Reconveyance sued the Department under the Uniform Declaratory Judgments Act, *see* TEX. CIV. PRAC. & REM. CODE §§ 37.001–37.011, for a judicial declaration that Reconveyance's mortgage release services are not a part of closing the transaction and that these services may be offered for a fee by title companies or agents in Texas. Reconveyance alleged that the Department acted beyond its statutory authority in attempting to prohibit Reconveyance from offering its services through title agencies. The Department filed a plea to the jurisdiction in the trial court. The trial court denied the plea and the Department took an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (permitting interlocutory appeal from an order that "grants or denies a plea to the jurisdiction by a governmental unit"). The court of appeals affirmed the trial court's judgment. 240 S.W.3d 418 (Tex. App.—Austin 2007). The court of appeals held that the trial court had jurisdiction because Reconveyance's pleadings sufficiently alleged an *ultra vires* action; i.e., the pleadings alleged that the Department had acted beyond its statutory authority, or *ultra vires*, in purporting to prohibit title companies and agents from charging a separate fee for Reconveyance's services. *Id.* at 430, 439. The Department petitioned this Court for review.

In *Heinrich*, decided after the court of appeals issued its opinion in this case, we confirmed 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." *Heinrich*, 284 S.W.3d at 372. However, "[t]o 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." *Id.* We held that "as a technical matter, the governmental entities themselves—as opposed to their officers in their official capacity—remain immune from suit" on such claims. *Id.* at 372–73. This rule "derives from the premise that the 'acts of officials which are not lawfully authorized are not acts of the State.'" *Id*. at 373 (quoting *Cobb v. Harrington*, 190 S.W.2d 709, 712 (Tex. 1945)). We concluded that suits complaining of *ultra vires* action may not be brought against a governmental unit possessed of sovereign immunity, but must be brought against the allegedly responsible government actor in his official capacity. *Id*.

Reconveyance's pleadings did not include the term "*ultra vires*," though it did urge the construction of its pleadings as such before the court of appeals. We agree that Reconveyance's allegations and requested declaration are, in substance, *ultra vires* claims. Here Reconveyance sued only the Texas Department of Insurance rather than Department officials acting in their official capacities. Thus, under *Heinrich*, the Department retains its sovereign immunity in this case and Texas courts are without subject-matter jurisdiction to entertain Reconveyance's suit as pleaded. Accordingly, without hearing oral argument, we reverse the court of appeals' decision as to Reconveyance's declaratory judgment action and render judgment dismissing its suit. TEX. R. APP. P. 59.1, 60.2(c).

OPINION DELIVERED: March 12, 2010

IN THE SUPREME COURT OF TEXAS

NO. 07-0787

SPECTRUM HEALTHCARE RESOURCES, INC., AND MICHAEL SIMS, PETITIONERS,

v.

JANICE MCDANIEL AND PATRICK MCDANIEL, RESPONDENTS

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 which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE GUZMAN joined.

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

The Texas Medical Liability Act imposes a threshold requirement in a healthcare liability lawsuit for the plaintiff to serve an expert medical report on the defendant within 120 days of filing the claim, the purpose of which is to ensure that only meritorious lawsuits proceed by verifying, at the outset, that the plaintiff's allegations are medically well-founded. TEX. CIV. PRAC. & REM. CODE § 74.351(a); *see Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 876–77 (Tex. 2001). In this healthcare liability suit, the defendants moved to dismiss the case after the plaintiffs

failed to serve their threshold expert report by the 120-day deadline. The plaintiffs argued that the deadline was extended by written agreement of the parties, in accordance with section 74.351(a) of the Texas Civil Practice and Remedies Code, in the form of the parties' agreed docket control order. After a hearing concerning the order's effect on the statutory deadline, the trial court granted the defendants' motion to dismiss. The court of appeals reversed, concluding that the docket control order was "an unambiguous agreement that extended the date for serving the section 74.351 expert report." 238 S.W.3d 788, 795 (Tex. App.—San Antonio 2007). The docket control order, however, made no mention of the section 74.351 expert report deadline. We hold that an agreement of the parties that is intended to extend the statutorily mandated 120-day expert report deadline must explicitly state that the agreement is for that purpose. An agreed docket control order that includes only a general discovery deadline for the production of expert reports is ineffective to extend the statute's specific threshold expert report requirement. We reverse the judgment of the court of appeals and reinstate the trial court's order dismissing the case.

I

According to the petition, Janice McDaniel's pelvis was broken while she was receiving physical therapy at Brooke Army Medical Center in San Antonio, Texas. In April 2004, Janice and Patrick McDaniel (collectively, McDaniel) filed a medical malpractice lawsuit against the United States of America, Spectrum Healthcare Resources, Inc., and therapist Michael Sims in the United States District Court for the Western District of Texas. McDaniel did not, however, serve an expert medical report within 120 days as required by section 74.351(a) of the Civil Practice and Remedies

Code.[1] Sims and Spectrum (collectively, Spectrum) filed a motion to dismiss the case under section 74.351(b)(2), which mandates dismissal with prejudice when the plaintiff fails to comply with the threshold expert report requirement. McDaniel responded that the procedural, discovery-oriented, requirements of the Civil Practice and Remedies Code would not apply in federal court because the federal discovery rules operated to preempt the relevant state laws. *See generally* FED. R. CIV. P. 26. The federal district court agreed with McDaniel and denied Spectrum's motion to dismiss on that ground. In the same order, the federal court granted the United States' earlier-filed motion for summary judgment. With the United States no longer a defendant, the court dismissed the entire federal case as to the remaining defendants without prejudice in November 2004 for lack of original federal jurisdiction.[2]

In May 2005, thirteen months after filing the federal lawsuit, McDaniel refiled the lawsuit against Spectrum in state district court. The parties entered into an agreed docket control order that set deadlines for designating testifying experts and producing expert reports. The order also permitted broad discovery to proceed immediately despite the discovery limitations of chapter 74. After McDaniel failed to serve a section 74.351 expert report within 120 days of filing the state court claim, Spectrum again moved to dismiss the case. As in federal court, McDaniel responded that the parties had agreed to extend the deadline for serving expert reports, including the section 74.351

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[1] The parties also agreed to a scheduling order in the federal district court.

[2] McDaniel argued, alternatively to the federal preemption argument, that even if chapter 74 did apply, the parties' agreed scheduling order operated to extend the chapter 74 deadlines. Because the federal court found the preemption issue dispositive and found chapter 74 deadlines not to apply at all, it did not address whether its standard scheduling order extended the deadline or not. *See McDaniel v. United States*, No. 04-CA-0314, 2004 WL 2616305, at *10 (W.D. Tex. Nov. 16, 2004).

expert report, by way of the docket control order, and that McDaniel had timely complied by serving such an expert report on Spectrum before the deadline contained in the docket control order. After a hearing concerning the applicability of the docket control order to the section 74.351 deadline, the trial court granted Spectrum's motion to dismiss, implicitly rejecting McDaniel's contention that the docket control order extended the chapter 74 expert report deadline.[3] Sitting en banc, a divided court of appeals reversed the trial court's order of dismissal, holding that the agreed docket control order unambiguously expressed the parties' intent to replace the statutory deadlines for serving all expert reports, including those required by section 74.351. 238 S.W.3d at 795.

II

The docket control order reads as follows:

> On this the 6th day of July, 2005, came to be heard, all parties to this cause of action who have agreed that the following dates of the Docket Control Order should be entered. It is, therefore, ORDERED, ADJUDGED and DECREED as follows:
>
> 1. Plaintiffs will designate all expert witnesses that they intend to call at the trial of this case, live or by deposition, and shall provide a written report and curriculum vitae of all retained experts in this case on or before **January 11, 2006**;
>
> 2. Defendant is to designate all expert witnesses it intends to call at the trial of this case, live or by deposition, and shall provide a written report and curriculum vitae of all retained experts in this case on or before **February 24, 2006**;
>
> 3. If the Court finds that this case is appropriate for alternate dispute resolution, mediation will be completed on or before

[3] The trial judge who signed the order of dismissal was not the same trial judge who signed the docket control order. *See* BEXAR COUNTY (TEX.) CIV. DIST. CT. LOC. R. 3 (regulating non-jury matters before a presiding court).

April 6, 2006, with a mediator mutually agreeable to and selected by the parties;

4. Deadline for completion of discovery in this case and for filing dispositive motions shall be on or before **April 21, 2006**; and

5. This case is specially set for trial on **May 22, 2006**.

It is further ORDERED to the extent these deadlines may be in conflict with deadlines set by rule or statute, the deadlines established by this Docket Control Order shall take precedence.

It is further ORDERED that the parties shall conduct discovery as soon as practicable, notwithstanding the limiting provisions found in Chapter 74 of the Texas Civil Practices and Remedies Code.

It is further, ORDERED that the above-stated deadlines shall not be changed or modified except upon written agreement of all parties or by order of this Court upon a showing of good cause.

McDaniel maintains that this docket control order contains the written agreement of the parties to extend the chapter 74 threshold expert medical report deadline. First, McDaniel says paragraph one imposes a deadline to do only two things: (1) designate testifying experts, and (2) provide written reports of all retained experts. McDaniel says that because an expert who prepares a chapter 74 medical report is a "retained expert," the paragraph necessarily must include that species of report. Second, McDaniel argues that to the extent the new deadline for serving the expert report is in conflict with the deadline mandated in chapter 74, the docket control order specifically takes precedence over any other deadline set by rule or statute. Finally, McDaniel urges that the order expressly permits the parties to conduct discovery despite the provisions of chapter 74 that would otherwise severely limit discovery until after the expert report is served. McDaniel claims this

provision makes it clear that the parties were aware of the chapter 74 limitations and requirements and agreed to waive those procedures.

Spectrum, on the other hand, argues that the docket control order is no more than a generic discovery order that cannot be reasonably construed as a written agreement to extend the date for serving the section 74.351 threshold expert medical report. Spectrum points out that the order makes no reference to chapter 74 expert reports and does not mention the 120-day deadline, such that it is not really about chapter 74 expert reports at all. Spectrum says the order is instead a fairly typical docket control order that includes matters that would ordinarily be found in such an order, like deadlines for completion of discovery and filing dispositive motions, and providing a trial setting. And also, like most docket control orders, it sets a deadline for the parties to designate their respective testifying experts and produce any reports that might have been generated by those testifying experts. Spectrum argues that the phrase "expert witnesses that they intend to call at the trial" in the first paragraph of the order defines the category of "retained experts" whose reports are to be produced, and can only mean testifying experts. Spectrum says the phrase cannot mean, as McDaniel suggests, that all retained expert reports must be produced by the stated deadline because reports of non-testifying consulting experts are not generally discoverable. Moreover, Spectrum contends that paragraph one cannot possibly include chapter 74 reports because paragraph two of the order uses identical text directing the defendant to serve its expert reports by a deadline and, of course, defendants are under no obligation to serve reports on plaintiffs under chapter 74. Lastly, Spectrum notes that McDaniel was well aware of this issue, having litigated it in federal court on a motion to dismiss, and could have avoided the same issue in state court by using explicit language.

We must decide whether a generic docket control order in a healthcare liability lawsuit that makes no reference to the section 74.351 threshold expert report requirement, but which establishes deadlines for the parties to produce reports of all "retained experts," establishes the intent of the parties to extend the statutory expert medical report deadline.[4] We hold that it does not.

III

We recognize, as did the court of appeals, that the statute itself does not require the express mention of section 74.351 threshold expert reports in parties' written agreements. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a) ("The date for serving the report may be extended by written agreement of the affected parties."). However, we believe that several considerations compel the conclusion that an agreed docket control order must explicitly reference section 74.351 threshold expert reports if the order is to constitute an agreement to extend that deadline.

First, a section 74.351 threshold expert report has a unique purpose separate and apart from the procedural rules relating to discovery and typical expert reports. The Legislature created the threshold report requirement as a substantive hurdle for frivolous medical liability suits before litigation gets underway. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(s) (staying all discovery, with few exceptions, until service of the threshold expert report); *Palacios*, 46 S.W.3d at 877 ("[E]liciting an expert's opinions early in the litigation [is] an obvious place to start in attempting to reduce frivolous lawsuits."). In recognition of their distinct role, threshold medical reports are treated differently from ordinary expert reports. One example of this distinct treatment is that a defendant

[4] Spectrum raises no issue about whether the expert report produced by McDaniel is sufficient to meet the requirements of a section 74.351 expert medical report, and we express no opinion in that regard. We assume without deciding that the report is sufficient to satisfy the statute.

may not use or even refer to the report for any purpose unless it is first used by the plaintiff. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(k), (t). Construing docket control orders as establishing a deadline for serving a section 74.351 expert medical report in the same way as any testifying expert report, in the absence of any reference to section 74.351's requirements, would eviscerate the statutory purpose of treating the threshold expert report differently. Accordingly, if parties intend to extend the 120-day deadline for a threshold expert report, the parties' agreed order must make a clear acknowledgment of their intent to do so.

Second, the interplay between docket control orders and the Texas Rules of Civil Procedure governing the required disclosure or protection from disclosure of certain experts and their reports demonstrates that it is extremely difficult to enter into a docket control order that would extend the section 74.351 threshold report deadline in the absence of an explicit reference to that specific deadline. *See generally* TEX. R. CIV. P. 192.7(c), (d). McDaniel contends that chapter 74 experts are generally "retained experts" whose reports would be disclosed under the language of a boilerplate docket control order such as the one at issue in this case. But this overlooks the fact that there is a difference between retained testifying experts and retained consulting-only experts. *See* TEX. R. CIV. P. 192.3(e). Under the Texas Rules of Civil Procedure, a retained testifying expert's report is always discoverable, but a retained consulting-only expert's report generally is not. *Id*.; *see also* TEX. R. CIV. P. 195 cmt.1 ("Information concerning purely consulting experts, of course, is not discoverable."). Section 74.351 makes clear that threshold expert reports fall into neither category. Such reports must be produced to the defendant, but generally they are not admissible and cannot be used in trial or any other proceeding. TEX. CIV. PRAC. & REM. CODE § 74.351(k); *but see id.*

§ 74.351(t) (providing an exception allowing defendant's use if plaintiff uses a threshold expert report first). Thus, an agreed order referring to "all retained experts" can be reasonably read to apply only to those retained experts whose reports are discoverable; i.e., testifying experts. Because not all retained expert reports are discoverable, a generic docket control order setting a deadline for production of "retained expert" reports must be more specific when purporting to extend the deadline to produce section 74.351 threshold expert reports.

Lastly, the ubiquity of agreed docket control orders militates the adoption of a simple standard for extending the threshold expert report deadline that litigants can easily meet and courts can readily apply. Agreed docket control orders are routinely used in Texas trial courts to allow parties to manage discovery, provide deadlines for dispositive motions, and set a conference or trial date, especially in medical malpractice suits. *See* TEX. R. CIV. P. 190.4. To require courts to scrutinize agreed docket control orders or gather additional evidence of the parties' intent to extend chapter 74's threshold expert report deadline along with the suit's unrelated discovery deadlines is impractical. It defeats the purpose of permitting the parties to agree to an order in the first place.

IV

We hold that when parties use an agreed order to extend the section 74.351 threshold expert report deadline, the order must explicitly indicate the parties' intention to extend the deadline and reference that specific deadline. Otherwise, the agreed order is ineffective to extend the section 74.351 deadline.[5] Because the agreed docket control order in this case did not explicitly reference

[5] Though only an agreed docket control order is presented in this case, we note that the considerations expressed above would apply equally, and thus require explicit reference to the threshold expert report deadline, in the context of other written agreements to extend the section 74.351 deadline.

and include the statutory threshold expert medical report deadline when extending McDaniel's deadline for designating testifying experts and producing expert reports, as a matter of law the order did not extend that deadline. We therefore reverse the court of appeals' judgment and reinstate the trial court's judgment of dismissal.

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Paul W. Green
Justice

OPINION DELIVERED: March 12, 2010

IN THE SUPREME COURT OF TEXAS

NO. 07-0787

SPECTRUM HEALTHCARE RESOURCES, INC., AND
MICHAEL SIMS, PETITIONERS,

v.

JANICE MCDANIEL AND PATRICK MCDANIEL, RESPONDENTS

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

Argued September 11, 2008

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

It is, therefore, ORDERED, ADJUDGED and DECREED as follows:

1. Plaintiffs will designate all expert witnesses that they intend to call at the trial . . . , and shall provide a written report and curriculum vitae of all retained experts in this case on or before **January 11, 2006**;

. . . .

It is further *ORDERED to the extent these deadlines may be in conflict with deadlines set by rule or statute, the deadlines established by this Docket Control Order shall take precedence.*

It is further ORDERED that the parties shall conduct discovery as soon as practicable, notwithstanding the limiting provisions found in Chapter 74 of the Texas Civil Practices and Remedies Code.

This is the order announcing the date by which McDaniel was required to serve her medical expert report, *irrespective of any statutory deadline*. Had she known that following the trial court's order would lead to dismissal of her claim, she could have taken steps to preserve her rights. Instead, having complied with the order, she now finds herself without recourse because "[a]n agreed docket control order that includes only a general discovery deadline for the production of expert reports is ineffective to extend the statute's specific threshold expert report requirement." ___ S.W.3d ___. I accept the value of the Court's bright-line rule, but I disagree with applying it to McDaniel's claim. I would apply today's decision prospectively, making it inapplicable to McDaniel or others who complied with trial court orders that altered the statutory deadline in healthcare liability suits. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-09 (1971);[1] *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536 (1991) (plurality opinion) (defining pure prospectivity); *Crowe v. Bolduc*, 365 F.3d 86, 93 (1st Cir. 2004) ("A court in a civil case may apply a decision purely prospectively, binding neither the parties before it nor similarly situated parties in other pending cases . . . .").

[1] The United States Supreme Court in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) (plurality opinion), rejected a modified prospectivity approach—when a court "appl[ies] a new rule in the case in which it is pronounced, [but] then return[s] to the old one with respect to all others arising on facts predating the pronouncement." *Beam*, 501 U.S. at 537; *see also Sw. Bell Tel. Co., L.P. v. Mitchell*, 276 S.W.3d 443, 450-52 (Tex. 2008) (Jefferson, C.J., dissenting) (rejecting modified prospectivity in a statutory construction case). The Supreme Court's approach to pure prospectivity remains to be seen. *See Harper*, 509 U.S. at 115 (O'Connor, J., dissenting) ("[N]o decision of this Court forecloses the possibility of pure prospectivity."); *Beam*, 501 U.S. at 544 ("We do not speculate as to the bounds or propriety of pure prospectivity."); *see also Educ. Credit Mgmt. Corp. v. Mersmann*, 505 F.3d 1033, 1051-52 (10th Cir. 2007); *Crowe v. Bolduc*, 365 F.3d 86, 93-94 (1st Cir. 2004); *Toms v. Taft*, 338 F.3d 519, 529 (6th Cir. 2003); *Glazner v. Glazner*, 347 F.3d 1212, 1216-19 (11th Cir. 2003); *Holt v. Shalala*, 35 F.3d 376, 380 n.3 (9th Cir. 1994). And, states are free to limit the retroactive operation of their own interpretations of state law. *Harper*, 509 U.S. at 100; *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 177 (1990) (plurality opinion).

This approach makes sense because, before today, litigants were operating under the expectation that the only requirement for extending the Chapter 74 deadline was a "written agreement," much like the agreed docket control order in this case. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a) (failing to mandate a specific format or to require a specific reference to section 74.351). Thus, today's decision involves an issue of first impression whose resolution was not clearly foreshadowed (and on which our courts of appeals are in conflict).[2] Retroactive application of the Court's rule will produce substantial inequitable results. *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4-5 (Tex. 1999). To avoid that injustice, *see Chevron Oil*, 404 U.S. at 107-08, I would hold that the Court's decision is applicable "to all conduct occurring after the date of [this] decision," *Beam*, 501 U.S. at 536.

I would affirm the court of appeals' judgment. Because the Court does otherwise, I respectfully dissent.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: March 12, 2010

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[2] *See, e.g.*, *Shelton v. Univ. of Tex. Med. Branch at Galveston*, No. 14-07-00994-CV, 2009 Tex. App. LEXIS 2543, at *12-*16 (Tex. App.–Houston [14th Dist.] Apr. 14, 2009, pet. filed) (mem. op.); *Lim v. West*, No. 01-08-00469-CV, 2008 Tex. App. LEXIS 8065, at *3-*6 (Tex. App.–Houston [1st Dist.] Oct. 23, 2008, pet. denied) (mem. op.); *Care Ctr., Ltd. v. Sutton*, No. 09-07-469-CV, 2008 Tex. App. LEXIS 2743, at *6-*12 (Tex. App.–Beaumont Apr. 17, 2008, pet. filed) (mem. op.); *King v. Cirillo*, 233 S.W.3d 437, 440-41 (Tex. App.–Dallas 2007, pet. filed); *Lal v. Harris Methodist Fort Worth*, 230 S.W.3d 468, 474-76 (Tex. App.–Fort Worth 2007, no pet.); *Brock v. Sutker*, 215 S.W.3d 927, 929 (Tex. App.–Dallas 2007, no pet.); *Rugama v. Escobar*, No. 04-05-00764-CV, 2006 Tex. App. LEXIS 2697, at *6-*8 (Tex. App.–San Antonio Apr. 5, 2006, no pet.) (mem. op.); *Hall v. Mieler*, 177 S.W.3d 278, 281-82 (Tex. App.–Houston [1st Dist.] 2005, no pet.); *Olveda v. Sepulveda*, 141 S.W.3d 679, 683-84 (Tex. App.–San Antonio 2004, pet. denied); *Cigna Healthcare of Tex., Inc. v. Pybas*, 127 S.W.3d 400, 408 (Tex. App.–Dallas 2004), *judgm't vacated & case dism'd pursuant to settlement*, 2004 Tex. App. LEXIS 2666 (Tex. App.–Dallas Mar. 25, 2004, no pet.) (mem. op.); *Tesch v. Stroud*, 28 S.W.3d 782, 787-89 (Tex. App.–Corpus Christi 2000, pet. denied); *Finley v. Steenkamp*, 19 S.W.3d 533, 539-40 (Tex. App.–Fort Worth 2000, no pet.).

IN THE SUPREME COURT OF TEXAS

NO. 07-0818

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P., PETITIONER,

v.

NATIONAL DEVELOPMENT AND RESEARCH CORPORATION, RESPONDENT

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

Argued December 9, 2008

JUSTICE JOHNSON delivered the opinion of the Court.

JUSTICE GUZMAN did not participate in the decision.

When a former client sues a lawyer for improperly prosecuting a prior lawsuit, part of what the plaintiff must prove is the amount of damages that would have been collectible from the defendant in the prior suit. In this legal malpractice case we address the following issues: (1) what evidence is necessary to prove damages would have been collectible in the prior case, and (2) whether a client may recover attorney's fees and expenses paid for representation in the prior case as damages in the malpractice case.

We hold that (1) the amount of damages that would have been collectible in the prior suit is the greater of the amount of a judgment for damages that would have been either paid or collected from the underlying defendant's net assets; and (2) the time at which collectibility is determined is

as of or after the time a judgment was first signed in the underlying case. We also hold that attorney's fees and expenses paid for representation in the underlying lawsuit may be recovered as damages to the extent they were proximately caused by the defendant's negligence.

Because there is legally insufficient evidence in this case to support a finding that damages in the underlying suit would have been collectible or that the defendant attorneys' negligence proximately caused the entire amount the jury awarded as damages for attorney's fees and expenses, we reverse the judgment of the court of appeals. Because there is evidence that the attorneys' negligence caused some amount of attorney's fees and expenses in the underlying suit, we remand to the court of appeals for further proceedings.

I. BACKGROUND

A. The Underlying Suit

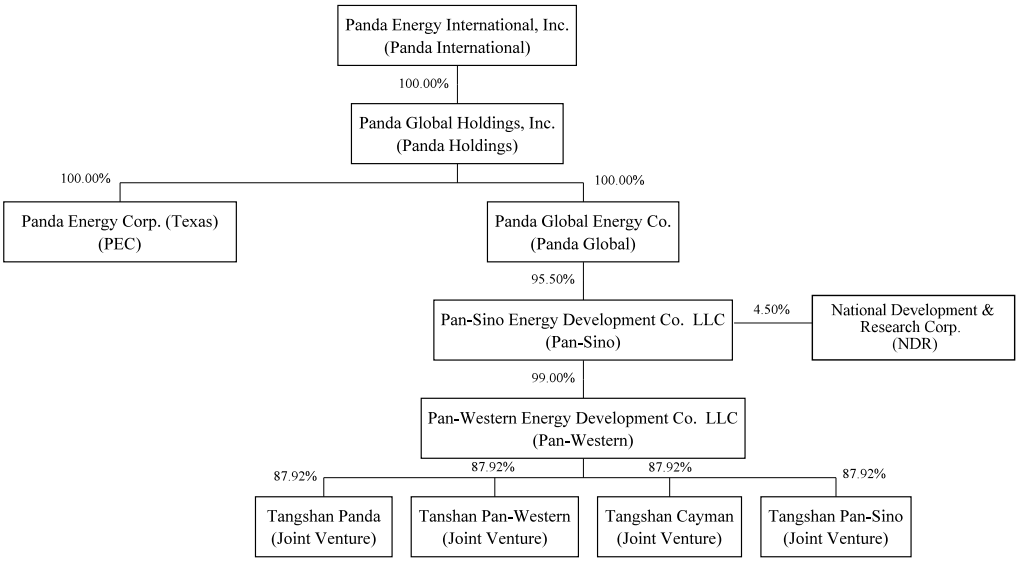
At times relevant to this matter, Panda Energy International Corporation (Panda International) was involved in developing energy-related projects. Its operations were conducted, in part, through several subsidiary corporations and joint ventures. In 1994, National Development and Research Corporation (NDR) entered into a Letter Agreement with Panda Energy Corporation (PEC), one of Panda International's subsidiary corporations, for NDR to assist PEC in locating and securing energy-related projects in China. NDR's compensation was to be (1) an annual service retainer, (2) stock grants in a Panda subsidiary corporation, and (3) success fees for each transaction that closed. To facilitate the stock grants, NDR and PEC entered into a Shareholders' Agreement with respect to Pan-Sino Energy Development Company, L.L.C. (Pan-Sino), the Panda subsidiary corporation whose shares would be transferred to NDR as part of its compensation. The

Shareholders' Agreement required NDR to sell its interest in Pan-Sino to PEC if the Letter Agreement was terminated.

Subsequently, and with NDR's approval, PEC assigned its interest in and obligations under the Letter Agreement to Panda International, the parent Panda corporation. PEC also sold its Pan-Sino stock to Panda Global Energy Company (Panda Global), another subsidiary of Panda International.[1]

In the spring of 1997, Panda Global, as the issuing company, closed a $155 million Senior Secured Notes offering (the bonds) from which a project in Luannan County, China (the Luannan project) was funded. NDR assisted with the Luannan project and, pursuant to the Letter Agreement, received 4 1/2% of Pan-Sino's stock. After NDR received its stock in Pan-Sino, and as relevant to this appeal, the corporate structure of the Panda entities and interests was as follows:

[1] NDR, PEC, and Panda International are Texas corporations. Panda Global and Pan-Sino are Cayman Island corporations. NDR, PEC, Panda International, and Panda Global have their principal offices in Dallas.



Shortly after funding closed on the Luannan project, Panda Global notified NDR that it was terminating the Letter Agreement and exercising its rights under the Shareholders' Agreement to purchase NDR's Pan-Sino stock. NDR disputed Panda Global's authority to take those actions. The dispute resulted in Panda Global filing a declaratory judgment action (the "underlying" or "Panda" suit) in Dallas County against NDR and its President, Robert Tang. NDR and Tang retained Akin Gump to represent them in the suit and agreed to pay the firm an hourly fee and a sliding percentage contingency fee on any recovery they obtained in the suit. NDR and Tang then, through Akin Gump, counterclaimed for declaratory judgment and breach of the Letter Agreement and filed third party claims against Panda International and Pan-Sino. The Panda entities responded by asserting claims against NDR and Tang for breach of contract, constructive fraud, breach of fiduciary duty, unjust enrichment, and negligence.

The case was tried to a jury in August 1999. The trial court held several post-trial hearings and signed, then modified, four successive judgments, all generally in favor of the Panda entities. Final judgment was signed on February 6, 2001, and provided that (1) Panda Global recover $111,043.50 from NDR and Tang as attorney's fees for obtaining the declaratory judgment; (2) Panda Global and Pan-Sino recover $316,273.50 from NDR as attorney's fees pursuant to the Shareholders' Agreement; (3) contingent attorney's fees be awarded in the event of appeal; and (4) all parties take nothing otherwise. The court of appeals affirmed the judgment. *Nat'l Dev. & Research Corp. v. Panda Global Energy Co.*, No. 05-00-00820-CV, 2002 WL 1060483 (Tex. App.—Dallas May 29, 2002, pet. denied) (not designated for publication).

B. The Malpractice Suit

NDR[2] later sued Akin Gump for legal malpractice based on its handling of the Panda suit. NDR asserted, in part, that Akin Gump negligently failed to request jury questions asking whether Panda breached the Letter and Shareholders' Agreements. NDR alleged that because there were no jury findings that the agreements were breached by Panda, the trial court rendered judgment against NDR despite the verdict having been favorable to NDR.

The malpractice jury found Akin Gump's negligence resulted in damages to NDR as follows: (1) $168,667.41 for the judgment paid by NDR in the Panda lawsuit; (2) $427,777.77 that was owed to NDR for the fair market value of its Pan-Sino stock; (3) $109,596.68 for success fees owed to

[2] Tang was initially a party in the suit but was dismissed in the trial court. He is not a party to this appeal.

NDR; and (4) $216,590.00 for attorney's fees and expenses paid by NDR in the Panda lawsuit. The trial court rendered judgment in favor of NDR according to the verdict.

Akin Gump did not appeal the negligence finding or damages awarded for the $168,667.41 NDR paid on the Panda judgment. 232 S.W.3d 883, 889. However, it appealed the other damage awards. The court of appeals reversed that part of the judgment awarding attorney's fees and expenses and affirmed the remainder of the judgment. *Id.* at 887.

We granted petitions for review filed by both Akin Gump and NDR. Akin Gump urges that the court of appeals erred in upholding the trial court's judgment for the value of NDR's Pan-Sino stock and success fees because (1) there is legally insufficient evidence to support the jury's finding that a favorable judgment in the Panda suit would have been collectible, (2) there is legally insufficient evidence to support the jury's finding as to the amount NDR was owed for the value of its Pan-Sino stock, and (3) the damages should have been reduced by the amount Akin Gump's contingency fee would have reduced NDR's net recovery.

NDR challenges the court of appeals' determination that attorney's fees it paid for representation in the Panda suit are not recoverable as damages.

We agree with Akin Gump that the evidence is legally insufficient to support the jury's findings that NDR would have collected damages awarded in the Panda suit for the value of NDR's Pan-Sino stock and for success fees. Absent such evidence, there is no evidence Akin Gump's negligence proximately caused those damages to NDR. We do not reach the law firm's issue challenging the evidentiary support for the damages findings or the issue of whether NDR's damages should be reduced by Akin Gump's contingency fee.

We also agree with NDR that it may recover damages for attorney's fees it paid[3] to its attorneys in the underlying suit to the extent the fees were proximately caused by the defendant attorneys' negligence. We conclude the evidence is legally sufficient to support a finding that some attorney's fees paid by NDR were proximately caused by Akin Gump's negligence, but the evidence is legally insufficient to support the finding of $216,590.

II. COLLECTIBILITY OF A JUDGMENT IN THE UNDERLYING SUIT

To prevail on a legal malpractice claim, the plaintiff must prove the defendant owed the plaintiff a duty, the defendant breached that duty, the breach proximately caused the plaintiff's injury, and the plaintiff suffered damages. *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995). When the claim is that lawyers improperly represented the plaintiff in another case, the plaintiff must prove and obtain findings as to the amount of damages that would have been recoverable and collectible if the other case had been properly prosecuted. *Cosgrove v. Grimes*, 774 S.W.2d 662, 666 (Tex. 1989). In *Cosgrove*, a lawyer was sued for failing to properly prosecute an automobile collision case. *Id.* at 662. The jury was charged to find the amount of damages the malpractice plaintiff would have "in reasonable probability recovered" and "in reasonable probability collected from [the defendant] *as a result of the collision*." *Id.* at 665 n.3 (emphasis added). Addressing the submission, we said, "The two issues should have inquired as to the amount of damages recoverable and collectible [in the prior case] if the suit had been *properly prosecuted*." *Id.* at 666.

[3] The jury found and NDR argues that the attorney's fees *paid* in the Panda suit are recoverable as damages. We address only that issue and express no opinion as to whether attorney's fees incurred but not paid in an underlying case would be recoverable as damages.

The jury in this case was charged to find the amount of damages that would have been "recovered and collected" in the prior case. In connection with the damages question, the jury was instructed:

> In determining damages, you are instructed to only consider the amount of money NDR actually would have recovered and collected from [Panda Global and Panda International].

See COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES, PRODUCTS PJC 84.3 cmt. (2008). Neither party questions whether the jury instruction was correct. *Cf. Cosgrove*, 774 S.W.2d at 665 n.3 (instructing jury to find the amount of damages the plaintiff would have collected to a reasonable probability). Because there was no objection to the charge as submitted, we assume, without deciding, that the instruction was correct and measure the evidence by the charge as given. *See Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000).

Akin Gump's argument on the collectibility issue is twofold. First, it asserts the court of appeals erred in considering evidence of collectibility as of the time the Panda suit was filed in 1997, as opposed to evidence of collectibility on or after the date execution could have issued on the final judgment. Second, it contends that if a judgment favorable to NDR had been rendered in the underlying suit for its Pan-Sino stock values and success fees, there is legally insufficient evidence that the judgment would have been collected.

A. When Must Judgment be Collectible

The Panda case was filed in October 1997 and tried in August 1999. The trial court signed its first judgment on February 25, 2000, and its final judgment on February 6, 2001. In affirming

the trial court judgment for NDR, the court of appeals considered evidence of the Panda entities' financial condition at times before any judgment was signed. In doing so, the court cited *Jackson v. Urban, Coolidge, Pennington & Scott*, 516 S.W.2d 948, 949 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.), for the proposition that the time to be considered in determining whether NDR would have collected on a judgment was "on the date the [underlying] case was filed or anytime thereafter." 232 S.W.3d at 895. Akin Gump asserts collectibility can only be proved by evidence of the underlying defendant's financial status as of the time execution could have been issued—thirty days after the final judgment was signed. We agree with Akin Gump's position in part.

NDR, citing Texas Civil Practice and Remedies Code sections 31.002 and 63.001(c), argues that the court of appeals was correct: evidence of collectibility prior to the date the judgment was signed is relevant because some remedies are available to judgment creditors even before a judgment becomes final. Section 31.002, commonly referred to as the "turnover statute," allows a party that has already secured a final judgment to collect the judgment through a separate court proceeding. TEX. CIV. PRAC. & REM. CODE § 31.002; *see also Schultz v. Fifth Judicial Dist. Court of Appeals at Dallas*, 810 S.W.2d 738, 739 n.3 (Tex. 1991) (stating that the "purpose of the turnover statute is to aid the collection of final money judgments"). Because that section does not address prejudgment remedies, it does not aid NDR here.

Section 63.001 contemplates the availability of prejudgment writs of garnishment. But NDR did not attempt to garnish any Panda assets before judgment nor did it prove that it would have been entitled to do so. Accordingly, Section 63.001 does not make evidence of Panda International's

prejudgment financial condition relevant in determining collectibility of a judgment favorable to NDR.

We next address Akin Gump's position that a plaintiff must prove a judgment would have been collectible when the judgment becomes final or at some later time.[4] Texas Rule of Civil Procedure 627 states that unless an exception applies, "the clerk of the court or justice of the peace shall issue the execution upon [a] judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed." TEX. R. CIV. P. 627. Depending on the particular case's circumstances, however, the thirty-day period may be shortened or extended. *See* TEX. R. CIV. P. 628 (allowing a trial court to issue execution any time before the thirtieth day after the final judgment is signed if the plaintiff shows that the defendant may remove personal property subject to execution out of the county); TEX. R. CIV. P. 627 (extending the period for which a clerk must wait before issuing execution when a motion for new trial or a motion in arrest of judgment is filed). Further, unless the judgment debtor properly supersedes the judgment, the judgment creditor is not precluded from immediately filing an abstract of judgment to aid in seeking satisfaction of its judgment. *See* 5 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 31:2 (2d ed. 1999).

In light of the foregoing, we conclude that evidence a defendant in the underlying suit could have satisfied a judgment at times *prior* to the time a judgment is signed generally will not be

[4] To be enforced, an unsatisfied final judgment must not have become dormant and must not be preempted by federal law. *See* TEX. CIV. PRAC. & REM. CODE § 34.001; 5 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 31:3 (2d ed. 1999). Here, however, there is no contention that a judgment in the Panda suit would have been dormant or preempted by federal law.

relevant to and will not be probative of the judgment's collectibility unless, as discussed below, it is also shown that the defendant's ability to satisfy a judgment was not diminished by the passage of time until judgment was signed. On the other hand, because a judgment creditor does not have to wait thirty days past signing of the final judgment to begin procedures for collecting its judgment, evidence that the judgment would have been collectible on or after the date a judgment was first signed will be relevant.

Part of the evidence NDR references predates not only signing of a judgment in the Panda suit but the suit itself. We agree that prejudgment or pre-suit evidence of solvency or other evidence that damages would be collectible from a defendant could be sufficient to support a finding that damages were later collectible, provided the evidence also shows a reasonable probability that the underlying defendant's financial condition did not change during the time before a judgment was signed in a manner that would have adversely affected collectibility. Absent such evidence as to the gap time period, however, a factfinder could only speculate as to how events during the period affected the judgment debtor's finances. Findings based on speculation are not based on legally sufficient evidence. *See Leitch v. Hornsby*, 935 S.W.2d 114, 119 (Tex. 1996) (noting that proof of causation cannot rest on speculation or conjecture).

B. Evidence of Collectibility

The court of appeals stated that a legal malpractice plaintiff must prove the underlying defendant was solvent in order to prove collectibility of damages that would have been recovered in the underlying suit. 232 S.W.3d at 895. We agree with the court of appeals, at least in part. Proving the underlying defendant was solvent is one way to prove collectibility when "solvent"

means the underlying defendant owned sufficient property subject to legal process to satisfy all outstanding debts and have property remaining to satisfy some or all of the damages the malpractice plaintiff would have recovered. *See* BLACK'S LAW DICTIONARY 434 (8th ed. 2004) (defining a "solvent debtor" as a debtor who owns enough property to satisfy all outstanding debts and against whom a creditor can enforce a judgment). But collectibility may also be shown in other ways. For example, some judgment debtors might be classified as insolvent because they have a balance sheet showing more debts than assets, or showing liens or pledges that encumber their property, yet there is insurance or a surety that will pay some or all of the judgment. Or an insolvent judgment debtor might have current income, profits, or access to finances that can be diverted to satisfy a judgment. Evidence that damages awarded against the debtor in the underlying suit probably would have been paid, even though the debtor was not solvent, would be probative evidence that the damages were collectible.

Generally, then, the amount that would have been collectible in regard to an underlying judgment—provided the judgment is not dormant or preempted—will be the greater of either (1) the fair market value of the underlying defendant's net assets that would have been subject to legal process for satisfaction of the judgment as of the date the first judgment was signed or at some point thereafter, or (2) the amount that would have been paid on the judgment by the defendant or another, such as a guarantor or insurer. *See* 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 31.17 (2009); *see also James V. Mazuca & Assocs. v. Schumann*, 82 S.W.3d 90, 96 (Tex. App.—San Antonio 2002, pet. denied) (finding collectibility was adequately shown by a

letter recognizing the defendant in the underlying suit was insured and the policy would have satisfied a judgment against the defendant). But collectibility must be proved; it is not presumed.

We next consider Akin Gump's contention that the evidence was legally insufficient to support the jury's finding that NDR would have collected damages for the value of its Pan-Sino stock and success fees had they been awarded in the Panda suit. In doing so, we note NDR did not claim in the court of appeals that Panda Global was solvent or that damages would have been collectible from it. *See* 232 S.W.3d at 895 (noting that the parties did not dispute that Panda Global was insolvent). Nor does it do so here. Accordingly, our focus will be on whether NDR would have recovered and collected damages from Panda International.

C. Analysis

In reviewing a legal sufficiency challenge to the evidence, we credit evidence that supports the verdict if reasonable jurors could have done so and disregard contrary evidence unless reasonable jurors could not have done so. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). A legal sufficiency challenge "will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). "Evidence does not exceed a scintilla if it is 'so weak as to do no more than create a mere surmise or suspicion' that the fact exists." *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006) (quoting *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004)).

The jury charge instructed that in determining damages the jury was to consider the amount NDR would have collected from "Panda." "Panda" was defined as Panda International and Panda Global. As previously noted, however, because NDR did not address the collectibility of damages from Panda Global in the court of appeals and does not do so here, our review is for evidence that damages would have been collectible from Panda International.

NDR generally contends the evidence showing Panda International "owned numerous subsidiaries with hundreds of millions of dollars of assets is evidence that Panda [International], through its ownership of these subsidiaries, had sufficient assets to pay" a judgment. Specifically, NDR points to the following as legally sufficient evidence of collectibility from Panda International: (1) May 2001 "Consolidated Financial Statements" which were attached to a Panda International business records affidavit and showed over $47 million of owner's equity; (2) Panda International owned 100% of the stock of Panda Holdings, Inc. (Panda Holdings) and a May 1999 investor service report showed that Panda Holdings had $70 million on its balance sheet; (3) Tang's testimony that Panda International and Panda Global indirectly owned a portion of the Luannan project as well as several other power projects in the United States, Latin America, and Asia; (4) the value of Pan-Sino stock owned by Panda Global (which was wholly owned by Panda International) would have been over $8 million based on the jury finding as to the value of NDR's 4.5% ownership interest in Pan-Sino; (5) the ability of Panda International and Panda Global to pay NDR $593,000 in success fees in 1997; and (6) the award of attorney's fees to Panda International and Panda Global in the underlying suit as well as their ability to pay their own attorneys to prosecute their claims against NDR. We will address the evidence as it is categorized by NDR.

First, the consolidated financial statements which NDR refers to as part of Panda International's business records, and as showing "owner's equity," comprise just over one page. The document heading states "Consolidated Financial Statements (JV1-JV4) as of May 2001." The statements (1) do not purport to represent Panda International's financial capabilities or access to any asset shown on the financial statement, and (2) do not expressly set out which Panda entities were included in the statement, but imply that only the financial condition of the four joint ventures is represented. The same group of business records included a one-page balance sheet from Pan-Western, the subsidiary through which Panda International's interest in the joint ventures flowed.[5] Pan-Western owned 87.92% of the joint ventures. The Pan-Western balance sheet, however, showed no owner's equity and indicated that as of May 31, 2001, the Luannan Project had not commenced commercial operations, Pan-Western had not yet received any interest on loans it made to the joint ventures to fund the project, and Pan-Western had paid no interest on the $96.136 million in loans it received from Panda Global, the issuer of the $155 million in bonds that funded the Luannan project.

To the extent the consolidated financial statement referenced the joint ventures, the joint ventures were not parties to the Panda suit, nor did NDR allege that it would have been entitled to collect a judgment from any of them. *See* TEX. BUS. ORGS. CODE § 21.223 (stating that any affiliate of a corporation shall be under no obligation to the corporation or to its obligees with respect to "any

[5] As we begin our analysis of the evidence, it is helpful to review the relationships among the Panda entities. Panda International owned 100% of Panda Holdings, which owned 100% of Panda Global. Panda Global owned 95.5% of Pan-Sino (NDR owned the other 4.5%). Pan-Sino owned 99% of Pan-Western. Pan-Western owned 87.92% of each of the joint ventures, which in turn owned the Luannan facilities.

contractual obligation of the corporation or any matter relating to or arising from the obligation" unless "the obligee demonstrates that the . . . affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee"). Nor does one corporation's ownership of all or the majority of a second entity affect the second entity's existence as a distinct, separate legal entity. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 798 (Tex. 2002); *Lucas v. Tex. Indus., Inc.*, 696 S.W.2d 372, 374 (Tex. 1984); *Gentry v. Credit Plan Corp. of Houston*, 528 S.W.2d 571, 573 (Tex. 1975); *Bell Oil & Gas Co. v. Allied Chem. Corp.*, 431 S.W.2d 336, 337 (Tex. 1968). The consolidated financial statements NDR references are not evidence that a judgment would have been collectible from Panda International as of or after February 2000.

Next, NDR references a report reflecting that Panda Holdings's May 1999 balance sheet showed it had "millions of dollars." To begin with, NDR does not contend that it would have been entitled to collect its damages from Panda Holdings, a separate corporation, and Panda International's ownership of Panda Holdings is not, by itself, evidence that NDR would have collected any amount from Panda International, the parent corporation. *See* TEX. BUS. ORGS. CODE § 21.223; *BMC Software*, 83 S.W.3d at 798. Further, the report was dated May 14, 1999, which was more than nine months before the first judgment was signed on February 25, 2000. And the May 1999 report itself negates its value as evidence a judgment would have been collectible from Panda Holdings, even disregarding the fact Panda Holdings is a separate corporation from Panda International. The document is a third party report disclosing that "Moody's Investors Service has downgraded the bonds of Panda Global Energy from B2 to B3. The rating outlook is negative." The

report says that Panda Holdings "has up to $70-million available on its balance sheet *currently*," but "*there is no certainty as to how much may be available both in the short- and medium-term to supply Panda Global"* (emphasis added). To the extent NDR's argument is that cash held by Panda Holdings implies the corporation was an asset evidencing Panda International's solvency, we disagree with it. The Offering Memorandum for the $155 million bond issue contains financial data for Panda Holdings, including an Unaudited Pro Forma Consolidated Balance Sheet as of December 31, 1996. The balance sheet showed Panda Holdings' liabilities exceeded its assets by $101.5 million. There is no evidence that its financial situation improved even though it sold one of its assets and had $70 million in cash as of May 1999. No evidence shows whether the asset sale was at a loss or profit, how the sale affected the solvency of Panda Holdings itself, whether the cash was committed to and used for other projects or to pay creditors, or other such details. The May 1999 report simply is not evidence that damages would have been collectible from Panda International.

Third, the fact that success fees were paid to NDR in May 1997 is no evidence a judgment in the Panda suit would have been collectible over two years later. There is no evidence of events between the time the success fees were paid and the time judgment was signed except testimony evidencing financial deterioration of the Panda entities and projects.

NDR argues that collectibility is also shown by Panda International's indirect ownership of the Luannan Project and other power projects and Tang's testimony as to Panda International's ownership of the projects. Tang testified that Panda International indirectly owned multiple projects. But Tang's testimony is no better evidence a judgment would have been collectible from Panda International than the financial statement in Panda International's business records. First, the

evidence was uncontroverted that the joint ventures directly owned the Luannan project and there were several corporate entities between the joint ventures and Panda International. Moreover, there was no evidence the judgment was collectible from the joint ventures themselves, and NDR does not contend it would have been. Second, Tang's testimony did not set out any particular owner's equity, cash on hand, current assets, or similar details that would support a conclusion Panda International was solvent or that NDR could have collected any damages from it. Third, testimony from the Panda trial of a Panda International employee with first-hand knowledge of Panda International's affairs was read into evidence. The employee's testimony was that he was "trying to save the company" because the Luannan project "cannot meet its debt, and therefore, we are at risk of foreclosure."

Next, the total value of the Pan-Sino stock based on NDR's ownership interest is not evidence that damages in the Panda suit would have been collectible. The court of appeals relied on the jury finding that NDR's interest in Pan-Sino stock was valued at over $400,000 to conclude that the remaining 94.5% of Pan-Sino stock was worth over $8 million. The court attributed that value to Panda International. 232 S.W.3d at 895. But on April 11, 1997, four years prior to the final judgment in the Panda suit, PEC had transferred all the Pan-Sino stock to Panda Global, which NDR does not contend was solvent. The Chairman of the Board and Chief Executive Officer of Panda International testified in the Panda trial that bonds with a face value of over $155 million issued in 1997 to finance the Luannan project were trading at "30 to 40 cents on the dollar" at the time of the Panda trial because the "Chinese markets ha[d] deteriorated dramatically . . .. Banks ha[d] lost all confidence in this Chinese market." His testimony was introduced as evidence in the malpractice suit. Further, notes accompanying a Balance Sheet for Pan-Western Energy Corporation LLC (Pan-

Western) stated that as of May 31, 2001, the Luannan Project had not commenced commercial operations, Pan-Western had not received any interest on loans it made to fund the project, and Pan-Western had not paid any interest on the loans it received from Panda Global, the issuer of the bonds that funded the project. The Bond Offering Memorandum showed that the $155 million bonds were secured not only by the assets of Panda Global, including the Pan-Sino stock, but by the capital stock of Panda Global itself.[6] The only interest Panda International had in the Pan-Sino stock flowed from Panda Global's status as a subsidiary of Panda International, and any value the Pan-Sino stock had was subsumed in the uncontested insolvent financial status of Panda Global.

NDR asserts that the award of attorney's fees Panda Global incurred in the Panda suit and the fact that Panda International and Panda Global obtained representation in the Panda suit are evidence a judgment against them was collectible. We disagree. First, if judgment in the Panda suit had been in favor of NDR, then Panda Global would not have recovered attorney's fees. Therefore, the fact it recovered fees in the suit has no bearing on whether a judgment *against* Panda Global would have been collectible. *See Cosgrove*, 774 S.W.2d at 666. Second, as to NDR's assertion that a judgment would have been collectible because the Panda parties had sufficient assets to pay attorneys in the underlying lawsuit, NDR offered no evidence of (1) the terms by which the attorneys for the Panda entities were compensated, (2) whether the attorneys were actually paid, (3) the source

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[6] The record shows that Panda Global owned 94.5% of Pan-Sino, which in turn owned 99% of Pan-Western. The 1997 Bond Offering Memorandum stated that the bonds were secured by a pledge of 100% of Panda Global's Capital Stock as well as by

> a security interest in certain assets of [Panda Global] and its Subsidiaries, including a pledge of (i) at least 90% of the Capital Stock of Pan-Sino, (ii) 99% of the Capital Stock of Pan-Western, (iii) the Issuer Note and (iv) the Luannan Facility Notes and the granting of a security interest in certain funds of [Panda Global] and its Subsidiaries maintained by the Senior Secured Notes trustee.

of any funds used to pay the attorneys, even if they were paid, or (4) if any funds that might have been used to pay the Panda attorneys would have been used to pay NDR's damages.

In sum, none of the evidence NDR cites is legally sufficient to prove collectibility of damages it would have been awarded in the Panda suit for its Pan-Sino stock value and success fees. Accordingly, we need not and do not reach the issues of whether there was evidence to support the jury findings as to the amount of NDR's damages and whether the judgment in favor of NDR should have been reduced by the contingency fee Akin Gump would have collected had NDR prevailed in the Panda lawsuit.

III. ATTORNEY'S FEES AS DAMAGES

In its petition, NDR argues that the court of appeals erred in holding the attorney's fees it paid in the Panda lawsuit are not recoverable. 232 S.W.3d at 897. It says the fees paid to appeal the judgment in Panda's favor are economic damages proximately caused by Akin Gump's negligent failure to properly submit jury questions.[7]

Citing *Turner v. Turner*, 385 S.W.2d 230, 233 (Tex. 1964), NDR acknowledges the general rule that a party may not recover attorney's fees for the litigation in which it is involved unless recovery is authorized by statute or contract. It urges adoption of the "tort of another" exception. *See* RESTATEMENT (SECOND) OF TORTS § 914(2) (1977) (allowing a party to recover attorney's fees

[7] In its petition for review, NDR claims that legally sufficient evidence supports the jury finding it paid attorney's fees to Akin Gump for appeal. In its reply brief, NDR argues that it also paid post-trial and appellate attorney's fees to two attorneys who were not members of the firm and the evidence it paid those fees also supports the jury finding. Akin Gump asserts NDR did not timely raise the argument about evidence of fees paid to separate counsel supporting the jury finding. We believe the argument is fairly encompassed within the issue framed by NDR. TEX. R. APP. P. 53.2 (f) ("The statement of an issue or point [in a petition for review] will be treated as covering every subsidiary question that is fairly included.").

when that party must, as a result of some tort committed by another, bring or defend an action against a third party). NDR contends that under the exception, it can recover the attorney's fees it had to pay for appealing the Panda judgment.

As to the jury's finding on attorney's fees, Akin Gump asserts (1) NDR is seeking fee disgorgement, which is available only if the attorneys breached a fiduciary duty to NDR, but NDR did not plead or request jury questions on breach of fiduciary duty, *see Burrow v. Arce*, 997 S.W.2d 229, 241-43 (Tex. 1999); (2) the "tort of another" exception to the general rule is not implicated by facts such as these where the fees being sought were paid to the defendant attorneys in the underlying suit; (3) NDR did not prove it paid the appellate fees it seeks to recover; and (4) to the extent NDR paid the fees, the fees would have been incurred regardless of the firm's negligence and therefore were not proximately caused by Akin Gump's actions.[8]

We disagree with Akin Gump that attorney's fees paid in an underlying suit can only be recovered through forfeiture for breach of fiduciary duty. For the reasons set out below, we conclude the general rule as to recovery of attorney's fees from an adverse party in litigation does not bar a malpractice plaintiff from claiming damages in the malpractice case for fees it paid its attorneys in the underlying suit. Because the general rule does not apply to NDR's claim, we need not and do not address whether the exception set out in section 914(2) of the Second Restatement should be adopted as Texas law.

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[8] Akin Gump does not assert the collectibility argument in response to NDR's petition seeking attorney's fees based on the actual jury finding awarding attorney's fees. The firm makes the collectibility argument as to attorney's fees only in response to NDR's argument that if Akin Gump had not negligently submitted the underlying case, NDR would have recovered its appellate attorney's fees under Texas Civil Practice and Remedies Code § 38.001.

A. The American Rule

It has long been the rule in Texas that attorney's fees paid to prosecute or defend a lawsuit cannot be recovered in that suit absent a statute or contract that allows for their recovery. *See 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."); *Wm. Cameron & Co. v. Am. Sur. Co. of N.Y.*, 55 S.W.2d 1032, 1035 (Tex. Comm'n App. 1932, judgm't adopted) ("It is settled law in this state that, unless provided for by statute or by contract between the parties, attorneys' fees incurred by a party to litigation are not recoverable against his adversary either in an action in tort or a suit upon a contract."); *Sherrick v. Wyland*, 37 S.W. 345, 345 (Tex. Civ. App. 1896) ("It has often been ruled, in this state and elsewhere, that fees of counsel, incurred in prosecuting a suit for or defending against a wrong, are not ordinarily recoverable as actual damages, because they are not considered proximate results of such wrong."). The rule is known as the American Rule. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 602 (2001) ("[P]arties are ordinarily required to bear their own attorney's fees—the prevailing party is not entitled to collect from the loser."); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

The court of appeals in this case concluded that attorney's fees are not recoverable as damages for legal malpractice. 232 S.W.3d at 896-97 (citing *El Dorado Motors, Inc. v. Koch*, 168 S.W.3d 360, 366 (Tex. App.—Dallas 2005, no pet.) (noting that attorney's fees are not recoverable in a legal malpractice suit because attorney's fees expended in prior litigation are recoverable only when provided for by contract or agreement between the parties)). The court of appeals also cited

Martin-Simon v. Womack, 68 S.W.3d 793, 797-98 (Tex. App.—Houston [14th Dist.] 2001, pet. denied), where it was held that a plaintiff in an interference-with-contract case could not recover attorney's fees as damages when the fees were paid in a prior suit related to enforcement of the contract. That court relied on *Dallas Central Appraisal District v. Seven Investment Co.*, 835 S.W.2d 75, 77 (Tex. 1992), and *New Amsterdam Casualty Co. v. Texas Industries, Inc.*, 414 S.W.2d 914, 915 (Tex. 1967), for the proposition that attorney's fees are not recoverable unless provided for by statute or contract. But those cases should not be read so broadly.

For example, in *New Amsterdam Casualty Co.*, we considered the appeal of a case in which an unpaid materialman sued a construction contractor and its surety. *New Amsterdam Cas. Co.*, 414 S.W.2d at 914. Judgment was rendered in favor of the materialman for the amount due on the materials plus attorney's fees for prosecuting the suit. *Id.* at 915. The appeal before this Court concerned only the award of attorney's fees. *See id.* The Court reversed the award of attorney's fees and rendered judgment in favor of the surety. *Id.* at 916. In doing so, we "reaffirmed the rule previously recognized as settled law . . . that attorney's fees are not recoverable either in an action in tort or a suit upon a contract unless provided by statute or by contract between the parties." *Id.* at 915. Our statement, considered without reference to the facts of the case, could be read out of context as generally precluding recovery of attorney's fees for prosecuting or defending a suit. It was not intended to extend so far.

The situation before us does not involve the American Rule that prevails in Texas. NDR does not seek to recover attorney's fees for prosecuting its malpractice suit against Akin Gump. It seeks damages measured by the economic harm it suffered from Akin Gump's breach of its duty of

care in prosecuting the Panda suit. Akin Gump does not contend it did not have or did not breach a duty of care. Thus, unless there is some reason not to consider the Panda suit attorney's fees as damages in the malpractice suit, the question becomes an evidentiary one: Does evidence support the jury's finding that $216,590 in attorney's fees and expenses were proximately caused by Akin Gump's negligence?

Akin Gump, in effect, urges us to exclude all the Panda suit attorney's fees from being considered as damages. It says that awarding damages for the fees would be fee forfeiture by another name, and NDR did not plead or obtain findings that Akin Gump breached a duty that would allow fee forfeiture under the holding of *Burrow v. Arce*. *See Burrow*, 997 S.W.2d at 241-43. We disagree with the proposition.

If an attorney has breached his or her fiduciary duty to a client, then part or all of the fees the client paid may be recovered through disgorgement and forfeiture. *See id.* at 237. In *Burrow*, we noted our agreement with the following forfeiture rule: "A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter." *Id.* at 241-42 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996)). But because attorney's fees in an underlying case may be subject to forfeiture for breach of fiduciary duty, it does not follow that fees and expenses paid to attorneys who negligently try a suit should not be recoverable as compensatory damages in a second suit for malpractice.

In *Burrow*, the plaintiffs were injured in explosions at a Phillips 66 chemical plant. *Burrow*, 997 S.W.2d at 232. The defendant lawyers represented the plaintiffs in a suit for their personal

injuries. *Id.* The suit was settled and the plaintiffs received settlement payments. *Id.* They then sued their lawyers for breach of fiduciary duty, fraud, violations of the Deceptive Trade Practices-Consumer Protection Act, negligence, and breach of contract. *Id.* at 232. The trial court granted summary judgment for the defendant attorneys on the basis that the settlement in the underlying case was fair and reasonable and any misconduct of the lawyers did not cause damages to the plaintiffs. *Id.* at 233.

This Court held that the defendants were not entitled to summary judgment because they did not establish as a matter of law that the plaintiffs suffered no actual damages. *Id.* at 237. As to the breach of fiduciary duty claim, though, we held that a client need not prove actual damages as part of the breach of fiduciary duty claim. *Id.* at 240. We remanded the claim to the trial court for determination of whether the lawyers breached their fiduciary duties and if so, the appropriate amount of fee forfeiture. *Id.* at 246. The question of whether the plaintiffs were precluded from recovering, as damages in a malpractice case, attorney's fees paid to the defendant lawyers in the underlying case was not before the Court in *Burrow*. As we said, "[t]he main purpose of [fee] forfeiture is not to compensate an injured principal, even though it may have that effect. Rather, the central purpose of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty." *Id.* at 238.

A negligence claim, unlike a fee forfeiture claim for breach of fiduciary duty, is about compensating an injured party. *See Douglas v. Delp*, 987 S.W.2d 879, 885 (Tex. 1999) ("[W]hen the injuries caused by an attorney's negligence are economic, the plaintiff can be fully recompensed by the recovery of any economic loss. Restoration of the pecuniary interest suffices to return a

plaintiff to her prior circumstances."); THOMAS D. MORGAN, LAWYER LAW: COMPARING THE ABA MODEL RULES AND THE ALI RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 98 (2005) ("A key distinction between fee forfeiture and the malpractice remedy is that the amount forfeited need have no relation to actual damages suffered by the client.") (emphasis omitted); RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1977) ("When there has been harm only to the pecuniary interests of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed.").

We see little difference between damages measured by the amount the malpractice plaintiff would have, but did not, recover and collect in an underlying suit and damages measured by attorney's fees it paid for representation in the underlying suit, if it was the defendant attorney's negligence that proximately caused the fees. In both instances, the attorney's negligence caused identifiable economic harm to the malpractice plaintiff. The better rule, and the rule we adopt, is that a malpractice plaintiff may recover damages for attorney's fees paid in the underlying case to the extent the fees were proximately caused by the defendant attorney's negligence. *See Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 119 (Tex. 2004); *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799 (Tex. 1974); 3 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 21:19 (2009).

B. Analysis

NDR's position is that it incurred damages by paying attorney's fees to appeal the judgment rendered against it because Akin Gump negligently failed to request inclusion of necessary questions

in the jury charge. NDR does not contest its burden to prove that Akin Gump's negligence proximately caused it to pay the fees and expenses it seeks to recover.

Proximate cause has two elements: cause in fact and foreseeabilty. *IHS Cedars Treatment Ctr. of Desoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). Cause in fact must be established by proof that (1) the negligent act or omission was a substantial factor in bringing about the harm at issue, and (2) absent the negligent act or omission ("but for" the act or omission), the harm would not have occurred. *See id.* at 799. Causation must be proved, and conjecture, guess, or speculation will not suffice as that proof. *Leitch*, 935 S.W.2d at 119; *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995).

1. Fees and Expenses Paid to Akin Gump

NDR does not contest the reasoning of the court of appeals that "even a successful litigant may be forced to defend its judgment when the losing party appeals." 232 S.W.3d at 896. Instead, NDR argues that the court of appeals overlooked Texas Civil Practice and Remedies Code section 38.001, which allows a successful litigant on a breach of contract claim to recover its attorney's fees for appeal. It asserts that NDR would not have suffered economic loss by paying appellate attorney's fees because a judgment favorable to NDR would have included provisions that it recover appellate attorney's fees from Panda.

First, we agree with the court of appeals. There is no evidence that if NDR had recovered a favorable judgment in the Panda suit, it would not have paid appellate fees to defend the judgment. The evidence does not show that if NDR had obtained a favorable judgment, Panda would not have appealed the case or that NDR would not have defended its judgment on appeal if Panda appealed.

Thus, the court of appeals was correct in determining there is legally insufficient evidence to support a finding that Akin Gump's negligence was a cause in fact of the appellate attorney's fees and expenses NDR paid to Akin Gump.

Next, we address NDR's argument that it would have been entitled to recover in the Panda suit for its appellate attorney's fees under Texas Civil Practice and Remedies Code section 38.001. As Akin Gump points out, NDR's position in the malpractice suit was not that it would have recovered and collected a judgment for additional appellate attorney's fees from Panda had Akin Gump properly tried the Panda case. The damages question in the malpractice jury charge asked about, and NDR argued to the jury that it sought recovery for, "[a]ttorney's fees and expenses *paid* by NDR in the *Panda Lawsuit*," not about what fees and expenses would have been recovered and collected from Panda had Akin Gump properly tried the underlying case.

2. Fees for Separate Counsel

The situation is different as to the fees NDR paid the separate, additional counsel who were retained post-trial. Post-trial proceedings focused on whether the jury verdict entitled NDR to specific performance of the Letter and Shareholder Agreements calling for NDR's Pan-Sino stock to be purchased by Panda upon termination of the agreements, or whether NDR waived its claims by failing to request jury questions as to breach of the agreements. NDR at that point retained law Professors William Dorsaneo and Maureen Armour to help Akin Gump convince the trial judge to render judgment favorable to NDR. There was evidence that Professors Dorsaneo and Armour were retained to focus on the jury charge and argue to the trial court that despite the absence of a jury finding that Panda breached the agreements, the verdict supported judgment for NDR. The evidence

is legally sufficient to support the jury finding that Akin Gump's negligence was a cause in fact of NDR's retaining the professors and, thus, that the firm's negligence proximately caused NDR to pay the fees and expenses of the professors.

Akin Gump further argues that even if NDR were entitled to recover fees and expenses charged by Dorsaneo and Armour, there was no evidence NDR actually paid them. However, Professor Armour testified NDR paid her several thousand dollars for her work on the case, and Tang testified that Professor Dorsaneo was paid for his work. Thus, there was more than a scintilla of evidence that NDR actually paid attorney's fees and expenses to the professors. *See City of Keller*, 168 S.W.3d at 810.

But although there is some evidence that the fees and expenses of Dorsaneo and Armour were paid, the evidence is undisputed that the total of those payments was less than half the $216,590 awarded by the jury. NDR only argues that it paid Armour $49,500 and Dorsaneo $10,000. Accordingly, although the evidence is legally sufficient to support a finding of some amount, it is legally insufficient to support the entire amount the jury found. *Guevara v. Ferrer*, 247 S.W.3d 662, 669-70 (Tex. 2007); *see Texarkana Mem'l Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 841 (Tex. 1997).

Ordinarily, we render judgment when we sustain a no evidence issue. *Guevara*, 247 S.W.3d at 670; *Murdock*, 946 S.W.2d at 841. However, when there is some evidence of damages, but not enough to support the full amount, it is inappropriate to render judgment. *Guevara*, 247 S.W.3d at 670. In such a situation, we may either remand the case to the court of appeals for a suggestion of remittitur or to the trial court for a new trial. *Id.* Given the state of the evidence in this case, it is

appropriate to remand the case to the court of appeals. *See id.* (remanding to the court of appeals to consider suggestion of remittitur rather than remanding for a new trial after determining the evidence was legally insufficient to support all of the damages awarded by the jury). If the court of appeals determines that suggestion of remittitur is not appropriate or is unable to successfully suggest a remittitur, then the part of the case involving liability and attorney's fees and expenses–including those of both Akin Gump and separate counsel–should be remanded for a new trial. *See* TEX. R. APP. P. 61.2.

IV. CONCLUSION

We reverse the court of appeals' judgment. We render judgment that NDR take nothing on its claims for the fair market value of its stock and success fees owed to it. The claim for attorney's fees and expenses is remanded to the court of appeals for further proceedings consistent with this opinion.

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Phil Johnson
Justice

OPINION DELIVERED: October 30, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-0871

IN RE UNITED SERVICES AUTOMOBILE ASSOCIATION, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued December 9, 2008

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

JUSTICE JOHNSON did not participate in the decision.

Texas has some 3,241 trial courts[1] within its 268,580 square miles.[2] Jurisdiction is limited in many of the courts; it is general in others. *Compare* TEX. GOV'T CODE § 25.0021 (describing jurisdiction of statutory probate court), *with id.* § 24.007-.008 (outlining district court jurisdiction); *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006) (noting that Texas district courts are courts of general jurisdiction). We have at least nine different types of trial courts,[3] although that number does

[1] Texas Courts Online Home Page, http://www.courts.state.tx.us/ (all Internet materials as visited March 24, 2010 and copy available in Clerk of Court's file). This figure includes municipal courts, whose jurisdiction is generally limited to criminal matters, although they may also hear certain civil cases involving dangerous dogs. *See* TEX. HEALTH & SAFETY CODE § 822.0421. It also includes statutory probate courts.

[2] TEXAS ALMANAC 2010-11 60 (Elizabeth Cruce Alvarez ed., Texas State Historical Association 65th ed. 2010), *available at* http://www.texasalmanac.com/environment/.

[3] Those courts include district courts, criminal district courts, constitutional county courts, statutory county courts, justice of the peace courts, small claims courts, statutory probate courts, and municipal courts. They also include family district courts which, although they are district courts of general jurisdiction, have primary responsibility for handling family law matters. OFFICE OF COURT ADMINISTRATION, 2008 ANNUAL REPORT, TEXAS JUDICIAL SYSTEM,

not even hint at the complexities of the constitutional provisions and statutes that delineate jurisdiction of those courts. *See* OFFICE OF COURT ADMINISTRATION, 2008 ANNUAL REPORT, TEXAS JUDICIAL SYSTEM, SUBJECT-MATTER JURISDICTION OF THE COURTS *passim* (2008), *available at* http://www.courts.state.tx.us/pubs/AR2008/jud_branch/2a-subject-matter-jurisdiction-of-courts.pdf;[4] GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 367 (1977). Statutory county courts (of which county courts at law are one type)[5] usually have jurisdictional limits of $100,000, *see* TEX. GOV'T CODE § 25.0003(c)(1), unless, of course, they do not, *see, e.g.,* TEX. GOV'T CODE §§ 25.0732(a) (El Paso County), 25.0862(a) (Galveston County), 25.0942 (a) (Gregg County), 25.1322(a) (Kendall County), 25.1802(a) (Nueces County), 25.2142(a) (Smith County); *see also Sultan v. Mathew*, 178 S.W.3d 747, 756 (Tex. 2005) (Hecht, J., dissenting) (observing that "[m]onetary jurisdictional limits on statutory county courts are generally from $500 to $100,000, but they vary widely from county to county, and many such courts have no monetary limits"). Appellate rights can vary depending on which court a case is filed in, even among trial courts with concurrent jurisdiction, and even when the same judge in the same

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SUBJECT-MATTER JURISDICTION OF THE COURTS 1, 3-18 (2008), *available at* http://www.courts.state.tx.us/pubs/AR2008/jud_branch/2a-subject-matter-jurisdiction-of-courts.pdf.

[4] In a page-and-a-half, this report explains the subject matter jurisdiction of our appellate courts. OFFICE OF COURT ADMINISTRATION, SUBJECT-MATTER JURISDICTION OF THE COURTS at 1-2. The remainder of the eighteen-page, dual column, single-spaced document identifies, in painstaking detail, the various jurisdictional schemes governing our trial courts. *Id*. at 3-18.

[5] TEX. GOV'T CODE § 21.009(2) ("'Statutory county court' means a county court created by the legislature under Article V, Section 1, of the Texas Constitution, including county courts at law, county criminal courts, county criminal courts of appeals, and county civil courts at law, but does not include statutory probate courts as defined by Section 3, Texas Probate Code.").

courtroom presides over two distinct courts. *See, e.g., Sultan*, 178 S.W.3d at 752 (holding that there was no right of appeal to courts of appeals from cases originating in small claims courts, but recognizing that justice court judgment would be appealable); *see also id.* at 754-55 (Hecht, J., dissenting) (noting that the same justice of the peace hears small claims cases and justice court cases).[6] Consider the five-step process involved in determining the jurisdiction of any particular trial court:

> [R]ecourse must be had first to the Constitution, second to the general statutes establishing jurisdiction for that level of court, third to the specific statute authorizing the establishment of the particular court in question, fourth to statutes creating other courts in the same county (whose jurisdictional provisions may affect the court in question), and fifth to statutes dealing with specific subject matters (such as the Family Code, which requires, for example, that judges who are lawyers hear appeals from actions by non-lawyer judges in juvenile cases).

OFFICE OF COURT ADMINISTRATION, SUBJECT-MATTER JURISDICTION OF THE COURTS at 1.

Our court system has been described as "one of the most complex in the United States, if not the world." BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS, at 367; *see also Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 449 (Tex. 1996) (voicing "concern[] over the difficulties created for the bench, the bar, and the public by the patchwork organization of Texas' several trial courts"); *Sultan*, 178 S.W.3d at 753 (Hecht, J., dissenting) (noting that Texas courts' "jurisdictional scheme . . . has gone from elaborate . . . to Byzantine"); *Camacho v. Samaniego*, 831 S.W.2d 804, 807 n.4, 811 (Tex. 1992) (stating that "confusion and inefficiency are endemic to a judicial structure with different courts of distinct but overlapping jurisdiction" and observing that

[6] Section 28.053 of the Government Code, at issue in *Sultan*, was recently amended to allow appeals to the court of appeals from de novo trials in county court on claims originating in small claims court. *See* Act of June 19, 2009, 81st Leg., R.S., ch. 1351, section 8, 2009 Tex. Gen. Laws 4274, 4274.

"there are still more than fifty different jurisdictional schemes for the statutory county courts"); TEXAS JUDICIAL COUNCIL, ASSESSING JUDICIAL WORKLOAD IN TEXAS' DISTRICT COURTS 2 (2001), *available at* http://www.courts.state.tx.us/tjc/TJC_Reports/Final_Report.pdf (observing that "'the Texas trial court system, complex from its inception, has become ever more confusing as ad hoc responses are devised to meet the needs of an urban, industrialized society'" (quoting CITIZENS' COMMISSION ON THE TEXAS JUDICIAL SYSTEM, REPORT AND RECOMMENDATIONS—INTO THE TWENTY-FIRST CENTURY 17 (1993))).

Proposals to modernize this antiquated jurisdictional patchwork have failed,[7] but the Legislature has attempted to address one of its most worrisome aspects. In 1931, the Legislature passed "[a]n act to extend the period of limitation of any action in the wrong court." Act approved Apr. 27, 1931, 42d Leg., R.S., ch. 81, 1931 Tex. Gen. Laws 124, 124, current version at TEX. CIV. PRAC. & REM. CODE § 16.064. This statute tolls limitations for those cases filed in a trial court that lacks jurisdiction, provided the case is refiled in a proper court within sixty days of dismissal. TEX. CIV. PRAC. & REM. CODE § 16.064(a). The tolling provision does not apply, however, to those cases in which the first filing was made with "intentional disregard of proper jurisdiction." *Id.* § 16.064(b). We must decide today whether the plaintiff intentionally disregarded the jurisdictional limits applicable to county courts at law in Bexar County. Because we conclude that he did, in a way that cannot be cured by ordinary appellate review, we conditionally grant relief.

[7] *See, e.g.*, Tex. S.B. 1204, 80th Leg., R.S. (2007) ("AN ACT relating to the reorganization and administration of, and procedures relating to, courts in this state, including procedures for appeals."); Tex. H.B. 2906, 80th Leg., R.S. (2007) (same).

I. Background

James Steven Brite sued USAA, his former employer, alleging that it had illegally discriminated against him based on his age, violating the Texas Commission on Human Rights Act (TCHRA). *See generally United Servs. Auto. Ass'n v. Brite*, 215 S.W.3d 400 (Tex. 2007) ("*Brite I*"). He filed suit in the Bexar County Court at Law No. 7, which has jurisdiction concurrent with that of the district court in "civil cases in which the matter in controversy exceeds $500 but does not exceed $100,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the face of the petition . . . ." TEX. GOV'T CODE § 25.0003(c)(1). Brite asserted in his original petition that his damages exceeded the $500 statutory minimum, but he did not plead that his damages were below the $100,000 maximum. *Brite I*, 215 S.W.3d at 401. He pleaded that "[i]n all reasonable probability, [his] loss of income and benefits will continue into the future, if not for the balance of [his] natural life" and sought "compensation due Plaintiff that accrued at the time of filing this Petition" (back pay), "the present value of unaccrued wage payments" (front pay), punitive damages, and attorney's fees. *Id.*

Before limitations expired, USAA filed a plea to the jurisdiction, contending that Brite's damage claims exceeded the $100,000 jurisdictional limit of the statutory county court, excluding interest, statutory or punitive damages, and attorney's fees and costs. USAA argued that because Brite's annual salary was almost $74,000 when he was terminated, his front pay and back pay allegations alone exceeded the county court's jurisdictional maximum. Brite opposed, and the trial court twice denied, USAA's jurisdictional plea. Shortly thereafter, Brite amended his petition to seek damages of $1.6 million, and subsequently claimed in discovery responses that "'his lost wages

and benefits in the future, until age 65, total approximately $1,000,000.00.'" *Brite I*, 215 S.W.3d at 401 (quoting discovery responses). After a jury trial, the trial court awarded Brite $188,406 in back pay, $350,000 in front pay, $300,000 in punitive damages, $129,387 in attorney's fees, and prejudgment interest. *Id*.

A divided court of appeals affirmed the trial court's judgment. *See United Servs. Auto. Ass'n v. Brite*, 161 S.W.3d 566, 579 (Tex. App.—San Antonio 2005, pet. granted). We reversed, concluding that the amount in controversy at the time Brite filed suit exceeded $100,000, depriving the county court at law of jurisdiction over the matter. *Brite I*, 215 S.W.3d at 402. We dismissed the underlying suit for want of jurisdiction. *Id*. at 403.

Within sixty days of our judgment dismissing the county court case, Brite refiled his claim in Bexar County district court. USAA filed a plea to the jurisdiction and moved for summary judgment, asserting, among other things, that the trial court lacked subject matter jurisdiction because Brite failed to file suit within TCHRA's two-year time limit; that the tolling provision in section 16.064 of the Civil Practice and Remedies Code did not apply to TCHRA claims; and that even if it did, Brite's original suit was filed with "intentional disregard of proper jurisdiction," depriving him of that provision's protection. The trial court denied the plea and motion. The court of appeals denied relief, concluding that USAA had not established that its appellate remedy was inadequate. 2007 Tex. App. LEXIS 8206, at *1-*2. USAA now petitions this Court for mandamus relief.

II. Is TCHRA's two-year period for filing suit jurisdictional?

USAA argues that TCHRA's two-year deadline for filing suit is jurisdictional, precluding application of the tolling statute. But "'[j]urisdiction,'" as the United States Supreme Court has observed, "'is a word of many, too many, meanings.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n. 2 (D.C. Cir. 1996)). Nineteen years ago, in a footnote, we observed that the time period for filing a TCHRA lawsuit was "mandatory and jurisdictional." *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 487 n.10 (1991).[8] In support, we cited *Green v. Aluminum Co. of America*, 760 S.W.2d 378, 380 (Tex. App.—Austin 1988, no writ), which in turn relied on our decision in *Mingus v. Wadley*, 285 S.W. 1084 (Tex. 1926). *Mingus* held that the requirements of the Workmen's Compensation Act were jurisdictional, and that "[t]he general rule is that where the cause of action and remedy for its enforcement are derived not from the common law but from the statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable." *Mingus*, 285 S.W. at 1087.

But we, like the U.S. Supreme Court,[9] have recognized that our sometimes intemperate use of the term "jurisdictional" has caused problems. Characterizing a statutory requirement as jurisdictional means that the trial court does not have—and never had—power to decide the case. *See Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 359 (Tex. 2004) ("The failure of

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[8] In 1993, the limitations period was changed from one to two years. Act of May 14, 1993, 73rd Leg. R.S., ch. 276, § 7, 1993 Tex. Gen. Laws 1285, 1291 (amending TEX. REV. CIV. STAT. art. 5221k, § 7.01(a)) (now codified at TEX. LAB. CODE § 21.256).

[9] *See, e.g., Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006) (noting that "[t]his Court, no less than other courts, has sometimes been profligate in its use of the term"); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (observing that "[c]ourts, including this Court, it is true, have been less than meticulous" in their use of the term).

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."). Thus, "[n]ot only *may* an issue of subject matter jurisdiction 'be raised for the first time on appeal by the parties or by the court', a court is *obliged* to ascertain that subject matter jurisdiction exists regardless of whether the parties questioned it." *Id*. at 358 (footnote omitted).

In *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmt. b. at 118 (1982)), we observed that "'[t]he classification of a matter as one of jurisdiction . . . 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.'" Thus, "[a]lthough *Mingus* represented the dominant approach when it was decided, 'the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.'" *Dubai*, 12 S.W.3d at 76 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e. at 113). We overruled *Mingus* "to the extent that it characterized the plaintiff's failure to establish a statutory prerequisite as jurisdictional." *Id*. Instead, we held that "'[t]he right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, has been said to go in reality to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it.'" *Id*. at 76-77 (quoting 21 C.J.S. *Courts* § 16, at 23 (1990)).

Since *Dubai*, we have been "reluctant to conclude that a provision is jurisdictional, absent clear legislative intent to that effect." *City of DeSoto v. White*, 288 S.W.3d 389, 393 (Tex. 2009). We have held that the Payday Law's 180-day period for filing a wage claim, though "a mandatory condition to pursuing the administrative cause of action," was "not . . . a bar to . . . [the] exercise of

jurisdiction"; that the Tort Claims Act's notice provision was "a complete defense to suit but [did] not deprive the court of subject matter jurisdiction"; that the failure to comply with dismissal dates in parental rights termination cases did not deprive trial courts of jurisdiction; that the noncompliance with a mandatory notice requirement in the Fire Fighter and Police Officer Civil Service Act did not divest a hearing examiner of jurisdiction over an appeal; and that the statutory requirement that a condemnor and a property owner be "unable to agree" on damages was not jurisdictional but that a failure to satisfy the requirement would result in abatement. *City of DeSoto*, 288 S.W.3d at 398; *In re Dep't of Family & Protective Servs.*, 273 S.W.3d 637, 644 (Tex. 2009); *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78, 86 (Tex. 2008); *Loutzenhiser*, 140 S.W.3d at 354; *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 191 (Tex. 2004).

We have been careful to emphasize, however, that a statutory requirement commanding action, even if not jurisdictional, remains mandatory. *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."). And some requirements, such as a timely notice of appeal, remain jurisdictional. *See In the Interest of K.A.F.*, 160 S.W.3d 923, 928 (Tex. 2005); *accord Bowles v. Russell*, 551 U.S. 205, 213 (2007) (concluding that party's "failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction"). Moreover, when elements of a statutory claim involve "the jurisdictional inquiry of sovereign immunity from suit," those elements can be relevant to both jurisdiction and liability. *State v. Lueck*, 290 S.W.3d 876, 883 (Tex. 2009).

But we have never revisited our statement in *Schroeder*, even though courts have questioned whether *Schroeder* remains the law after *Dubai*. *See, e.g., Ramirez v. DRC Distribs, Ltd.*, 216 S.W.3d 917, 921 n.8 (Tex. App.—Corpus Christi 2007, pet. denied) (noting that "[a]lthough the Texas Supreme Court held in *Schroeder v. Texas Iron Works* . . . that exhaustion of the TCHRA's administrative remedies is mandatory and jurisdictional, several courts of appeals have questioned whether its decision in *Dubai Petroleum Co. v. Kazi* indicated a retreat from this position") (collecting cases). Most recently, although we observed that "in the past we have described a statutory time limitation in the Commission on Human Rights Act as 'mandatory and jurisdictional,'" we stated only that "those cases predate *Dubai* and dealt with a different statutory scheme than presented here." *Igal*, 250 S.W.3d at 83 n.5 (quoting *Schroeder*, 813 S.W.2d at 486).

Today we reexamine whether section 21.256's time limit is jurisdictional. We begin with the statutory language, presuming "that the Legislature did not intend to make the [provision] jurisdictional; a presumption overcome only by clear legislative intent to the contrary." *City of DeSoto*, 288 S.W.3d at 394. The statute provides that an action "may not be brought . . . later than the second anniversary of the date the complaint relating to the action is filed." TEX. LAB. CODE § 21.256. The Legislature titled the provision "Statute of Limitations," *id.*, and while such a heading cannot limit or expand the statute's meaning, TEX. GOV'T CODE § 311.024, the heading "gives some indication of the Legislature's intent," *Loutzenhiser*, 140 S.W.3d at 361; *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982) (noting that legislative history indicated that Title VII filing deadling was intended to operate as a statute of limitations rather than jurisdictional requirement). We too have characterized the deadline as a statute of limitations, calling it a

"limitation period" and noting that "[t]he statute of limitations for such action runs from the date of filing the complaint with the Commission." *Schroeder*, 813 S.W.2d at 487 n.10. In *Schroeder*, a case that dealt primarily with "whether exhaustion of administrative remedies is a prerequisite to bringing a civil action for age discrimination in employment," the legal character of the section 21.256 deadline was not at issue. *Schroeder*, 813 S.W.2d at 484; *accord Zipes*, 455 U.S. at 395 (stating that "[a]lthough our cases contain scattered references to the timely-filing requirement as jurisdictional, the legal character of the requirement was not at issue in those cases, and as or more often in the same or other cases, we have referred to the provision as a limitations statute"). While the phrase "may not be brought" makes the provision mandatory, *see* TEX. GOV'T CODE § 311.016(5), the statute does not indicate that the provision is jurisdictional or that the consequence of noncompliance is dismissal. *City of DeSoto*, 288 S.W.3d at 396 (observing that statute did not contain explicit language indicating that requirement was jurisdictional nor did it provide a consequence for noncompliance); *accord Igal*, 250 S.W.3d at 84 (noting that statutory language did not indicate that statute was intended to address jurisdiction, as it merely "establish[ed] a procedural bar similar to a statute of limitations and does not prescribe the boundaries of jurisdiction"); *see also Zipes*, 455 U.S. at 394 (noting that statutory time period for filing EEOC claim under Title VII "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts").

Our procedural rules, which have the force and effect of statutes, and our cases classify limitations as an affirmative defense. TEX. R. CIV. P. 94; *In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex. 2001); *see also Day v. McDonough*, 547 U.S. 198, 205 (2006) ("A statute of limitations defense . . . is not 'jurisdictional,' hence courts are under no obligation to raise the time bar sua

sponte."). While the Legislature could make the Labor Code filing deadlines jurisdictional, as it has in cases involving statutory requirements relating to governmental entities, *see* TEX. GOV'T CODE § 311.034 (providing that "statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity"), it has not done so here.

We also consider the statute's purpose. *See Loutzenhiser*, 140 S.W.3d at 360; *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 494 (Tex. 2001). The TCHRA was enacted to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964." TEX. LAB. CODE § 21.001(1). It is "modeled after federal civil rights law," *NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999), and "[o]ne of the primary goals of the statute is to coordinate state law with federal law in the area of employment discrimination," *Vielma v. Eureka Co.*, 218 F.3d 458, 462 (5th Cir. 2000). Thus, "analogous federal statutes and the cases interpreting them guide our reading of the TCHRA." *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001)

The United States Supreme Court has consistently construed Title VII's requirements as mandatory but not jurisdictional. *See Arbaugh v. Y&H Corp*., 546 U.S. 500, 516 (2006)*; Zipes*, 455 U.S. at 393; *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (holding that equitable tolling applied to Title VII suit against federal employer); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 349 n.3 (1983) (rejecting argument that time period was jurisdictional and holding that filing of class action tolled limitations under Title VII). In *Zipes*, 455 U.S. at 393, the Court held that the timely filing of an employment discrimination complaint with the Equal Employment Opportunity Commission was not a jurisdictional prerequisite to suit under Title VII, a conclusion compelled by "[t]he structure of Title VII, the congressional policy underlying it, and

the reasoning of [the Court's] cases." In a later case, the Court decided that Title VII's 15-employee minimum was an element of the claim, rather than a jurisdictional prerequisite. *Arbaugh*, 546 U.S. at 516. In reaching that conclusion, the Court adopted a "readily administrable bright line" rule:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. . . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515-16 (footnote omitted). This is not unlike our own post-*Dubai* approach: we have been "reluctant to conclude that a provision is jurisdictional, absent clear legislative intent to that effect." *City of DeSoto*, 288 S.W.3d at 393.

Although the Supreme Court has not addressed whether the time period for filing suit under Title VII is jurisdictional, every federal circuit that has considered the issue has held that it is not. *See Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 239-40 (3d Cir. 1999); *Smith-Haynie v. D.C.*, 155 F.3d 575, 579 (D.C. Cir. 1998); *Truitt v. County of Wayne*, 148 F.3d 644, 646 (6th Cir. 1998) ("Although *Zipes* dealt only with the time limit for filing charges of discrimination with the EEOC, its logic has been extended to the ninety-day time limit for filing suit in the district court after receipt of a right-to-sue letter.") (citations omitted); *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1161 (11th Cir. 1993); *Scheerer v. Rose State Coll.*, 950 F.2d 661, 665 (10th Cir. 1991); *Hill v. John Chezik Imps.*, 869 F.2d 1122, 1124 (8th Cir. 1989); *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1174 (9th Cir. 1986) (concluding that Supreme Court precedent "firmly establish[es] that the 90-day filing period is a statute of limitations subject to equitable tolling in appropriate circumstances"); *Espinoza v. Mo. Pac. R.R. Co.*, 754 F.2d 1247, 1248 n.1 (5th Cir. 1985); *Brown v. J.I. Case Co.*, 756 F.2d 48,

50 (7th Cir. 1985); *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 146 (2d Cir. 1984) (noting that "[t]he Supreme Court . . . has evinced a policy of treating Title VII time limits not as jurisdictional predicates, but as limitations periods subject to equitable tolling"); *see also Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151-52 (1984) (holding that plaintiff had not shown herself entitled to equitable tolling of filing deadline, but not rejecting equitable tolling as inapplicable to that deadline).

We also consider the consequences that result from each interpretation. *Helena Chem.*, 47 S.W.3d at 495. A judgment is void if rendered by a court without subject matter jurisdiction. *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990). If TCHRA's limitations period were jurisdictional, trial courts that have denied summary judgment motions based on the failure to satisfy that requirement would forever have their judgments open to reconsideration. Conversely, those courts that granted such motions would have had no power to do so, nor would appellate courts have had the power to affirm the judgments. *See, e.g., Vu v. Exxonmobil Corp.*, 98 S.W.3d 318, 321 (Tex. App—Houston [1st Dist.] 2003, pet. denied) (affirming summary judgment because TCHRA suit not filed until more than two years after charge of discrimination); *see also Zipes*, 455 U.S. at 397 (observing that, if the timely filing requirement were jurisdictional, "the District Courts in *Franks* [*v. Bowman Transp. Co.*, 424 U.S. 747 (1976),] and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), would have been without jurisdiction to adjudicate the claims of those who had not filed as well as without jurisdiction to award them seniority," but "[w]e did not so hold"). It is preferable to "avoid a result that leaves the decisions and judgments of [a tribunal] in limbo and subject to future attack, unless that was the Legislature's clear intent." *City of DeSoto*, 288 S.W.3d at 394.

In keeping with the statute's language, *Dubai* and subsequent cases, as well as the purposes behind TCHRA and federal interpretations of Title VII, we conclude that the two-year period for filing suit is mandatory but not jurisdictional, and we overrule *Schroeder* to the extent it held otherwise.

II. Does the tolling statute, Tex. Civ. Prac. & Rem. Code § 16.064, apply to a TCHRA claim?

In pertinent part, section 16.064 provides:

> The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:
>
> (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
>
> (2) not later than the 60th day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.

TEX. CIV. PRAC. & REM. CODE § 16.064(a).

USAA contends that, even if the limitations period is not jurisdictional, the tolling statute does not apply, citing a string of cases holding generally that section 16.064 does not apply to special statutory proceedings. *See, e.g., Heart Hosp. IV, L.P. v. King*, 116 S.W.3d 831, 836 (Tex. App.—Austin 2003, pet. denied); *Argonaut Sw. Ins. Co. v. Walker*, 64 S.W.3d 654, 657 (Tex. App.—Texarkana 2001, pet. denied); *Gutierrez v. Lee*, 812 S.W.2d 388, 392 (Tex. App.—Austin 1991, writ denied); *Castillo v. Allied Ins. Co.*, 537 S.W.2d 486, 487 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.); *Pan Am. Fire & Cas. Co. v. Rowlett*, 479 S.W.2d 782, 783 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.); *Braden v. Transp. Ins. Co.*, 307 S.W.2d 655, 656 (Tex. Civ.

App.—Dallas 1957, no writ); *Leadon v. Truck Ins. Exch*., 253 S.W.2d 903, 905 (Tex. Civ. App.—Galveston 1952, no writ); *Bear v. Donna Indep. School Dist*., 85 S.W.2d 797, 799 (Tex. Civ. App.—San Antonio 1935, writ dism'd w.o.j.).

But there are at least three problems with this approach. First, we have never endorsed the theory that section 16.064 is inapplicable to causes of action created by statute. All of those decisions were from our courts of appeals, and most predate *Dubai*. Second, those cases are based on the *Mingus* rationale, overruled in *Dubai*, that a "dichotomy [exists] between common-law and statutory actions," with mandatory statutory provisions also being jurisdictional. *Dubai*, 12 S.W.3d at 76. Post-*Dubai*, we have rejected such a distinction, adopting instead "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.*" *City of Desoto*, 288 S.W.3d at 394 (emphasis added).

Third, the argument conflates equitable tolling with statutory tolling. The former is a court-created doctrine, *see, e.g., Taliani v. Chrans*, 189 F.3d 597, 597 (7th Cir. 1999) (noting that "equitable tolling [is] the judge-made doctrine . . . that excuses a timely filing when the plaintiff could not, despite the exercise of reasonable diligence, have discovered all the information he needed in order to be able to file his claim on time"), that may not apply if a statutory requirement is deemed jurisdictional, *see Zipes*, 455 U.S. at 393 (holding that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit, . . . but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). The latter is a legislative dictate that limitations be tolled for "*any* action" filed in the wrong court. *See* Act approved Apr. 27, 1931,

42d Leg., R.S., ch. 81, 1931 Tex. Gen. Laws 124, 124, current version at TEX. CIV. PRAC. & REM. CODE § 16.064 (emphasis added).

Here we must construe two statutes—one that creates a limitations period and a second that tolls it. There is no reason, absent clear legislative intent, that we should not harmonize the two. *See La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 565 (Tex. 1984) ("Generally, courts are to construe statutes so as to harmonize with other relevant laws, if possible."). Had the Legislature wanted to prohibit statutory tolling, it could have done so, but TCHRA is devoid of any such indication. *Cf.* TEX. CIV. PRAC. & REM. CODE § 74.251(a) (creating limitations period that applies "[n]otwithstanding any other law"); *Liggett v. Blocher*, 849 S.W.2d 846, 850 (Tex. App.—Houston [1st Dist.] 1993, no writ) (holding that "notwithstanding any other law" meant that statutory tolling provision did not apply to health care liability claims). Thus, absent language indicating that section 16.064 was not intended to apply to TCHRA claims, the statute of limitations is tolled for those cases falling within section 16.064's savings provision.

IV. Was Brite's first suit filed with "intentional disregard of proper jurisdiction"?

Section 16.064 will not save a later-filed claim if the first action was filed "with intentional disregard of proper jurisdiction." TEX. CIV. PRAC. & REM. CODE § 16.064(b). USAA contends that is what happened here, while Brite asserts that a jury must decide whether he intended to evade jurisdiction, given that he vigorously denies doing so. We agree with USAA.

Noting "[t]he importance of simplifying Court procedure," the Texas Judicial Council in 1930 drafted the tolling statute. *See* SECOND ANNUAL REPORT OF THE TEXAS CIVIL JUDICIAL COUNCIL TO THE GOVERNOR AND SUPREME COURT, Bill No. 6, at 10-12 (1930). The Legislature

made a single change—extending the refiling period from thirty to sixty days—and passed the bill. *See* Act approved Apr. 27, 1931, 42d Leg., R.S., ch. 81, 1931 Tex. Gen. Laws 124, 124, current version at TEX. CIV. PRAC. & REM. CODE § 16.064; *see also Burford v. Sun Oil Co.*, 186 S.W.2d 306, 310 (Tex. Civ. App.—Austin 1944, writ ref'd w.o.m.). In its recommendation accompanying the bill, the Council noted

> [t]hat the wrong court is frequently and in good faith chosen by capable lawyers, [as] evidenced by the hundreds of cases cited in the annotations upon the subject given in Vernon's Annotated Texas Statutes,—9 pages upon Justice Court, 17 pages upon county court and 29 pages upon district court jurisdiction.

SECOND ANNUAL REPORT, at 11. The Council explained that the Texas bill was based on a Kentucky statute that tolled limitations for actions "commenced in due time and in good faith" in a court that lacked jurisdiction. *Id*. (citing CARROLL'S KY. STAT. § 2545 (1922)). The Council stated that its bill was "like that of Kentucky in substance, but . . . a definition of 'good faith' [is] supplied." *Id.* at 11-12. It is that definition that is at issue here.

As we noted in *Brite I*, "[t]he jurisdictional statute for county courts at law values the matter in controversy on the amount of damages 'alleged' by the plaintiff . . . ." *Brite I*, 215 S.W.3d at 402-03 (quoting TEX. GOV'T CODE § 25.003(c)(1)). Here, Brite's petition omitted the statement required by our rules—that the "damages sought are within the jurisdictional limits of the court," TEX. R. CIV. P. 47(b)—and instead pleaded only that his damages exceeded $500. Brite has never contended that he was unaware of or confused about the county court's jurisdictional limitation. *See, e.g., Clary Corp. v. Smith*, 949 S.W.2d 452, 461 (Tex. App.—Fort Worth 1997, pet. denied) (noting that 16.064 did not apply because "there [was] no evidence of mistake here," as plaintiffs "have neither alleged

nor presented evidence that they were unaware of the trial court's amount in controversy limits"). While such confusion would be understandable, as other statutory county courts (even those in one county adjacent to Bexar County)[10] have no such restriction, he instead argued that "the amount in controversy should not be calculated by the damages originally sued for, but instead by the amount of damages that, more likely than not, the plaintiff would recover." *Brite I*, 215 S.W.3d at 402. We rejected that argument, concluding that "[t]he amount in controversy in this case exceeded $100,000 at the time Brite filed suit." *Id.* at 403.

The parties disagree about the proper standard for intentional disregard under the tolling statute, which requires that USAA "show[] in abatement that the first filing was made with intentional disregard of proper jurisdiction." TEX. CIV. PRAC. & REM. CODE § 16.064(b). Brite contends that intent is always a fact issue, inappropriate for resolution on summary judgment, while USAA asserts it has met its burden through circumstantial evidence of Brite's intent and that Brite is charged with knowledge of the law. We have never before addressed this issue.

We agree, in part, with USAA. Once an adverse party has moved for relief under the "intentional disregard" provision, the nonmovant must show that he did not intentionally disregard proper jurisdiction when filing the case. As it is the nonmovant who has this information, he should bear the burden of producing it. *Cf. Brown v. Shores*, 77 S.W.3d 884, 889 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (Brister, J., concurring) (noting that, because "diligent-service question focuses almost entirely on the efforts and thoughts of plaintiff's counsel, so the initial burden of

[10] *See* TEX. GOV'T CODE § 25.1322 (a) (providing that county courts at law in Kendall County have concurrent jurisdiction with the district court); *see also* TEXAS ALMANAC 2010-11, at 221, 306.

presenting evidence should rest there, too"; "[o]therwise, every one of these numerous cases will begin with the defendant sending a notice to depose plaintiff's counsel and a subpoena for all files").

We disagree, however, that a plaintiff's mistake about the court's jurisdiction would never satisfy the requirement. Section 16.064's intent standard is similar to that required for setting aside a default judgment, *see Craddock v. Sunshine Bus Lines*, *Inc.*, 133 S.W.2d 124, 126 (Tex. 1939) (requiring new trial if defendant proves three elements, the first of which is that default was neither intentional nor due to conscious indifference), and we have held that a mistake of law may be a sufficient excuse, *Bank One, Tex., N.A. v. Moody*, 830 S.W.2d 81, 84 (Tex. 1992). Moreover, section 16.064 was drafted precisely because "capable lawyers" often make "good faith" mistakes about the jurisdiction of Texas courts. *See* SECOND ANNUAL REPORT, at 11; *see also* CITIZENS' COMMISSION ON THE TEXAS JUDICIAL SYSTEM, REPORT AND RECOMMENDATIONS—INTO THE TWENTY-FIRST CENTURY, at 17 (1993) ("No one person understands or can hope to understand all the nuances and intricacies of Texas' thousands of trial courts.").

But while the tolling statute protects plaintiffs who mistakenly file suit in a forum that lacks jurisdiction, it does not apply to a strategic decision to seek relief from such a court—which is what happened here. *Hotvedt v. Schlumberger, Ltd. (N.V.)*, 942 F.2d 294, 297 (5th Cir. 1991) (refusing to apply section 16.064 because "[i]t is clear . . . that errors in [an attorney's] tactical decisions were not meant to be remedied by the savings statute"); *Clary*, 949 S.W.2d at 461 (holding that "[s]ection 16.064 was not intended to remedy . . . tactical decisions"); *see also Brite I*, 161 S.W.3d at 586 (Duncan, J., dissenting) (noting that "the record, taken as a whole, establishes that Brite's trial attorney filed the Original Petition with full knowledge that Brite sought far more than $100,000 in

actual damages and purposefully drafted the Original Petition to conceal that fact by omitting the statement required by Rule 47(b)"). Because Brite unquestionably sought damages in excess of the county court at law's jurisdiction, it matters not that he subjectively anticipated a verdict within the jurisdictional limits. For that reason, limitations was not tolled. His second suit, filed long after the expiration of the two-year statute, is therefore barred.

V. Is USAA entitled to mandamus relief?

Finally, we must decide whether mandamus relief is appropriate. Deciding whether the benefits of mandamus outweigh the detriments requires us to weigh public and private interests, recognizing that—rather than categorical determinations—"the adequacy of an appeal depends on the facts involved in each case." *In re McAllen Med. Ctr., Inc*., 275 S.W.3d 458, 469 (Tex. 2008); *In re The Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136-37 (Tex. 2004).

In *CSR Ltd. v. Link*, 925 S.W.2d 591, 596-97 (Tex. 1996), we conditionally granted mandamus relief ordering the trial court to grant CSR's special appearance in a toxic tort case. We held that "extraordinary circumstances" (namely the enormous number of potential claimants and the most efficient use of the state's judicial resources) warranted extraordinary relief, even though it was typically unavailable for the denial of a special appearance. *CSR*, 925 S.W.2d at 596; *see also Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 308-09 (Tex. 1994).

And although "mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion," that rule is based in part on the fact that "trying a case in which summary judgment would have been appropriate does not mean the case will have to be tried twice"—a justification not applicable here. *In re McAllen Med. Ctr.*, 275 S.W.3d at 465-

66. USAA has already endured one trial in a forum that lacked jurisdiction (and then a subsequent appeal to the court of appeals and this Court) and is facing a second trial on a claim that we have just held to be barred by limitations. Two wasted trials are not "[t]he most efficient use of the state's judicial resources." *CSR*, 925 S.W.2d at 596; *cf. In re McAllen Med. Ctr.*, 275 S.W.3d at 466. Denying mandamus relief here would thwart the legislative intent that non-tolled TCHRA claims be brought within two years (as well as the tolling provision's inapplicability to suits filed with intentional disregard of proper jurisdiction), and we should not "frustrate th[at] purpose[] by a too-strict application of our own procedural devices." *In re McAllen Med. Ctr.*, 275 S.W.3d at 467.

Because the extraordinary circumstances presented here merit extraordinary relief, we conditionally grant the writ and direct the trial court to grant USAA's motion for summary judgment. We are confident the trial court will comply, and our writ will issue only if it does not.

_____

Wallace B. Jefferson
Chief Justice

Opinion Delivered: March 26, 2010

IN THE SUPREME COURT OF TEXAS

NO. 07-0931

CITY OF DALLAS, PETITIONER,

v.

GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, RESPONDENT

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

Argued October 15, 2008

JUSTICE O'NEILL delivered the opinion of the Court in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE GUZMAN joined.

JUSTICE WAINWRIGHT filed a dissenting opinion, in which JUSTICE JOHNSON joined.

JUSTICE WILLETT did not participate in the decision.

The Public Information Act mandates disclosure of public information upon request to a governmental body, but excepts certain categories of information from the disclosure requirement. *See* TEX. GOV'T CODE §§ 552.021, 552.221, 552.101–.136. A governmental body wishing to claim an exception must make a timely request for an attorney general's opinion as to the exception's applicability. *Id*. § 552.301(a). If a request is not timely made, the information is presumed subject to disclosure unless there is a compelling reason to withhold it. *Id*. § 552.302. In this case, we must decide whether the governmental body's request was timely, and, if not, whether the public policy

reasons supporting the confidentiality of attorney-client communications are sufficiently compelling to overcome the public-information presumption that applies when a governmental body fails to make a timely request. We hold that the timeliness of a request for an attorney general opinion is measured from the date a party seeking public information responds to a governmental body's good-faith request for clarification or narrowing of an unclear or overbroad information request. Accordingly, we reverse the court of appeals' judgment and render judgment that the information in the City's exhibits F and G is excepted from disclosure under the Act.

I. Background

On May 16, 2002, the City of Dallas received a Public Information Act request from James F. Hill, II, for

> 1. Any and all information pertaining to the City of Dallas "Assessment Center Process" for uniform positions of the Dallas Fire and Police Departments."
>
> 2. The definition of KG/BRG?
>
> 3. Any and all memos, directives, documents and communications of meetings of (scheduled or un-scheduled) boards, councils, department heads/staff, and City Managers pertaining to the establishment of the Assessment Center Process.

On May 22, the City responded, seeking to clarify whether Hill sought "information regarding specific assessment centers and if so for what period of time." *See id.* § 552.222(b) (allowing a governmental body to seek clarification of an unclear request). Six days later, Hill replied, clarifying his request as follows:

> The time frame and positions I am relating the request for are: the positions of Dallas Fire Rescue Fire Lieutenant and Captain for the year 2000.
>
> Additionally:
>
> * Any written documents on "how Assessment Process was to be administered" for the above positions and time frame.
>
> * Job Analysis for the positions of Fire Lieutenant and Fire Captain and date of each analysis.
>
> * Any contracts between Booth and the City of Dallas/Civil Service to conduct the Assessment Center for the Dallas Fire department positions Fire Lieutenant and Fire Captain.
>
> * An explanation on the "mirroring" of percentages between Fire Prevention and Fire Operations testing for the same time period.

In preparing to fulfill the clarified request, the City encountered several documents, identified as exhibits F and G, which it considered protected from disclosure by the attorney-client privilege. TEX. R. EVID. 503(b)(1); TEX. GOV'T CODE § 552.107(1). On June 10, 2002, the City requested an attorney general opinion regarding application of the privilege to the withheld documents. TEX. GOV'T CODE § 552.301(a). The Attorney General concluded that the City's request was untimely. *See id.* § 552.301(b) (requiring a governmental body to request an attorney general decision "not later than the 10th business day after receiving the written request" when seeking to withhold information). According to the Attorney General, the ten-day clock began to run on May 16 when the City received Hill's first request, and the City's May 22 response seeking clarification merely tolled the ten-day clock until Hill's second letter was received on May 28. *See* Tex. Att'y Gen. ORD-663 (1999). With the clock tolled until May 29, the City had until June 6 to request an

attorney general decision, according to the Attorney General's calculations.[1] Because the City did not submit its request until four days later, on June 10, the Attorney General determined the City's request was untimely. As a result, the Attorney General explained, a legal presumption arose that exhibits F and G were public, and the City could only overcome that presumption by demonstrating a compelling reason to withhold the documents. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). Considering the attorney-client privilege a discretionary exception subject to waiver, the Attorney General concluded that a compelling reason to overcome the public-information presumption had not been presented.

The City brought this suit seeking a declaratory judgment that exhibits F and G are protected from public disclosure by the attorney-client privilege.[2] *See* TEX. GOV'T CODE §§ 552.324, 552.325; *In re City of Georgetown*, 53 S.W.3d 328, 330 (Tex. 2001). At trial, the City argued that its request for an attorney general decision was timely because the ten-day response period under section 552.301(d) did not begin to run until Hill clarified his request. Alternatively, the City contended the public policy reasons that support the attorney-client privilege are sufficiently compelling to overcome the public-information presumption. After a bench trial, the trial court — initially assuming the privileged nature of the documents and later confirming, *in camera*, the privilege under Texas Rule of Evidence 503(b)(1) — rejected both arguments and ordered that the documents be

[1] It appears that the Attorney General excluded the dates of the City's clarification request and Hill's response, as well as two intervening weekends and Memorial Day (May 27) in calculating that response deadline.

[2] The City also sought a writ of mandamus ordering the Attorney General to declare the documents excepted from public disclosure. Absent express statutory authority providing otherwise, "[o]nly the supreme court has the authority to issue a writ of mandamus . . . against [the Attorney General]". *See A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672 (Tex. 1995) (citing TEX. GOV'T CODE § 22.002(c)). Because the City requested only declaratory relief in its prayer, we will address our attention only to that issue.

disclosed. The court of appeals affirmed. 279 S.W.3d 806, 808. We granted the City's petition for review to consider the Act's application under the circumstances presented. 51 Tex. S. Ct. J. 1076 (Tex. June 27, 2008).[3]

II. Discussion

We first consider the timeliness of the City's request for an attorney general opinion. A governmental entity that believes information requested under the Public Information Act is excepted from disclosure must ask for an attorney general's opinion no later than the tenth business day after it receives the request. TEX. GOV'T CODE § 552.301(b). But, "[i]f what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request." *Id.* § 552.222(b). Further, "[i]f a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed . . . ." *Id.* We must decide what effect a request for clarification or narrowing has on the ten-day deadline. Section 552.222(b) is silent on this issue.

The City contends the ten-day period should be measured from the date the party seeking public information clarifies or narrows the request. It maintains that Hill's original letter was so broad that it did not put the City on notice that he was requesting the information in exhibits F and G. The City notes that section 552.301(b) requires a governmental body seeking a ruling that information is excepted from disclosure to "state the exceptions that apply within a reasonable time

[3] We have received *amicus curiae* briefs supporting the City from the Texas Association of Counties and, jointly, the Texas Association of School Boards Legal Assistance Fund, Texas Municipal League, and the Texas City Attorneys Association. The Freedom of Information Foundation of Texas, the Texas Association of Broadcasters, and the Texas Daily Newspaper Association filed a joint brief in support of the Attorney General, as did Senator John Cornyn.

but not later than the 10th business day after the date of receiving the written request." According to the City, a governmental body cannot reasonably comply with that obligation if the request is unclear or overbroad.

Relying on a 1999 open records decision, Open Records Decision No. 663, the Attorney General contends the ten-day deadline for the City to request a ruling under section 552.301(b) was merely tolled during the period the City was waiting for a response from Hill, and did not reset once the City received Hill's clarification. According to the Attorney General, such a construction is necessary to ensure that governmental bodies comply with their duty to respond promptly to requests for public information. *See* TEX. GOV'T CODE § 552.221(a). If the ten-day period were reset rather than tolled by a clarification request, the Attorney General argues, governmental bodies could extend the deadline to respond to a public information request indefinitely by repeatedly requesting clarification. The Attorney General maintains that a conclusion that a clarification request restarts the statutory deadline would be contrary to the Act's directive that its provisions are to be "construed in favor of granting a request for information." *Id.* § 552.001(b).

Our task in construing a statute is to give effect to the Legislature's intent in enacting it. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). Ordinarily, we are confined to the statute's plain language. *Id.* (citing *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985)). However, when a provision is silent as to its consequences as it is here, we look to the statute as a whole and strive to give it a meaning that is in harmony with other provisions. *Id.* (citing *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex.1978)). We presume that the Legislature intended all provisions of a statute to be effective, and that it intended a just and reasonable result. *Id*. (citing TEX. GOV'T CODE

§ 311.021(2), (3)). While the Attorney General's interpretation of the Act may be persuasive, it is not controlling. *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996). In this instance, we conclude that the Attorney General's interpretation of section 552.222(b) is inconsistent with other provisions of the Act. Reading section 552.222(b) in harmony with those provisions, we hold that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general opinion is measured from the date the request is clarified or narrowed.

A. Other Provisions of the Act

The Legislature has clearly expressed an intent that governmental entities respond promptly to requests for public information. TEX. GOV'T CODE § 552.221(a). But, as the Attorney General has acknowledged, while the Act prohibits

> "unreasonable delays in providing public information, [it also] recogniz[es] that the functions of the governmental body must be allowed to continue. The interests of one person requesting information under the Open Records Act [now Public Information Act] must be balanced with the interests of all the members of the public who rely on the functions of the governmental body in question."

Tex. Att'y Gen. ORD-664, 3 (2000) (quoting Tex. Att'y Gen. ORD-467, 6 (1987)). And while the Act's fundamental purpose is to mandate the maximum disclosure of public information, it was also designed "to simultaneously protect the personal privacy of individuals." House Comm. on State Affairs, Bill Analysis, Tex. H.B. 1718, 74th Leg., R.S. (1995); *see*, *e.g.,* TEX. GOV'T CODE §§ 552.102, .109, .114, .115, .117. According to the House Research Organization, as of 2007, some Texas agencies received as many as 2,000 Public Information Act requests a year, House Research Org. Bill Analysis, Tex. H.B. 1497, House Committee Report, 80th Leg., R.S. (2007), and officials

responding to those requests bear an onerous responsibility: if they disclose information that is confidential under the Act, they face criminal liability. TEX. GOV'T CODE § 552.352(a).[4] Moreover, public entities requesting an attorney general opinion must specify the exceptions that apply within the same ten-day period in which an opinion must be requested. *Id.* § 552.301(b). As the Attorney General has observed, the requirements to request an opinion and specify the applicable exceptions "presuppose[] that the governmental body has identified the responsive information." Tex. Att'y Gen. ORD-664, at 4 fn.2. In light of those considerations, it is reasonable to assume that the Legislature intended that public entities would have a reasonably clear idea of the information requested before the ten-day deadline begins to run.

Other provisions of the Act also weigh in favor of measuring the statutory deadline from the date an unclear or overbroad request has been clarified or narrowed. The Act permits governmental entities to impose charges for the cost of copying records, and, in certain circumstances, preparing them for inspection. TEX. GOV'T CODE §§ 552.261, .271. The governmental body must provide the person requesting information with a detailed statement itemizing all the estimated anticipated costs of complying with the request. *Id.* § 552.2615(a). If the person requesting the information does not respond to the estimate within ten business days by accepting the estimate, modifying their request, or filing a complaint with the Attorney General alleging that the governmental entity is overcharging, the request is considered withdrawn. *Id.* § 552.2615(b). A public information officer may require a deposit or payment of a bond if the estimated costs of preparing copies will exceed $100 (for

[4] Officials who wrongfully withhold public information may also face criminal sanctions, but only if they act with criminal negligence. Tex. Gov't Code § 552.353(a).

bodies with more than fifteen employees) or $50 (for entities with fewer than sixteen employees). *Id.* § 552.263(a). If a deposit or bond is required, then, for purposes of section 552.301, the request is not considered received until the entity receives the deposit or bond. *Id.* 552.263(e). This provision belies the Attorney General's contention that section 552.301's ten-day deadline is "absolute," and signals the Legislature's recognition of the potential burden responding to public information requests may place on governmental bodies. *See* Senate Research Ctr., Bill Analysis, Tex. S.B. 623, 79th Leg., R.S., 2005 ("The time and resources used in the preparation of a brief to the attorney general are not reimbursed to the governmental entity, which creates a problem when a requestor is authorized to force a governmental entity to prepare briefs for the attorney general, before payments have been made.")

None of these provisions specifically addresses the effect of a clarification request.[5] But they suggest that the Legislature envisioned an orderly process in which both the government and the requesting party will proceed with a reasonable idea of the burdens and costs each is likely to incur in connection with a request for public information. If a request is unclear or overbroad, the government's ability to identify applicable statutory exceptions to disclosure, or to prepare an accurate estimate of anticipated costs, is severely hampered; if the statutory ten-day period is merely tolled while the government awaits clarification, the government is left with little time to assess applicable exceptions or prepare any estimate of costs, a result that could leave both parties with less accurate information. While the Act requires governmental entities to respond promptly to public

[5] The latter provision would not apply to Hill's request as it did not become effective until 2005. *See* Act of May 27, 2005, 79th Leg., R.S., ch. 315, §§ 2, 3 2005 Tex. Gen. Laws 938. Nevertheless, the Legislature's willingness to extend the statutory deadline until a deposit or bond is paid is suggestive.

information requests, "'promptly' means as soon as possible under the circumstances, that is, within a reasonable time, without delay." *Id.* § 552.221(a). If the circumstances are that a request is so unclear or overbroad that a governmental entity, acting in good faith, cannot understand what is requested, then it is consistent with the Act's structure to measure the time period in which an attorney general opinion must be requested from the date the request is clarified.

The regulatory background against which section 552.222(b) was enacted reinforces our construction of the statute. More than a decade before the Legislature enacted the clarification statute, the Attorney General had issued Open Records Decision 333, a decision that has never been withdrawn or overruled.[6] In that decision, the City of Houston received a request from the Houston Chronicle for "access to blotters maintained by all divisions of the Houston Police Department." Tex. Att'y Gen. ORD-333, 1 (1982). The newspaper relied on a decision holding that police blotters were public information, *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976). *Id.* The City disagreed because, broadly read, the Chronicle's request included the identities of police

[6] The Attorney General does not contend that the City's request for clarification was pretextual, and the City maintains that it was unaware Hill was seeking the information in exhibits F and G until it received that clarification. Open Records Decision No. 663, on which the Attorney General relied in this case, reads Open Records Decision No. 333 to apply when the responding entity "did not understand the nature of the information requested as information which could be protected from disclosure until the day [it] received the clarification." Tex. Att'y Gen. ORD-663, at 3. Although the original request in Open Records Decision No. 333 was couched in broad terms, Open Records Decision No. 663 concluded that the clarified request became the operative request because it "included excepted information not sought in the original request." *Id.* at 3. It then articulated the tolling rule that the Attorney General advocates in this case. *Id.* at 4. Ultimately, however, in Open Records Decision No. 663, the Attorney General ruled that a request for information containing certain search terms did not initiate the ten-day period in which to seek an attorney general's opinion about documents containing those terms that were in the possession of the agency's outside counsel, even though those documents were clearly public information. *Id.* at 6. The Attorney General did "not believe that the first request, which did not specify information held by [the agency's] outside counsel, served to notify [the agency] that the requestor was seeking information held not only by [the agency], but also by its counsel." *Id.*

informants. *Id.* The Chronicle and the City then engaged in a series of verbal and written exchanges in which the City sought to clarify the precise information the newspaper sought. *Id*. As a consequence of these efforts, more than ten days elapsed between the Chronicle's original request and the date the City requested an attorney general open records decision. *Id*. at 2. Because the original request was "extremely broad, and referred only to 'blotters'," the Attorney General concluded that a letter from the Chronicle precisely identifying the information it sought was the operative date to trigger the ten-day period, even though the Act contained no provision allowing a governmental entity to attempt to clarify or narrow a request. *Id*. at 2–3. Presumptively, the Legislature was aware of this opinion when it enacted section 552.222(b) in 1995. *See Tex. Dept. of Prot. & Reg. Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004). While the opinion was not based on any explicit clarification provision, it did provide the Legislature with the view of the officer in charge of enforcing the Act that measuring a governmental body's response time from the date an unclear or overbroad information request is clarified would be consistent with the Act's overarching purposes. It is not unreasonable to assume that the Legislature anticipated that section 552.222(b) would have the same effect on the ten-day deadline.

Construing the statute so that clarification of an unclear or overbroad information request resets the statutory ten-day deadline would not be contrary to the Legislature's mandate that the Act be construed in favor of granting a request. TEX. GOV'T CODE § 552.001(b). To the contrary, as we have observed, allowing a governmental entity ten days from the time an unclear or overbroad request is clarified only helps ensure that the response will be meaningful, providing the requestor with the information he or she actually wants. As the Attorney General has recognized, if a request

is vague or overbroad, a governmental body cannot "accurately identify and locate the requested items." Office of the Attorney General of Texas, PUBLIC INFORMATION 2008 HANDBOOK, ix. And, in sections 552.263 and 552.2615 of the Act, the Legislature itself has attempted to balance the policy of broad disclosure against the burden that may be placed upon scarce government resources in attempting to respond to extremely broad information requests.

We agree with the Attorney General that a governmental entity should not be allowed to use requests for clarification in bad faith merely to delay production of public information. But in this case, it is undisputed that the City acted in good faith in asking Hill to clarify or narrow his broad request for public information. Once he did, the City promptly responded. There is nothing to indicate that the City was attempting to drag out the process by its request for clarification. Under these circumstances, the ten-day period for requesting an attorney general opinion ran from the date of Hill's response, and the City's request for an attorney general opinion was timely. Because we conclude that the ten-day period in this case ran from the date of Hill's clarification, we do not reach the City's argument that Hill's response asked for "additional items" that were not included in his original request, or its alternative argument that the attorney-client privilege is itself sufficiently compelling to overcome the public-information presumption that inheres when an attorney general's opinion is not timely requested.

III. Conclusion

We reverse the court of appeals' judgment and render judgment that the information contained in exhibits F and G is excepted from disclosure under the Act.

_____
Harriet O'Neill
Justice

OPINION DELIVERED: February 19, 2010

IN THE SUPREME COURT OF TEXAS

NO. 07-0931

CITY OF DALLAS, PETITIONER,

v.

GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, RESPONDENT

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

Argued October 15, 2008

JUSTICE WAINWRIGHT, joined by JUSTICE JOHNSON, dissenting.

The introductory section of the Public Information Act (PIA) announces the policy of the State of Texas on the peoples' right of access to public information.

> Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.

TEX. GOV'T CODE § 552.001. This laudable objective of the PIA, to ensure transparency in public affairs, does not require that all public information be routinely disclosed. Sensibly, some data defined as public information may be withheld under the statute's terms, but the PIA requires that exclusions from disclosure be timely raised with the Office of the Attorney General. *Id.* §§ 552.101, .301. A public entity has ten business days to request the Attorney General's opinion if it desires to

withhold public information. *Id.* § 552.301. If the governmental body fails to meet this statutory deadline, the standard for withholding the public information from disclosure rises from merely "confidential" to the governmental entity having to establish a "compelling reason" for nondisclosure. *Id*. § 552.302.

There is no dispute that the information at issue in this case is public information, and it may have been excepted from disclosure. However, the City of Dallas did not request a written opinion from the Attorney General on its desire to withhold the public information until seventeen business days after it received the request for disclosure. The Court holds that eight of the days need not be counted because the clock does not begin on the deadline to request an attorney general opinion until after the public's request for information is clarified, even though the PIA states that the ten-day period begins when the request is "received." The Court concludes that the City's request to the Attorney General was timely and the City need not turn over the public information requested because the lower standard for withholding the public information was met. Because the Court's approach hinders the Legislature's goal of providing the people with prompt access to public information, *see id*. § 552.221(a), and creates an easy manner to delay such access, contrary to the PIA's purpose and language, I respectfully dissent.

I. Background

On May 16, 2002, the City of Dallas received a request from James F. Hill, II for "[a]ny and all information pertaining to the City of Dallas 'Assessment Center Process' for uniform positions

of the Dallas Fire and Police Departments."[1] On May 22, 2002, the City sent a letter to clarify the request, asking: "Are you seeking information regarding specific assessment centers and if so for what period of time?"[2] Hill responded on May 28, 2002, specifying that he requested information for the year 2000 for the positions of Dallas Fire Rescue Fire Lieutenant and Captain. On June 10, 2002, the City requested from the Office of the Attorney General a decision on whether some of the information sought, specifically a memorandum designated Exhibit F and two memoranda designated Exhibit G, could be withheld under the privilege for attorney-client communications. The Office of the Attorney General concluded that the City's request was untimely and that the City had not presented a compelling reason to withhold the information. Tex. Att'y Gen. LA-4450 (2002). The Attorney General therefore directed the City to disclose the information. Claiming the information was protected from disclosure by the attorney-client privilege, the City sought declaratory judgment in district court in Travis County to withhold the documents from disclosure. The trial court issued findings of fact and conclusions of law in its final judgment ordering disclosure. The court of appeals also concluded that the City's request was untimely, held that it had not established a compelling reason to withhold the information, and affirmed the trial court's order of disclosure. The Court's opinion reaches the contrary result.

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[1] The PIA precludes the governmental entity from inquiring about the reason for the request, so the parties do not provide the reason. *See* TEX GOV'T CODE § 552.222.

[2] Police and fire departments use assessment centers to evaluate potential candidates for promotion. *See* Paul Lepore, *Firefighter's Five-Step Guide to a Promotion*, FIRE LINK, http://www.firelink.com/benefits/articles/1825--firefighters-five-step-guide-to-a-promotion (last visited Feb. 16, 2010). It typically includes a tactical scenario and other exercises, an oral interview and presentation, and an employee counseling session. *Id.*

II. The Public Information Act Provides for Prompt Disclosure of Public Information.

The PIA codifies and strengthens the policy of the State of Texas that the people are entitled to "complete information" about the affairs of government. TEX. GOV'T CODE §§ 552.001, .021. From this initial premise, the statute then allows selected exceptions to the right to complete information.

When a member of the public requests public information, the governmental entity "shall promptly produce public information." *Id*. § 552.221(a). "'[P]romptly' means as soon as possible under the circumstances, that is, within a reasonable time, without delay." *Id.* If the entity believes that any of the requested information is protected from disclosure by the exceptions in Subchapter C of the PIA, it must request, within ten business days, an opinion from the Attorney General on whether the information may indeed be withheld. *Id*. § 552.301(a), (b). The provisions of Subchapter C set forth the exceptions from disclosure for public information. *See id*. §§ 552.101–.151. These are the standards the Office of the Attorney General considers when it receives compliant requests by governmental bodies to withhold public information under section 552.021.

When the governmental body fails to request an attorney general decision on withholding certain public information within the PIA deadline, the statute establishes a presumption that the information must be publicly disclosed. *Id*. § 552.302. The information then may only be withheld if the governmental body establishes a "compelling reason" to do so. *Id.* The Attorney General opined that the City of Dallas did not timely file its request for a decision on the asserted attorney-client privilege, an issue I now consider.

III. The City's Request for a Decision from the Attorney General Was Untimely.

On May 16, 2002, Dallas received Hill's request for all information pertaining to the City of Dallas Assessment Center Process for uniform positions of the Dallas Fire and Police Departments. Four business days later, the City requested from Hill a clarification of his broad request. The City received Hill's clarification four business days after its request. The City waited another nine business days thereafter, until June 10, to request an attorney general opinion. Thus, the City did not request a decision from the Attorney General until seventeen business days (twenty-five calendar days) after it received Hill's original request. If the four business-day period during which the City sought clarification is excluded, the City's request to the Attorney General was not sent until thirteen business days after receiving Hill's original May 16 request.

Section 552.301(b) expressly starts the clock ticking for the ten business-day deadline on the date the City "receives" the written request. TEX. GOV'T CODE § 552.301(b). Section 552.222(b) allows a governmental body to seek clarification upon receipt of an unclear or overbroad request for information, but it does not address how a clarification affects the ten-day deadline. *Id*. § 552.222(b); *see also* Tex. Att'y Gen. ORD-663, 3 (1999) ("[W]hile the PIA expressly permits a governmental body to seek clarification and narrowing of a request, it is silent as to the effect of such inquiry on the PIA's deadline for requesting a decision."). The City claims its request was timely because, upon receipt of Hill's clarification, it was treated as a new request, and the ten-day period reset. The Attorney General asserts, and the court of appeals reasoned, that the City's request was untimely because the time period was only tolled for the four business days between the City's request for Hill's written clarification and its receipt of that clarification.

The custom and practice in the Office of the Attorney General over the years have provided a consistent and rational manner for handling clarification requests. The Office of the Attorney General issues thousands of PIA rulings per year. In 2007 alone it issued 17,000 rulings. Between 2001 and 2007, the Attorney General issued approximately 4,515 rulings regarding claims of attorney-client privilege. Brief of Respondent-Attorney General at 29, 31, *City of Dallas v. Greg Abbott, Attorney General of Tex.*, No. 07-0931 (Tex. May 9, 2009). Attorney general opinions, which this Court has recognized as persuasive, provide that a governmental entity's good faith attempt to clarify or narrow a request tolls the time period for the information requested; conversely a request for new information that is included in a clarification starts the period anew only for that new information. *See Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996) (explaining that attorney general opinions are "persuasive, but not controlling" authority); *Doe v. Tarrant' County Dist. Attorney's Office*, 269 S.W.3d 147, 152 (Tex. App.—Fort Worth 2008, no pet.) (giving special "due consideration" to attorney general decisions involving public information because the Legislature requires the Attorney General to issue written opinions advising governmental entities); Tex. Att'y Gen. ORD-663; Tex. Att'y Gen. LA-12245 (2009) (finding that a clarification was not a new request resetting the time period); Tex. Att'y Gen. LA-9346 (2007) (finding a request untimely notwithstanding the agency's request for clarification from the requestor); Tex. Att'y Gen. LA-2258, 1-2 (2003) (finding that the tolling from clarification made request timely). If the request is simply too broad and the governmental entity seeks to narrow it, the governmental body does not get a new ten-day period for the information included in the original request. For that information, the clock

is tolled the period between the time the governmental body requests clarification and the time the governmental body receives the clarification response. *Id.*

The Attorney General has recognized that governmental bodies that genuinely need clarification of a request should not be threatened with loss of their statutory time to seek an attorney general opinion on an exception from disclosure. Tex. Att'y Gen. ORD-663 at 5. It stands to reason that clarification and narrowing, sought in good faith, should be encouraged. *See id.* For the last decade, the opportunity for reasonable clarification has been incorporated in the Attorney General's application of tolling principles to requests for clarification by governmental entities. *See id.* The public entity thereby gains more time to gather the alleged privileged information during the clarification period but must request the attorney general decision within ten business days plus the period during which the clock is tolled for a good faith clarification request. *See id.*

Hill's clarification limited the request to the year 2000 and to the positions of Dallas Fire Rescue Fire Lieutenant and Captain. It also requests a list of information: "[a]ny written documents on 'how Assessment Process was to be administered' for the above positions and time frame"; "[j]ob analysis[] for the positions of Fire Lieutenant and Fire Captain and date of each analysis"; "[a]ny contract between Booth and the City of Dallas/Civil Service to conduct the Assessment Center for the Dallas Fire department positions Fire Lieutenant and Fire Captain"; and "[a]n explanation on the 'mirroring' of percentages between Fire Prevention and Fire Operations testing for the same period." This information would be subsumed by his original request for information pertaining to the City of Dallas 'Assessment Center Process' for uniform positions of the Dallas Fire and Police Departments. Indeed, the City does not contend that the three documents it seeks to withhold, in

Exhibits F and G, were not included in the original request from Hill.[3] Accordingly, the ten business-day period should be tolled for the intervening time between the government's clarification request and Hill's response. Thus, excluding the four business days during which the time period was tolled, the City's request for a decision from the Office of the Attorney General was not sent until the thirteenth business day after Hill's May 16 request. The City's request was not timely.

Asserted exceptions to disclosure of public information had been handled in this manner for years when the City received Hill's request. *See* Tex. Att'y Gen. ORD-663 (1999). The City was charged with knowledge of the law yet failed to follow it. *See* TEX GOV'T CODE § 552.012 (mandating training of public information officers); *Osterberg v. Peca*, 12 S.W.3d 31, 38 (Tex. 2000) (holding that ignorance of the law is not an excuse for violation of a statute).

Tolling the ten-day period during the clarification process for information in the original request furthers the PIA's objective of promptly providing, "without delay," the public with information from its servants—governmental entities. *See* TEX. GOV'T CODE § 552.221(a). Resetting the time period in this circumstance delays disclosure of public information. It imposes no additional incentive to timely produce information sought within the original request that is also sought in the clarification. *See Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976) (holding that "the Act does not allow either the custodian of records or a court to

[3] In its brief on the merits, the City notes that the court of appeals framed this issue as "whether the information [Exhibits F and G] sought to be excluded from public disclosure was included in the first request." The appellate court concluded that it was. The City contends that the court should have considered the different question of what information Hill "really wanted" or "sought" because he "did not actually want all information pertaining to the assessment center process." The City argues that Hill's initial request did not specify that he wanted Exhibits F and G, but it does not deny that Exhibits F and G were included within the scope of Hill's first request. The Attorney General points out that Exhibits F and G must have been included in Hill's original request because the clarification narrowed the scope of documents sought.

consider the cost or method of supplying requested information in determining whether such information should be disclosed"). Moreover, tolling the time period for this information that was included in the original request is the established method for handling clarifications under the PIA. *See* Tex. Att'y Gen. ORD-663 at 1. The Court's approach resets the clock for all information in the original request each time a clarification is sought, and it is not justified where that clarification only narrows the scope of the original request for the benefit of the governmental entity. *See* Tex. Att'y Gen. LA-12245 (discussing multiple clarification requests). Surely, where new information is sought in a clarification, the entity should receive ten business days to seek an attorney general opinion. But it is inconsistent with the language and purpose of the PIA to extend the statutory deadline ten business days beyond the time already allotted for public information requested initially. The Court's holding ignores the date of receipt of the original request and, contrary to the statutory mandate, inserts an unnecessary delay into the process. This allows both inadvertent delay of disclosures about government affairs and easy manipulation of the deadline through clarification requests.

The Office of the Attorney General distinguishes between new requests framed as clarifications (for which a new ten business-day period applies), clarifications of public information within the scope of initial requests (for which tolling applies), and new information sought as part of legitimate clarifications of original information requested (for which the ten business-day period resets for the new information and tolling applies to information within the scope of the original request). *See* Tex. Att'y Gen. LA-4352, 1 (2005). The Court not only reverses a decades-old policy of tolling for unclear requests but creates a new category of "vague or overbroad" requests for public

information. The Attorney General's approaches addressed the various circumstances while insisting on compliance with the Legislature's mandate to address open records requests "without delay." The Court's holding could insert delays and increase costs to all parties involved by shifting the emphasis in PIA disclosure disputes from defining "compelling reason" for nondisclosure (in the case of untimely requests) to squabbles over whether non-lawyer members of the public precisely worded their requests to governmental entities for admittedly public information. It is problematic to insert into the Legislature's PIA scheme of disclosure a bane that exists in civil litigation: incessant disputes over the wording of discovery requests.

IV. The Higher, Compelling Reason Standard Governs the City's Untimely Request to Withhold Public Information.

Because the City's request for an attorney general opinion on withholding Exhibits F and G was untimely, I address whether the asserted reason for disclosure satisfied the PIA's elevated compelling reason standard.

The only exceptions to required disclosure of public information under Subchapter C that the City may raise in this suit are exceptions it raised with the Attorney General in its request for decision contained in its letter of June 10, 2002. *See* TEX GOV'T CODE § 552.326. The only exception the City raised in the June 10 letter was section 552.107(1) of Subchapter C concerning "information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client . . . ." *Id.* § 552.107(1). Whether Exhibits F and G are subject to public disclosure depends on the interpretation of the exception for attorney-client privileged information in Subchapter C of the PIA. *See id.* To simply assert the exception, however, the City must have

requested a decision from the Attorney General on the privilege within ten business days from the date of receipt of the request. *Id.* § 552.301. If the City's request was dilatory, Exhibits F and G would be presumed subject to public disclosure and "must be released unless there is a compelling reason to withhold the information." *Id.* § 552.302.

The City argues that it satisfies the compelling reason standard by merely asserting the attorney-client privilege as an exception to disclosure. If so, the City could except public information from disclosure merely by asserting the same justification it was late in raising with the Office of the Attorney General. But such an interpretation contradicts the express language of the statute and violates its purpose.

The very use of the word "compelling" in this context indicates the intent to impose a tougher standard for violation of the deadline. Precepts of statutory construction dictate that because the Legislature did not define the word "compelling" in the PIA, we interpret the word according to its plain and common meaning. *See McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). The common meaning of "compelling" is "demanding attention" or "respect." COMPACT OXFORD ENGLISH DICTIONARY 300 (2nd ed. 1991). To be compelling, a justification must be more than simply legitimate or good, it should be persuasive to the point of demanding respect or acquiescence.

The City argues that the attorney-client privilege is always a "compelling reason" to prevent disclosure because it is the oldest of the privileges for confidential communications known to the common law and is vital to encourage clients to confide in their attorneys. *See Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995). The City's interpretation of the section 552.301 compelling reason standard would require nothing more to keep public information secret than a late

assertion of a legitimate justification, notwithstanding the statutory mandates. There are several other reasons this conclusion is incorrect.

A. The Legislature's Adoption of the Compelling Reason Standard in the PIA Codified the Attorney General's Application of the Standard.

In considering the 1999 proposed amendment to the PIA that would include the compelling reason standard, the Legislature was not acting in a vacuum. The Office of the Attorney General originated the compelling reason standard long before the Legislature amended the statute to incorporate it.

Every Attorney General in the thirty-five years since the PIA was enacted has applied and enforced the heightened compelling reason standard. *See* Tex. Att'y Gen. ORD-26 (1974) (Attorney General John Hill); Tex. Att'y Gen. ORD-319 (1982) (Attorney General Mark White); Tex. Att'y Gen. ORD-552 (1990) (Attorney General Jim Mattox); Tex. Att'y Gen. ORD-630 (1994) (Attorney General Dan Morales); Tex. Att'y Gen. LA-3474 (2001) (Attorney General John Cornyn); Tex. Att'y Gen. LA-6858 (2002) (Attorney General Greg Abbott). In 1974, the Attorney General reasoned that a late request for decision meant that the resulting presumption that information must be disclosed could only be overcome by a "compelling demonstration that the information requested should not be released to the public." Tex. Att'y Gen. ORD-26; *see also* Tex. Att'y Gen. ORD-552. That office affirmed the application of this standard in several instances. *See* Tex. Att'y Gen. ORD-319; Tex. Att'y Gen. ORD-150 (1977); Tex. Att'y Gen. ORD-34 (1974). In 1994, an attorney general opinion addressed the very issue before this Court. "The mere fact that the information is within the attorney-client privilege and thus would be excepted from disclosure under section 552.107(a) of the

Open Records Act [now PIA] if the governmental body had made a timely request for an open records decision does not alone constitute a compelling reason to withhold the information from public disclosure." Tex. Att'y Gen. ORD-630 at 7. The office confirmed that ruling in 2001. *See* Tex. Att'y Gen. LA-5561 (2001). In 1999, before the PIA was amended that year, the Attorney General again explained that the compelling reason standard applied to public information for which the request for decision was late. Tex. Att'y Gen. LA-725 (1999) (Attorney General John Cornyn). And these attorney general opinions consistently apply a higher standard to allow this type of exception to withholding information.

In addition, several courts of appeals have adopted the Attorney General's standard for deciding PIA disputes arising out of a late request for an attorney general opinion. *Doe*, 269 S.W.3d at 154 (stating that "statutory and case law support the AG's general rule" and adopting that standard); *Jackson v. Tex. Dep't of Pub. Safety*, 243 S.W.3d 754, 758 (Tex. App.—Corpus Christi 2007, pet. denied) (adopting the Attorney General's compelling reason standard); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no pet.) (citing attorney general opinions, recognizing the compelling reason standard, and holding that the agency must do more than present a "mere showing of the applicability of one of the statutory exceptions" to overcome the presumption of openness). *But see City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 554–55 (Tex. App.—Dallas 1998) (refusing to adopt the "compelling demonstration test" because the court did not find "*Hancock* and the attorney general opinions" adopting that test persuasive), *aff'd on other grounds*, 22 S.W.3d 351, 364 (Tex. 2000) (plurality opinion) (declining to address the applicability of the compelling reason standard because the information at issue was subject to

disclosure regardless of that analysis). As the Attorney General and these courts of appeals have consistently held, to uphold a late request to except public information from disclosure based on the attorney-client privilege requires more than reasserting the same privilege. *See* Tex. Att'y Gen. ORD-676 (2002); Tex. Att'y Gen. LA-5561; Tex. Att'y Gen. ORD-630.

It is thus not surprising that the Legislature continued this established and predictable policy. At a Senate hearing on amending the PIA in 1999 to explicitly incorporate the compelling reason standard, the author of the bill, Senator Corona, explained that the amendment "will require the governmental body to forfeit any discretionary exceptions and would require the release of the information," consistent with the Attorney General's previous decisions. The author then introduced the chief of the open records division of the Office of the Attorney General, who explained:

> [T]he attorney general's office has interpreted that this— and basically this codifies a long standing interpretation of the attorney general's office, that I think stretches all the way back from 1977 in Open Records Decision 150—and the attorney general has determined that, uh, compelling reasons would be if if [sic] the information were made confidential by another source of law outside the Open Records Act . . . as well as if release of the information would adversely affect the privacy or property interest of third parties.[4]

Hearing on S.B. 277 Before the Senate Committee on State Affairs, 76th Leg., R.S. (Partial Transcript at 2, March 11, 1999); Act of September 1, 1999, 76th Leg., R.S. ch. 1319, § 21, 1999 Tex. Gen. Laws 4509; *see also Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex. 1999) (stating that courts presume the Legislature acts with knowledge of the accepted legal meanings of terms); *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942) (explaining that "statutes are presumed to be

[4] Actually, the standard was created by the attorney general's office in 1974 in Open Records Decision No. 26, which explained there must be a "compelling demonstration that the information requested should not be released to the public," decided by the Honorable John L. Hill.

enacted by the legislature with full knowledge of the existing condition of the law and with reference to it").

Since the Legislature's 1999 addition of the compelling reason standard to the PIA, the Attorney General has affirmed its interpretation, and the Legislature has not responded negatively to it. Tex. Att'y Gen. ORD-676. The Court has explained that it is persuasive that the Legislature had amended the PIA several times without responding negatively to attorney general interpretations. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 366 (Tex. 2000).

B. The Compelling Reason Standard Provides Incentives for Expeditious Action as Contemplated by the PIA.

The overall scheme of the statute indicates the Legislature's goal of preventing open government requests from languishing in the bureaucratic process due to dilatory requests for decisions and slow responses. *See, e.g.*, § 552.301(b) (requiring governmental entities to request decisions on exceptions from disclosure of public information within ten business days); §552.306 (requiring the Attorney General to render a decision "not later than the 45th business day after the date the Attorney General received the request").[5] To accomplish this goal of the PIA, a "compelling reason" must be a higher and more demanding standard to create a persuasive incentive for governmental entities to comply with the PIA's expeditious time frames. The Court's holding undercuts the incentive to be prompt by allowing an easy manner to delay the decision to produce public information. Under the City's position, a city that prioritizes open government and works

[5] In an amicus brief from Senator John Cornyn, former Texas Attorney General, supporting the current Attorney General's position, he explains that the Texas Public Information Act is widely regarded as the strongest and most successful open government law in the country particularly because of its deadlines and enforcement mechanisms and that the Federal Act is largely based on the Texas PIA, citing 151 Cong. Rec. S1525-26 (Feb. 16, 2005).

diligently to meet the deadline for a request for decision on an attorney-client privilege issue is treated no differently than a city that is not diligent in attempting to respond to a PIA request and simply asks for a "good faith" clarification of a word or phrase in a request.

To demonstrate a compelling reason to withhold information, the Attorney General's longstanding interpretations require that the governmental entity assert the attorney-client privilege along with another special circumstance that increases the consequences of disclosure, such as that the interests of third parties would be harmed or that the governmental entity is prohibited from disclosing the information by other law.[6] *See* Tex. Att'y Gen. LA-5561; Tex. Att'y Gen. ORD-630; Tex. Att'y Gen. ORD-26. I agree that the two bases for demonstrating compliance with the compelling reason standard are reasonable. However, application of the standard should also consider circumstances in which the disclosure of such privileged information would likely inflict substantial harm to the public or the entity. In this case, without more, the City's privilege fails the compelling reason standard. However, in other circumstances, disclosure of privileged attorney-client communications could cause substantial harm to the public entity and add substantial cost or even harm the public that the PIA seeks to keep informed.

C. The City's Position Would Delete the "Compelling Reason" Standard From the Statute in These Situations.

The City argues that attorney-client privilege is always a compelling reason to prevent disclosure. *In re City of Georgetown*, 53 S.W.3d 328, 332–33 (Tex. 2001) (quoting *Leggat*, 904

[6] The fact that the attorney-client privilege exists in other law does not mean that the City could not waive it. *See* Tex. Att'y Gen. ORD-630. The attorney-client privilege benefits the City, as the client, and therefore can be waived by the City. *Id.* However, if the City were claiming a non-discretionary exception, such that the City were actually prohibited from disclosing it at the risk of penalty, that exception would be a compelling reason and satisfy the statute.

S.W.2d at 647). That holding essentially means that a governmental entity could either intentionally or unintentionally make a late request to the Attorney General seeking an exception from disclosure and still not have any higher burden to except information from disclosure. I disagree that the importance of the privilege means that a statute or rule cannot provide for waiver of the privilege or elevate the standard to rely on it. *See, e.g.*, TEX. R. CIV. P. 193.3(d) (stating that a party who inadvertently discloses information waives the attorney-client privilege if it does not assert the privilege within ten days of disclosure); TEX. R. APP. P. 33.1(a); *see also In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 439–41 (Tex. 2007); *In re Living Ctrs. of Tex., Inc.*, 175 S.W.3d 253, 259–60 (Tex. 2005). The City waived the straightforward application of the attorney-client privilege by not requesting a decision within ten business days and should not be able to overcome that waiver by reasserting the same privilege.[7]

It is important to remember that the City retains control over the nondisclosure of otherwise privileged information if it simply abides by the PIA's deadlines. This in no way diminishes the importance of the attorney-client privilege; instead, I believe that the City must follow the procedures specifically mandated by the PIA in order to assert it without having to establish a compelling reason. The procedure in section 552.301 is not a trap for the unwary that could catch a

[7] The Attorney General has held in multiple decisions that a governmental entity waived privileges. *See, e.g.*, Tex. Att'y Gen. ORD-663 (holding that a governmental body waived the attorney client privilege, the work product privilege, and the litigation exception by missing the deadlines in 552.301); Tex. Att'y Gen. LA-5561 (same); Tex. Att'y Gen. ORD-400 (1983) (holding that a governmental body waived the work product privilege by showing the information to the members of the public); Tex. Att'y Gen. ORD-325 (1982) (holding that a governmental body waived exceptions to disclosure by not raising them).

conscientious governmental official off guard.[8] An action as simple as placing a letter to the Attorney General with a short request for a decision in the United States mail, first class, within ten business days after receiving the public information request, satisfies the statute. *See* TEX. GOVT. CODE § 552.308. The likely reason the entity would not comply with this requirement is simply because it does not have a system in place to handle these requests quickly and efficiently, which is the harm the Legislature attempted to remedy in the statute by training all public officials in the requirements of the PIA and explicitly requiring prompt responses to the people for public information.

V. Conclusion

The Legislature requires disclosure of public information and prompt resolution of exemptions from disclosure. Because the City failed to comply with the requirements to withhold public information from disclosure, I respectfully dissent and would hold that the PIA requires the City to disclose the public information.

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Dale Wainwright
Justice

OPINION DELIVERED: February 19, 2010

[8] In fact, all public officials have been required since 2006 to complete a training regarding the government's responsibilities under the PIA. *See* TEX. GOVT. CODE § 552.012.

IN THE SUPREME COURT OF TEXAS

NO. 07-0960

IN THE INTEREST OF B.G., C.W., E.W., B.B.W., AND J.W., CHILDREN

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

Argued September 8, 2009

JUSTICE HECHT delivered the opinion of the Court.

JUSTICE LEHRMANN did not participate in the decision.

In cases brought by the government for termination of parental rights, section 263.405 of the Texas Family Code prescribes shortened post-trial deadlines and special procedures to discourage frivolous appeals and expedite finality, minimizing the time a child must spend in temporary care. Section 263.405(i) limits an appeal to the issues included in a statement filed in the trial court within fifteen days after the judgment is signed. But if an indigent parent who has requested appointed counsel fails to timely file the required statement, the statutory limitation cannot, consistent with due process, preclude an appeal complaining of ineffective assistance. So we held in *In re J.O.A.*[1] For

[1] 283 S.W.3d 336, 347 (Tex. 2009).

essentially the same reasons, we now hold that due process[2] does not allow the lack of the required statement to be the basis for denying the parent an appellate record. Accordingly, we reverse the judgment of the court of appeals[3] and remand the case to that court for further proceedings in accordance with this opinion.

I

A

Section 263.405(a) provides that an appeal from a judgment in a parental rights termination case brought by the government is accelerated under the Texas Rules of Appellate Procedure.[4] Section 263.405(b) requires that a motion for new trial be filed within fifteen days from the date the judgment is signed, instead of the usual thirty,[5] and requires that within the same period "a statement of the point or points on which the party intends to appeal" must be filed.[6] The statute does not

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[2] Petitioner invokes both the Fourteenth Amendment to the United States Constitution and article I, section 19 of the Texas Constitution. Because "[t]he parties have not identified any difference between the state and federal guarantees material to the issues in this case", we treat them as the same. *Nat'l Collegiate Athletic Ass'n v. Yeo*, 171 S.W.3d 863, 867-868 (Tex. 2005); *id*. at 868 n.14 (citing *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995), and *Mellinger v. City of Houston*, 3 S.W. 249, 252-253 (Tex. 1887)); *see also Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 525 (Tex. 1995) (noting that while these provisions have sometimes been treated as providing identical guarantees, the Court has occasionally attempted to formulate an independent standard for the state provision).

[3] ___ S.W.3d ___ (Tex. App.–Tyler 2007).

[4] TEX. FAM. CODE § 263.405(a) ("An appeal of a final order rendered under this subchapter is governed by the rules of the supreme court for accelerated appeals in civil cases and the procedures provided by this section.").

[5] TEX. R. CIV. P. 329b(a) ("A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.").

[6] TEX. FAM. CODE § 263.405(b) ("Not later than the 15th day after the date a final order is signed by the trial judge, a party who intends to request a new trial or appeal the order must file with the trial court: (1) a request for a new trial; or (2) if an appeal is sought, a statement of the point or points on which the party intends to appeal.").

provide for an extension of the deadline. The statement of appellate points is crucial. Section 263.405(i) states:

> The appellate court may not consider any issue that was not specifically presented to the trial court in a timely filed statement of the points on which the party intends to appeal or in a statement combined with a motion for new trial. For purposes of this subsection, a claim that a judicial decision is contrary to the evidence or that the evidence is factually or legally insufficient is not sufficiently specific to preserve an issue for appeal.

Notice of appeal and an appellant's affidavit of indigence must be filed within twenty days after the judgment is signed.[7] (A party's indigent status in the trial court does not establish indigence on appeal.[8]) This deadline is not extended by the filing of post-trial motions or requests for findings and conclusions,[9] but the appellate court can grant a fifteen-day extension.[10] Within thirty days after the judgment is signed, section 263.405(d) requires the trial court to "hold a hearing" to determine whether a new trial should be granted, whether any claim of indigence should be sustained, and

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[7] TEX. R. APP. P. 26.1(b) ("in an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed"); TEX. R. APP. P. 20.1(c)(1) ("An appellant must file the affidavit of indigence in the trial court with or before the notice of appeal.").

[8] TEX. R. APP. P. 20.1(c)(1) ("The prior filing of an affidavit of indigence in the trial court pursuant to Texas Rule of Civil Procedure 145 does not meet the requirements of this rule, which requires a separate affidavit and proof of current indigence.").

[9] TEX. FAM. CODE § 263.405(c) ("A motion for a new trial, a request for findings of fact and conclusions of law, or any other post-trial motion in the trial court does not extend the deadline for filing a notice of appeal under Rule 26.1(b), Texas Rules of Appellate Procedure, or the deadline for filing an affidavit of indigence under Rule 20, Texas Rules of Appellate Procedure."); TEX. R. APP. P. 28.1(b) ("Filing a motion for new trial, any other post-trial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.").

[10] TEX. R. APP. P. 28.1(b) ("Unless otherwise provided by statute, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25.1 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3."); TEX. R. APP. P. 26.3 ("The appellate court may extend the time to file the notice of appeal if, within 15 days after the deadline for filing the notice of appeal, the party: (a) files in the trial court the notice of appeal; and (b) files in the appellate court a motion complying with Rule 10.5(b).").

whether the appeal is frivolous.[11] A parent whose claim of indigence is not denied within thirty-six days after the judgment is signed is considered to be indigent.[12]

Ordinarily in an accelerated appeal, the record is due ten days after the notice of appeal,[13] but in a parental rights termination case, preparation of the record for an indigent's appeal cannot even begin until the trial court has determined at the hearing required by section 263.405(d) that an appeal will not be frivolous,[14] and section 263.405(f) allows the appellate record to be filed up to sixty days after the judgment is signed.[15] Thus, an indigent parent must move for new trial, file a statement of appellate points, and convince the trial court that appeal is not frivolous, all without a reporter's record.

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[11] TEX. FAM. CODE § 263.405(d) ("The trial court shall hold a hearing not later than the 30th day after the date the final order is signed to determine whether: (1) a new trial should be granted; (2) a party's claim of indigence, if any, should be sustained; and (3) the appeal is frivolous as provided by Section 13.003(b), Civil Practice and Remedies Code."); *see* TEX. CIV. PRAC. & REM. CODE § 13.003(b) ("In determining whether an appeal is frivolous, a judge may consider whether the appellant has presented a substantial question for appellate review.").

[12] TEX. FAM. CODE § 263.405(e).

[13] TEX. R. APP. P. 35.1(b). However, "[i]n lieu of the clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers." TEX. R. APP. P. 28.1(e).

[14] *See* TEX. CIV. PRAC. & REM. CODE § 13.003(a) ("[A] court reporter shall provide without cost a statement of facts and a clerk of a court shall prepare a transcript for appealing a judgment from the court only if: (1) an affidavit of inability to pay the cost of the appeal has been filed under the Texas Rules of Appellate Procedure; and (2) the trial judge finds: (A) the appeal is not frivolous; and (B) the statement of facts and the clerk's transcript is needed to decide the issue presented by the appeal.").

[15] TEX. FAM. CODE § 263.405(f) ("The appellate record must be filed in the appellate court not later than the 60th day after the date the final order is signed by the trial judge, unless the trial court, after a hearing, grants a new trial or denies a request for a trial court record at no cost.").

An indigent parent is entitled to appointed counsel in parental rights termination cases,[16] and that statutory right, we have held, "embodies the right to effective counsel".[17] There are no statutory directives for when or how the appointment is to be made. Once appointed, an attorney cannot withdraw without good cause and the court's permission,[18] and withdrawal is subject to ethical restrictions.[19] It is not uncommon for appellate counsel to be substituted for trial counsel, but appellate counsel cannot be appointed until the appellant has been determined to be indigent on appeal.[20] An attorney who was not present at trial often faces significant difficulties in determining what grounds there may be for a motion for new trial or appeal within the prescribed timeframe.

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[16] TEX. FAM. CODE § 107.013(a) ("In a suit filed by a governmental entity in which termination of the parent-child relationship is requested, the court shall appoint an attorney ad litem to represent the interests of: (1) an indigent parent of the child who responds in opposition to the termination . . . .").

[17] *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003).

[18] TEX. R. CIV. P. 10 ("An attorney may withdraw from representing a party only upon written motion for good cause shown. . . . The Court may impose further conditions upon granting leave to withdraw.").

[19] TEX. DISCIPLINARY R. PROF'L CONDUCT 6.01 ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) representing the client is likely to result in violation of law or rules of professional conduct; (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."). The Court has proposed to amend the rule by redesignating the existing text as paragraph (b) and adding the following paragraph (a): "When a tribunal appoints a lawyer to represent a person, the lawyer shall represent the person until the representation is terminated in accordance with Rule 1.16(c)." Order Approving Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct, Misc. Docket No. 09-9175 (Tex. Oct. 20, 2009). Proposed Rule 1.16(c) adds a sentence to what is currently Rule 1.15(c), so that it reads as follows: "A lawyer shall comply with these Rules, applicable rules of practice or procedure, and applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." *Id*.

[20] TEX. FAM. CODE § 263.405(e) ("If a party claims indigency and requests the appointment of an attorney, the court shall require the person to file an affidavit of indigency and shall hear evidence to determine the issue of indigency. If the court does not render a written order denying the claim of indigence or requiring the person to pay partial costs before the 36th day after the date the final order being appealed is signed, the court shall consider the person to be indigent and shall appoint counsel to represent the person.").

B

The Texas Department of Family and Protective Services sued petitioner Lester Williams in February 2005 to terminate his rights in his four children on the ground that he had endangered their well-being.[21] From the scant record before us, which does not include a reporter's record of the trial, it appears that Williams, an inmate, was permitted to discharge his appointed counsel and proceed to trial *pro se*. The trial court signed a judgment terminating Williams's parental rights on July 18, 2006. The docket sheet reflects that on July 20 the trial court appointed attorney Claude Welch to represent Williams, and we infer from this notation that Williams indicated an intention to appeal and requested appointment of counsel, and that Welch was actually appointed. But the record does not contain an order appointing Welch or reflect that he took any action on behalf of Williams. The record does contain an order dated August 9 appointing attorney Brent Watkins to represent Williams. Watkins stated at oral argument that the trial court accommodated Welch's request to be relieved of the appointment and that Welch never actually represented Williams, but our record is silent on the subject.

Watkins's appointment came twenty-two days after the judgment was signed, and thus after the deadlines for filing a statement of appellate points, a notice of appeal, and an affidavit of indigence. Watkins filed Williams's notice of appeal on August 14 and his affidavit of indigence on August 23, and was granted extensions for both. Watkins filed a statement of appellate points

[21] *See* TEX. FAM. CODE § 161.001(1)(D)-(E) ("The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence: (1) that the parent has: . . . (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child . . . .").

on September 11, forty days late. The statement set out two points of appeal: first, that Williams had not been allowed to offer family members' testimony about efforts he had made to provide his children physical and emotional care, to refute the charges that he had placed his children, or allowed them to remain, in dangerous conditions; and second, that the evidence for termination was not clear and convincing.

The trial court held a hearing on September 12, fifty-six days after the judgment was signed. The record does not reflect a reason for the delay. By that time, since the trial court had not denied Williams's claim of indigence, he was considered to be indigent. The trial court ordered that because Williams had not filed a statement of appellate points by the statutory deadline, an appellate record was "not needed to decide any issue presented for the appeal", and found that "no substantial question for appellate review has been presented".[22] The court of appeals affirmed,[23] and we granted Williams's petition for review.[24]

II

Williams contends that by precluding his appeal, section 263.405 violates due process. We faced a similar contention in *In re J.O.A.*[25] There, an indigent parent's appointed counsel was permitted to withdraw after the trial, and new counsel was appointed, but not until after the statement

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[22] Despite this finding, the trial court refused to find that an appeal would be frivolous. The trial court did not explain its reasoning. One possibility is that the judge presiding at the hearing had not presided over the trial and, of course, did not have a record of the evidence presented.

[23] ___ S.W.3d ___ (Tex. App.–Tyler 2007).

[24] 52 Tex. Sup. Ct. J. 653 (May 1, 2009).

[25] 283 S.W.3d 336 (Tex. 2009).

of appellate points was due.[26] On appeal, the parent complained that he had been denied effective assistance of counsel. Section 263.405(i) foreclosed that complaint because it was not included in a timely filed statement of points, even though the lack of a statement was the basis of the complaint. We held that by precluding the parent from complaining on appeal of ineffective assistance of counsel in those circumstances, section 263.405(i) violated due process.[27] We further held, based on a full record, that the parent had been denied effective assistance because his appellate issue, insufficiency of the evidence, would have required reversal had it been included in a timely filed statement of appellate points.[28]

The present case differs from *J.O.A.* in that it is unclear whether Williams was represented by counsel in the fifteen days he had to file a statement of appellate points. Attorney Welch was appointed two days after the judgment was signed, but the record does not reflect whether he actually undertook to represent Williams or, as Watkins tells us, was allowed to withdraw. The Department insists that we must presume Welch represented Williams until Watkins was appointed, but the issue is immaterial. Whether Williams failed to file the statement required for appeal because he had no counsel or ineffective counsel, he is entitled under *J.O.A.* to complain on appeal of ineffective assistance.

The important difference between this case and *J.O.A.* is that a complaint of ineffective assistance of counsel is foreclosed by the trial court's denial of an appellate record as a consequence

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[26] *Id*. at 340.

[27] *Id*. at 339-340, 344-347.

[28] *Id*.

of Williams's failure to file a statement of points. We explained in *J.O.A.* that "[a]n ineffective assistance of counsel claim . . . requires more than merely showing that appointed counsel was ineffective."[29] There must also be "a showing of a deficient performance by counsel so serious as to deny the defendant a fair and reliable trial."[30] To make this showing, Williams would be required to demonstrate that he could prevail on appeal on either of the two issues raised in his late-filed statement of points: that he was not allowed to call other witnesses, and that the evidence for termination was not clear and convincing. Without a reporter's record, it would be impossible to show that either issue has merit. The parent in *J.O.A.* was able to make the required showing because he had been provided a full record despite section 263.405(i).

Williams has not asserted ineffective assistance of counsel, but given that the assertion would fail as a matter of law without an appellate record, he need not do so to complain that section 263.405 has operated to deprive him of an appeal. In essence, Williams's complaint is that because a statement of points was not timely filed, despite his entitlement to effective representation by appointed counsel, the trial court determined that no issues could be raised on appeal, that any appeal would therefore be frivolous, and consequently, no record should be prepared. Importantly, the trial court did not determine that the issues raised in the late-filed statement of points were frivolous; the trial court determined only that the lateness of the filing made the appeal frivolous. Although Williams's argument is not cast as a complaint of ineffective assistance of counsel, the effect is the same. Like the parent in *J.O.A.*, Williams has been deprived of an appeal because of section

[29] *Id.* at 344.

[30] *Id.* at 342, 344 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

263.405(i). That deprivation is no less a denial of due process merely because it results indirectly from the lack of an appellate record.

The Department argues that there can be no denial of due process when there is no constitutional right to an appeal.[31] But once appellate review is afforded, it cannot be unduly restricted. As the United States Supreme Court has reiterated: "'This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.'"[32] Whether section 263.405's requirements pose an impermissible impediment to appeal in this case depends on three factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure".[33]

The Department acknowledges that the private interests affected in a parental rights termination case are of the highest order. As the Supreme Court has said, natural parents have a "fundamental liberty interest . . . in the care, custody, and management of their child [which] does not evaporate simply because they have not been model parents or have lost temporary custody of

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[31] *Sultan v. Mathew*, 178 S.W.3d 747, 752 (Tex. 2005) ("Under the Texas Constitution, the courts of appeals have jurisdiction over 'all cases of which the District Courts or County Courts have original or appellate jurisdiction, *under such restrictions and regulations as may be prescribed by law*.' [TEX. CONST. art. V, § 6.] As we stated in *Seale v. McCallum*, 116 Tex. 662, 287 S.W. 45, 47 (1926), 'the principle is fixed that the Legislature has the power to limit the right of appeal . . . .'"); *id.* at 752 n.6 ("[W]e also note that the United States Constitution does not guarantee the right to an appeal.").

[32] *M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996) (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966)).

[33] *Santosky v. Kramer*, 455 U.S. 745, 754 (1982) (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27-31 (1981), and *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)); *see In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003).

their child to the State."[34] We have said that "termination cases implicate fundamental liberties"[35] and that "a parent's interest in maintaining custody of and raising his or her child is paramount".[36]

The Department argues that the risk of error created by section 263.405 is small and it does not often occur. An inability to file a statement of appellate points by the statutory deadline has been an issue in only a few cases since the statute was enacted in 2001[37] and paragraph (i) added in 2005.[38] But frequency is not the only measure of risk; the magnitude of harm must also be considered,[39] and the harm in losing all right to an appeal by missing a deadline by a few days is potentially severe. Also, in considering whether section 263.405 has worked a denial of due process as applied to Williams, we ignore the almost nonexistent risk of harm to the Department. In circumstances like those in this case, the risk that an appeal will be improperly denied is much greater. Indeed, this is the second case of its kind to be decided by this Court in a year. The risk of error posed by section 263.405 in cases in which an indigent parent is represented by counsel appointed after trial is significant.

Finally, the Department argues that section 263.405 serves the important state interest of bringing finality to parental rights termination proceedings, keeping foster care from being

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[34] *Santosky*, 455 U.S. at 753-754; *see Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) ("The natural right existing between parents and their children is of constitutional dimensions.").

[35] *In re B.L.D.*, 113 S.W.3d 340, 351-352 (Tex. 2003).

[36] *In re M.S.*, 115 S.W.3d at 547.

[37] Act of May 22, 2001, 77th Leg. R.S., ch. 1090, § 9, 2001 Tex. Gen. Laws 2395, 2397-2398.

[38] Act of May 12, 2005, 79th Leg., R.S., ch. 176, § 1, 2005 Tex. Gen. Laws 332, 332.

[39] *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994).

unnecessarily prolonged, and providing stability and certainty to families and children. We do not question the State's interest in avoiding delay in these proceedings, but that interest must be viewed in context. Section 263.401 allows a year for trial, plus an additional 180 days in extraordinary circumstances.[40] Williams's case was tried and adjudicated in the eighteenth month after it was filed. Section 263.405(d) allows the trial court thirty days to hold a hearing to determine whether an appeal would be frivolous, and section 263.405(f) allows sixty days for filing the appellate record. An inflexible fifteen-day deadline for filing a statement of appellate points is not essential to achieve expedition. But more to the point, the unavailability of a record to show whether an indigent parent was denied effective assistance of counsel and precluded from appeal without regard to the merits of his arguments serves no legitimate interest we can see.

This does not mean that a reporter's record must be prepared in every parental rights termination case involving an indigent parent. If a trial court determines in a section 263.405(d) hearing that an appeal on the issues attempted to be raised by the parent would be frivolous, review is limited to the record of that hearing.[41] Here, the trial court determined that Williams had presented no substantial question for appellate review, not because the issues in his statement of points challenging the sufficiency of the evidence and exclusion of witnesses were frivolous, but because the statement was not timely filed. The judge who presided at the section 263.405(d) hearing was

[40] TEX. FAM. CODE § 263.401.

[41] TEX. FAM. CODE § 263.405(g) ("The appellant may appeal the court's order denying the appellant's claim of indigence or the court's finding that the appeal is frivolous by filing with the appellate court the reporter's record and clerk's record of the hearing held under this section, both of which shall be provided without advance payment, not later than the 10th day after the date the court makes the decision. The appellate court shall review the records and may require the parties to file appellate briefs on the issues presented, but may not hear oral argument on the issues. The appellate court shall render appropriate orders after reviewing the records and appellate briefs, if any.")

not the judge who presided over the trial and may thus have been reluctant to assess the evidence at trial, which Williams's issues challenged. A reporter's record is necessary in this case because we have set aside the trial court's finding that Williams presented no substantial question for appellate review.

III

Having concluded that section 263.405, as applied to Williams, deprived him of due process, we must determine an appropriate disposition. The trial court determined that Williams had presented no substantial question for appellate review only because his statement of points was late-filed. Because we have concluded that the late filing should not impede his appeal, a complete appellate record should be prepared, and the court of appeals should consider the issues raised in his statement of points as if it had been timely filed. We see no need to remand the case to the trial court, and in the interest of avoiding further delay, we do not do so. When the record has been prepared, the court of appeals can set an appropriate briefing schedule.

Accordingly, we reverse the judgment of the court of appeals and remand the case to that court.

Nathan L. Hecht
Justice

Opinion delivered: July 2, 2010

IN THE SUPREME COURT OF TEXAS

NO. 07-0970

LAURI SMITH AND HOWARD SMITH, PETITIONERS,

v.

PATRICK W. Y. TAM TRUST, RESPONDENT

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

Argued August 29, 2008

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

The reasonableness of attorney's fees is generally an issue for the trier of fact. In *Ragsdale v. Progressive Voters League*, however, we held that a court may award attorney's fees as a matter of law when the testimony on fees "'is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon.'" *Ragsdale*, 801 S.W.2d 880, 882 (Tex. 1990) (quoting *Cochran v. Wool Growers Cent. Storage Co.*, 166 S.W.2d 904, 908 (Tex. 1942)). We must decide whether *Ragsdale* authorizes a court to award fees as a matter of law when a jury awards roughly one-third of the damages sought and no attorney's fees. Because, under such circumstances, a court's award of the full amount of fees sought is unreasonable, we reverse in part the court of appeals' judgment and remand to the trial court for a new trial on attorney's fees.

I
Factual and Procedural Background

The Patrick W. Y. Tam Trust owns a shopping center in Collin County. The Trust leased space to Independent Quality Wholesale, Inc. d/b/a Plano Pets & Grooming, with Lauri and Howard Smith as guarantors. When Plano Pets stopped making payments, the Trust sued Plano Pets[1] and the Smiths, seeking $215,391.50 in damages and $47,438.75 in attorney's fees.

At trial, Scott Hayes, the Trust's attorney, testified that a reasonable fee for the preparation and trial of the case would be $47,438.75, plus $15,000 for appeals, for a total of $62,438.75. To support his testimony, Hayes offered the legal bills of several other attorneys in his firm. The Smiths unsuccessfully objected that the bills were hearsay but did not otherwise challenge the Trust's evidence.

The jury found the Smiths liable and awarded the Trust $65,000 in damages but no attorney's fees. The Trust moved to enter judgment on the jury's liability and damages answers and to disregard the jury's refusal to award attorney's fees. The trial court rendered judgment that the Trust receive the $65,000 the jury awarded, and rendered judgment notwithstanding the verdict on attorney's fees: $7,500 for fees incurred through trial and up to $15,000 in attorney's fees for success at various stages of appeal. Both sides appealed.

The court of appeals vacated the $7,500 attorney's fee award and rendered judgment for $47,438.75 instead, holding that "[b]ecause the Trust presented competent, uncontroverted evidence of its right to attorney's fees and because the Smiths did not challenge the amount, nature, or

[1] The Trust nonsuited Plano Pets after the company filed bankruptcy.

necessity of these fees . . . the trial judge abused his discretion in awarding $7,500." 235 S.W.3d 819, 828 (citing *Ragsdale*, 801 S.W.2d at 881). The court of appeals affirmed the remainder of the judgment. *Id*. at 829. We granted the Smiths' petition for review. 51 Tex. Sup. Ct. J. 980, 987 (June 9, 2008).

II
Discussion

"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." TEX. CIV. PRAC. & REM. CODE § 38.001(8). If attorney's fees are proper under section 38.001(8), the trial court has no discretion to deny them. *See Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998) (holding that statutes providing that a party "may recover" attorney's fees are not discretionary). Generally, the party seeking to recover attorney's fees carries the burden of proof. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991).

The reasonableness of attorney's fees is ordinarily left to the factfinder, and a reviewing court may not substitute its judgment for the jury's. *Barker v. Eckman*, 213 S.W.3d 306, 314 (Tex. 2006); *Ragsdale*, 801 S.W.2d at 881. In *Ragsdale*, we held that "[i]n awarding attorney's fees the trial court, as the trier of fact, must take into account various factors such as: the nature and complexity of the case; the nature of the services provided by counsel; the time required for trial; the amount of money involved; the client's interest that is at stake; the responsibility imposed upon counsel; and the skill and expertise required." *Ragsdale*, 801 S.W.2d at 881. We noted that generally, "'the testimony of an interested witness, such as a party to the suit, though not contradicted, does no more

than raise a fact issue to be determined by the jury.'" *Id*. at 882 (quoting *Cochran*, 166 S.W.2d at 908). But we recognized that there was "'an exception to this rule, which is that where the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon, it is taken as true, as a matter of law.'" *Id*. (quoting *Cochran*, 166 S.W.2d at 908). "The court, as a trier of fact, may award attorneys' fees as a matter of law in such circumstances, especially when the opposing party has the means and opportunity of disproving the testimony or evidence and fails to do so." *Id*. Because the attorney's fees evidence met those requirements, we rendered judgment for $22,500 in attorney's fees and affirmed the $40,000 damages award. *Id*.

Relying on *Ragsdale*, the court of appeals in this case rendered judgment as a matter of law, holding that the Trust's attorney's fee evidence was competent, uncontroverted, and unchallenged. 235 S.W.3d at 828-29. But *Ragsdale* recognized that its rule would not apply whenever attorney's fees testimony is undisputed:

> [W]e do not mean to imply that in every case when uncontradicted testimony is offered it mandates an award of the amount claimed. For example, even though the evidence might be uncontradicted, if it is unreasonable, incredible, or its belief is questionable, then such evidence would only raise a fact issue to be determined by the trier of fact.

Ragsdale, 801 S.W.2d at 882. We also cautioned that the factfinder had to consider "the amount of money involved." *Id*. at 881; *see also Wayland v. City of Arlington*, 711 S.W.2d 232, 233 (Tex. 1986) ("One of the factors in determining the reasonableness of attorney's fees is the amount of damages awarded."). Seven years later, we added a corollary: the factfinder should consider "the

amount involved and the results obtained," among other things. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

Here, the Trust sought over $200,000 in damages, but the jury awarded only $65,000. The Trust asked for a maximum of $62,438.75 in attorney's fees; the jury awarded nothing. The court of appeals held that fees were established as a matter of law. *See Ragsdale*, 801 S.W.2d at 882. But the fee, though supported by uncontradicted testimony, was unreasonable in light of the amount involved and the results obtained, and in the absence of evidence that such fees were warranted due circumstances unique to this case. *Cf. Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (holding that "'the degree of the plaintiff's overall success goes to the reasonableness' of a fee award" and "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'") (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). Although the Trust sought some $215,000 in damages, the jury found that "the amount involved" was much lower—$65,000. The jury then decided that the Trust was entitled to no fees (which must be reversed for reasons explained below).

The Trust complains that the Smiths' failure to request a jury instruction on the *Arthur Andersen* factors waives their right to complain about the fee award. But the jury's fee award is not at issue here. The court of appeals awarded the full amount requested, despite the jury's rejection of a substantial portion of the damages sought. Those fees, even though supported by uncontradicted testimony, may not be awarded by a court as a matter of law.

We have held that the *Arthur Andersen* factors apply to fee awards made by trial courts, not just juries. *Young v. Qualls*, 223 S.W.3d 312, 314 (Tex. 2007). We see no reason why they would

not apply—as the *Ragsdale* factors do—to an appellate court's assessment of whether fees were established as a matter of law. Because the fee is unreasonable in light of the amount involved and the results obtained, the evidence did no more than raise a fact issue to be decided by the jury. *See Ragsdale*, 801 S.W.2d at 882.

The jury, however, awarded nothing. Although it could have rationally concluded that, in light of the amount involved and the results obtained, a reasonable fee award was less than the full amount sought, no evidence supported the jury's refusal to award any attorney's fees (as the court of appeals correctly noted). 235 S.W.3d at 829. The trial court could have directed the jury to reform its verdict, *see* TEX. R. CIV. P. 295, but the court was not free to set a reasonable fee on its own. Accordingly, the Smiths are entitled to a new trial on attorney's fees.

On retrial, the evidence may support a similar fee award, but that is a matter within the jury's purview. *See Young*, 223 S.W.3d at 315 ("It may be that, upon consideration of the correct results obtained, this evidence would be factually sufficient to support a like fee award."). On this record, the Trust is not entitled to its fees as a matter of law. Because the court of appeals concluded otherwise, we reverse its judgment as to attorney's fees and remand that part of the case to the trial court for a new trial. TEX. R. APP. P. 60.2(d).

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Wallace B. Jefferson
Chief Justice

Opinion Delivered: October 23, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-1032

METRO ALLIED INSURANCE AGENCY, INC. AND C. MICHAEL MCGLOTHLIN, PETITIONERS,

v.

SHIHCHE E. LIN, INDIVIDUALLY AND D/B/A APTUS COMPANY, AND SUNG-PING H. LIN, RESPONDENTS

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

PER CURIAM

At issue in this case is whether the causation standard for a claimed failure to procure insurance under a negligence theory and under the Texas Deceptive Trade Practices Act (DTPA) requires proof of the availability of some insurance that would have covered the plaintiff's damages. In a memorandum opinion, the court of appeals held that such proof was not required and reversed the trial court's take-nothing judgment notwithstanding the verdict. ___ S.W.3d ___. We reverse the judgment of the court of appeals.

The United States government awarded Shihche Lin, an electrical engineer, a contract to perform work on a hydroelectric plant in Michigan. The contract required Lin to provide a performance bond and to procure commercial general liability (CGL) insurance. Lin purchased the

bond from a surety company and obtained quotes for CGL insurance from two insurance agencies—Metro Allied Insurance,[1] through its agent Michael McGlothlin (collectively, Metro), and Elbert Insurance. Lin testified that he obtained the Elbert quote because he did not feel comfortable with the original quote from McGlothlin as it lacked detail. Lin forwarded the Elbert quote to McGlothlin as an example of the type of coverage he sought. Metro claims that the Elbert quote is indecipherable, but Lin claims that the insurance quoted would have provided coverage for the breach of contract claims against him.

The Elbert quote contained a section with a subhead "CONDITIONS" under which terms such as "explosion," "underground," and "host liquor" are listed. In addition, it lists "CONTRACTUAL" with an "X" marked next to it. Lin testified, "X meaning that this will be covered." After receiving the Elbert quote, McGlothlin advised Lin of the premium amount for the coverage, and Lin began paying premiums to McGlothlin. However, it is undisputed that Metro failed to write or procure a CGL policy for Lin.

The federal government later terminated Lin's contract and required Lin's surety company to complete the contract under the performance bond. To recoup the money it spent to complete the contract, the surety company sued Lin in November 2000. Lin appeared pro se, but later asked Metro to provide him with an attorney. McGlothlin repeatedly assured him that a CGL policy was

[1] Metro Allied is an independent insurance agency, run by McGlothlin, that contracts with a number of insurance companies to provide coverage for its clients. To procure an insurance policy like the kind needed by Lin, McGlothlin would contact a "managing general agent," a person usually representing eight to ten different insurance companies, for quotes, or "indications." Then, to procure the policy, McGlothlin would contract with the managing general agent offering the best price. Rather than "direct bill" insurers like Aetna, Travelers Insurance, or Safeco for policies such as Lin's, Metro Allied would bill Lin, Lin would pay Metro Allied, and Metro Allied would then pay the managing general agents, which have open accounts with Metro Allied.

in place and that a lawyer would be provided to Lin to assist in his defense under Lin's CGL policy. In 2002, McGlothlin discovered that no policy existed and reported the situation to Metro's errors and omissions insurer. Metro's errors and omissions insurance company refused to defend Lin, and Metro did not provide a defense for Lin in the suit filed by Lin's surety company. Lin continued his pro se defense and eventually settled the lawsuit for $175,000, which was less than the surety company had paid to the federal government after it terminated Lin's contract.

Lin subsequently sued Metro for negligence and a violation of the DTPA for failure to procure a CGL policy, claiming that the surety company's suit against him would have been covered by a CGL policy and that he would not have had to settle the surety company's lawsuit if Metro had procured an insurance policy as it contracted to do. At trial, Lin did not present any evidence of the typical terms or coverage in a CGL policy issued by an insurance company utilized by Metro, any evidence that a typical CGL policy would provide coverage for breach of an indemnity agreement under a performance bond, or any expert testimony opining on the scope of coverage for an indemnity claim under a surety bond in a typical CGL policy. Rather, Lin merely argued that he requested a CGL insurance policy that included "CONTRACTUAL" as one of its covered "CONDITIONS."

Metro acknowledges the failure to procure a CGL policy for Lin and that this failure to procure the policy was negligent. However, Metro disputes that the negligence caused Lin any damages. In this suit, the jury awarded damages against "Metro and/or McGlothlin" of $175,000 for negligence, actual damages of $200,000 under the DTPA, and additional damages of $300,000 for knowingly violating the DTPA. The trial court, however, granted Metro's motion for judgment

notwithstanding the verdict and rendered a take-nothing judgment in favor of both Metro Allied and McGlothlin, holding that Lin failed to prove causation under either theory. The court of appeals reversed, holding that sufficient evidence supported the findings that Metro Allied, through its agent, McGlothlin, knowingly engaged in unconscionable conduct that was the producing cause of Lin's damages under the DTPA. The court of appeals further stated that for Lin to recover, he "is not required to 'prove a specific policy in order to show that he was adversely affected' by the failure of the insurance agent to obtain the policy." ___ S.W.3d ___ (citing *Parkins v. Tex. Famers Ins. Co.*, 645 S.W.2d 775, 776 (Tex. 1983)).

Metro petitioned this Court for review, arguing that both the negligence and DTPA theories require proof of some CGL policy that would have covered the damages, as necessary causation evidence, and that Lin provided no such evidence. Lin agrees that his negligence theory requires such proof, but argues that the DTPA theory does not. He further argues that, even if both theories require this proof of causation, he provided legally sufficient evidence to uphold the jury's verdict. Because the parties agree that the negligence theory requires proof that some insurance policy would have covered the losses in question, we begin with an analysis of whether the DTPA likewise requires such proof.

In 1979, the Legislature amended the provision in the DTPA to change the causation standard from "adversely affected" to the current "producing cause" standard. TEX. BUS. & COM. CODE § 17.50; *Jacobs v. Danny Darby Real Estate, Inc.*, 750 S.W.2d 174, 176 (Tex. 1988) (Kilgarin, J., concurring) (discussing the amendment). Absent other guidance from the Legislature indicating the effective date of an amendment, the date the allegedly deceptive act or practice occurred determines

which version of the DTPA applies. *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 566 (Tex. 1984). Because the misrepresentations in this case occurred over a period of time in the late 1990s, the "producing cause" standard in the current version of the DTPA controls the resolution of this case. TEX. BUS. & COM. CODE § 17.41, *et. seq*. That standard requires proof that the act was a substantial factor in bringing about the injury, without which the injury would not have occurred. *Doe v. Boys Clubs of Greater Dallas*, 907 S.W.2d 472, 481 (Tex. 1995) (defining "producing cause" under the DTPA); *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995) (same). We have previously endorsed this for the DTPA's "producing cause" standard. In *Hurst v. Sears, Roebuck & Co.*, the Court held that because the misrepresentations in the case arose before the 1979 amendment, the controlling version of the DTPA required that the consumer prove he or she had been "adversely affected" by the defendant's actions. 647 S.W.2d 249, 252 (Tex. 1983). However, the trial court mistakenly submitted a "producing cause" issue to the jury because the case went to trial after the 1979 amendments. *Id.* We held that the mistake was not reversible error because "the jury's affirmative findings on the producing cause issues were sufficient to satisfy the statute's requirement that Hurst be adversely affected by Sears' conduct," thereby implicitly holding that the "producing cause" standard encompassed the lesser, "adversely affected" standard. *Id.* at 252–53.

Our previous opinions addressing the evidence required to prove causation in a failure to procure insurance case involved conduct that arose prior to the 1979 amendments and thus was governed by the "adversely affected" causation standard. *See Parkins*, 645 S.W.2d at 776; *Hurst*, 647 S.W.2d at 251; *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 694 (Tex. 1979).

In *Royal Globe*, we held that the injury to Bar Consultants was that it "believed it was covered by a policy of insurance from any loss caused by vandalism when it was not so covered." *Id.* at 694. We later said in *Parkins v. Texas Farmers Insurance Co.*, that a plaintiff "need not prove a specific policy in order to show that he was adversely affected by Farmers' conduct." *Parkins*, 645 S.W.2d at 776. In other words, under the "adversely affected" standard, plaintiffs only needed to prove that the insurer's authorized agent represented there was insurance coverage when there was none, rather than that the terms of another specific policy would have covered the plaintiff's damages. *See id.*

In this case, after *Hurst*, we clarify the proof required under the amendment to the DTPA's 1979 causation standard. The material change in the statutory language indicates a legislative intent to create a different standard. *Indep. Life Ins. Co. of Am. v. Work*, 77 S.W.2d 1036, 1039 (Tex. 1934) ("The rule is elementary that we must give some effect to changes in the words of legislative acts, and must also construe their words, so as to accomplish the legislative intent."). The Legislature's amendment of the causation standard in the DTPA to "producing cause" establishes a higher standard for proof of causation in cases brought under the DTPA, including failure to procure insurance cases. *See* TEX. BUS. & COM. CODE § 17.50. Further, as we suggested in *Hurst*, the current standard requires more than simply a misrepresentation of coverage, which was the requirement under the "adversely affected" standard. 647 S.W.2d at 252–53.

Both producing cause and proximate cause contain the cause-in-fact element, which requires that the defendant's act be "a substantial factor in bringing about the injury and without which the harm would not have occurred." *Boys Clubs of Greater Dallas*, 907 S.W.2d at 481; *accord IHS Cedars v. Mason*, 143 S.W.3d 794, 799 (Tex. 2004) (discussing the cause-in-fact element); *see also*

Ford v. Ledesma, 242 S.W.3d 32, 46 (Tex. 2007) (defining "producing cause" in a products liability action as "being a substantial factor in bringing about an injury, and without which the injury would not have occurred"). In this context, the harm would have occurred only if the CGL insurance that Metro agreed to procure would have actually covered the injury suffered by Lin. Otherwise, Lin would have obtained an insurance policy that did not provide coverage for his surety's claims against him, and the injury would have been the same regardless of whether Metro procured the insurance or not. Therefore, the more stringent causation standard of the current DTPA statute requires proof that the coverage sought was actually available in a CGL policy, as sought by Lin. *See Stinson v. Cravens, Dargan & Co.*, 579 S.W.2d 298, 299–300 (Tex. Civ. App.—Dallas 1979, no writ) (holding that where a duty to obtain specified insurance coverage exists, a plaintiff must prove "that the loss is one insured against in some policy"). This departure from the standards articulated in *Parkins* and *Royal Globe*, if not compelled by logic, is required by the 1979 amendments to the DTPA and is consistent with an established line of authority from other states. *See, e.g., Johnson & Higgins of Alaska Inc. v. Blomfield,* 907 P.2d 1371, 1374 (Alaska 1995) (holding that plaintiffs satisfied a burden to show that "coverage was commercially available for the loss sustained" and noting that such a burden "seems to be the majority rule" (citations omitted)); *Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc*., 739 P.2d 239, 244 (Colo. 1987) ("The law is well established that the plaintiff must show by a preponderance of the evidence that other insurance could have been obtained." (quoting *Heller-Mark & Co v. Kassler & Co.*, 544 P.2d 995, 997 (Colo. App. 1976), and citing cases from Kansas, New York, Texas, Washington, and Wisconsin)).

Because both producing cause and proximate cause require proof that a CGL insurance policy would have covered the damages, we consider whether Lin submitted legally sufficient evidence to carry his burden. *See Boys Clubs of Greater Dallas*, 907 S.W.2d at 477, 481; *see also Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 582 (Tex. 2007) (stating that proximate cause requires proof of cause in fact). Lin produced no CGL insurance contract that provides coverage of his breach of contract damages that would have been, or normally was, sold by Metro; no CGL insurance agreement available in the market that would have provided coverage for the claims against him; nor even any expert testimony regarding coverage for indemnity claims under a surety bond in a typical CGL policy. Instead, Lin points only to his testimony that McGlothlin told Lin that the CGL policy McGlothlin believed was issued would cover the claims. McGlothlin testified that he never made any specific assurances as to what the putative policy covered, but that it would include "standard CGL coverages." However, even accepting Lin's characterization of McGlothlin's assurances as true, Lin is required to present legally sufficient evidence that the coverage he sought is obtainable to surmount the causation hurdle. The law is clear that misrepresentations about insurance coverage cannot, under the doctrine of estoppel, expand coverage provided in an insurance policy. *See, e.g., Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778–80 (Tex. 2008); *Tex. Farmers Ins. Co. v. McGuire*, 744 S.W.2d 601, 602–03 (Tex. 1988); *Wash. Nat'l Ins. Co. v. Craddock*, 109 S.W.2d 165, 166–67 (Tex. 1937). An insurance agent's independent representations may affect his responsibilities to his client, but they cannot add to or alter the coverages of any insurance contract or provision. *Int'l Sec. Life Ins. Co. v. Finck*, 496 S.W.2d 544, 546 (Tex. 1973). Therefore, Lin's testimony regarding McGlothlin's statements about coverage is no evidence that

a contract, had one existed, would actually have covered his damages. There must be proof of an insurance policy that would cover the alleged injury.

Lin also asserted that the Elbert quote and McGlothlin's testimony as to its meaning were evidence of the coverage he sought. Elbert Insurance sent the quote to Lin in response to Lin's request for a CGL policy quote; Lin then forwarded the quote to McGlothlin as evidence of the type of CGL policy he sought. McGlothlin, after stating that it is the insurance company that determines the language used in an insurance policy, that he is not qualified to interpret policies, and that coverage varies from company to company, testified as follows to his understanding of the meaning the "X" marked next to "CONTRACTUAL" under the "CONDITIONS" subhead in the Elbert quote:

Q: What does that mean to you when you see that?
A: Contractual liability.
Q: Can you describe the content and the nature of contractual liability?
A: Contractual liability, as I understand it, is if you were to violate a provision of—a legal provision of a contract. But to my understanding it also does not cover performance on a contract.
Q: The contractual portion, was it your understanding it's the coverage of contractual liability when a contractor failed to meet a provision of the contract? Was that your understanding?
A: It would not—again I'm not an expert, but if you—if the coverage was that broad, he wouldn't have to have performance bonds, all you would have to have would be contractual liability and companies would not accept exposure based on my experience of performance or nonperformance on a contract and instead give you an endorsement to the policy on contractual liability . . .[which] would require you to have a performance bond which would not be the same thing as contractual coverage on the insurance policy.
Q: How often did you see in early 1999 and 2000 . . . a contractual liability included in a CGL policy?
A: That would be fairly rare.
Q: But it did happen, was it your understanding?
A: Down in the quotation here it says contractual, yes.

McGlothlin testified that CGL policies may cover contractual liability for damages, but not performance or nonperformance of work. McGlothlin never opines that any contractual endorsement would have covered, or that he could have procured a policy that covered, Lin's nonperformance on the construction contract from any of the insurers contracting with Metro. Neither Elbert's agents nor any expert in insurance provided any testimony explaining what the Elbert quote covered. In fact, McGlothlin was the only witness presented by either side who had some knowledge of insurance, and he both disclaims being an expert on insurance coverage and expressed his understanding that contractual coverage under a CGL policy does not cover performance under a contract. Viewing this evidence to indulge all reasonable inferences in favor of the jury's verdict, *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005), at best, a jury could draw two equally compelling inferences from the Elbert quote—that coverage for breaches of contract was excluded or included in the policy— because "CONDITIONS" could mean those that are covered or those that are not. *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 324 (Tex. 1984) ("When circumstances are consistent with either of the two facts and nothing shows that one is more probable than the other, neither fact can be inferred."); *see also Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001) (Phillips, C.J., concurring in part and dissenting in part) (discussing the history and application of the equal inference rule). Because the only evidence presented was McGlothlin's testimony based on an unclear quote from Elbert, the jury would have to guess about a vital fact. Therefore, the Elbert quote, and McGlothlin's interpretation thereof, provide no evidence of causation. *See Litton Indus*, 668 S.W.2d at 324.

In sum, the only evidence from the trial regarding the insurance coverage Metro was to provide was McGlothlin's testimony that contractual liability coverage is "rare," that "violat[ing] a legal provision of a contract" is covered, but "performance on a contract" is not, and that providing CGL insurance that would have satisfied the Elbert quote likely provide some type of contractual coverage. The court of appeals held that this is evidence of "some" policy that would cover the claim. On the contrary, Lin did not present any evidence showing any CGL policy would have covered the loss he sustained. The mere fact that *some* CGL policies rarely cover losses related to *some* types of contractual liability is no evidence that CGL insurance Metro could have procured (or that Lin could have procured himself had Metro not assured him that he was covered) would cover the loss sustained by Lin.

Because Lin brought forth no evidence of cause in fact as required to prevail under both his negligence and DTPA claims, we reverse the court of appeals and remand the case to the trial court to reinstate the judgment notwithstanding the verdict.

OPINION DELIVERED: December 11, 2009

IN THE SUPREME COURT OF TEXAS

NO. 07-1042

ERI CONSULTING ENGINEERS, INC. AND LARRY G. SNODGRASS, PETITIONERS,

v.

J. MARK SWINNEA, BRADY ENVIRONMENTAL, INC., AND MALMEBA COMPANY, LTD., RESPONDENTS

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

Argued December 17, 2009

JUSTICE GREEN delivered the opinion of the Court.

The principal question in this case is whether consideration received for the sale of a business interest is subject to equitable forfeiture as a remedy for breach of fiduciary duty. We hold that when a partner in a business breached his fiduciary duty by fraudulently inducing another partner to buy out his interest, the consideration received by the breaching party for his interest in the business is subject to forfeiture as a remedy for the breach, in addition to other damages that result from the tortious conduct. Here, the trial court ordered equitable forfeiture, but the court of appeals reversed, concluding that forfeiture was not an available remedy. We reverse the court of appeals' judgment in part and remand the case to that court for further proceedings consistent with this opinion.

I. Facts

Larry G. Snodgrass and J. Mark Swinnea owned equal interests in two business entities, ERI Consulting Engineers, Inc., and Malmeba Company, Ltd., which they operated together for approximately ten years. ERI is a small consulting company that manages asbestos abatement projects for contractors. It leased office space from Malmeba, a partnership that owned the building.

Snodgrass and ERI purchased Swinnea's interest in ERI in 2001. ERI paid Swinnea $497,500 to redeem Swinnea's ERI stock, and Snodgrass transferred his half-interest in Malmeba to Swinnea. ERI agreed to employ Swinnea for six years, and Swinnea agreed not to compete with ERI. At the same time, ERI agreed to continue leasing from Malmeba for six years.[1]

Unknown to Snodgrass, the wives of Swinnea and Chris Power, an ERI employee, had created a new company called Air Quality Associates a month before Swinnea and Snodgrass executed the buyout agreement. Air Quality Associates was created to perform mold abatement, but later engaged in asbestos abatement as a contractor even though neither wife had experience in the asbestos abatement field. Swinnea did not disclose the existence of Air Quality Associates to Snodgrass during the ERI buyout negotiations. In fact, because Swinnea believed Snodgrass would "run [ERI] into the ground," Swinnea told Power to "[b]e patient because we can buy this company back 50 cents on the dollar." The trial court found that "Swinnea's placement of his wife, Dawn Swinnea, and Tracy Power as principals of Air Quality Associates, Inc. was deceptive, a sham and constituted fraud."

[1] The parties dispute whether the lease agreement was intended to be consideration for the buyout. None of the documents in the buyout agreement expressly addressed this, but Snodgrass testified that he and Swinnea had agreed to the lease as part of the comprehensive buyout.

After the buyout, Swinnea's revenue production as an ERI employee dropped 30%–50%. Snodgrass testified that although Swinnea's supervisory responsibilities were to cease under their agreement, Swinnea's revenue production was to remain the same, if not increase. Soon thereafter, Snodgrass learned about Swinnea's relationship with Air Quality Associates from one of ERI's asbestos contractors, Merico, with which Air Quality Associates was competing. Because of the personal relationship between the individuals involved with ERI and Air Quality Associates, Merico told Snodgrass that Merico would no longer work with ERI if ERI were to accept bids from Air Quality Associates on asbestos abatement projects. ERI had been accepting bids from Air Quality Associates without Snodgrass knowing of Swinnea's or Power's relationship with Air Quality Associates.

Power and his wife later bought out the Swinneas' interest in Air Quality Associates. ERI subsequently worked with Air Quality Associates, while its work with Merico declined. Meanwhile, Swinnea and his wife formed a new company, Brady Environmental. The Swinneas told Snodgrass that Brady Environmental was going to clean homes and air ducts. However, Brady Environmental began performing asbestos abatement using the Resilient Floor Covering Institute method. Evidence suggests that ERI's clients' use of this method impacted ERI's business because RFCI does not require a consultant like ERI. Although he was employed by ERI, Swinnea encouraged ERI's clients to use RFCI instead, contrary to ERI's interest and policy. After the relationship between Swinnea and ERI deteriorated, Snodgrass ultimately fired Swinnea, releasing him from his non-compete obligations. Swinnea obtained a license to perform asbestos consulting work the next day and began

working for Brady Environmental as a consultant. Snodgrass moved ERI out of Malmeba's building and pursued this lawsuit with ERI against Swinnea, Malmeba, and Brady Environmental.

After a bench trial, the trial court found for Snodgrass and ERI on their claims for statutory fraud in a real estate and stock transaction, common law fraud, breach of the non-compete clause in the contract, as well as for breach of fiduciary duty. It rendered judgment awarding ERI and Snodgrass combined damages of $1,020,700, and $1 million in exemplary damages. The non-exemplary damages awarded by the trial court consisted of both equitable forfeiture and actual damages: forfeiture of $437,500, a portion of the $497,500 paid to Swinnea by ERI; forfeiture of $150,000, the value of Snodgrass's one-half interest in Malmeba transferred to Swinnea; forfeiture of $133,200, constituting the sum of the lease payments from ERI to Malmeba after the buyout; and $300,000 as ERI's lost profits from its business relationship with Merico. The trial court found that a civil conspiracy existed between Swinnea and Brady Environmental, and held Brady Environmental jointly and severally liable with Swinnea for the damages.

The court of appeals reversed and rendered judgment in favor of Swinnea because it found the evidence "legally insufficient to support the damage awards." 236 S.W.3d 825, 832 (Tex. App.—Tyler 2007). In particular, the court of appeals found that ERI failed to prove any actual damages. *Id.* at 841. It found that the equitable remedy of forfeiture was unavailable because there was no fee paid to Swinnea to be forfeited. *Id.* It concluded further that ERI failed to prove that Swinnea obtained any ill-gotten gains subject to disgorgement. *Id.* It determined that the lease payments were not recoverable because the evidence that the lease payments were intended as consideration for the buyout was "incompetent parol evidence." *Id.* at 835. Finally, the court of

appeals concluded that there was no basis for joint liability as to Brady Environmental because there was no evidence of a conspiracy between Swinnea and Brady Environmental. *Id.* at 841–42.

Swinnea does not dispute his liability for fraud, breach of contract, or breach of fiduciary duty. Rather, he disputes the damages the trial court awarded. He asserts that the forfeiture award is unsupported by law. He also asserts that the lost profits award is unsupported by legally sufficient evidence. Brady Environmental primarily disputes whether it can be jointly liable for any of the particular damages awarded by the trial court regardless of whether it later conspired in certain wrongful acts.

II. Equitable Forfeiture

The primary question we must address is whether forfeiture of contractual consideration is available as a remedy against Swinnea. We have previously upheld equitable remedies for breach of fiduciary duty. *E.g.*, *Burrow v. Arce*, 997 S.W.2d 229, 237–45 (Tex. 1999) (upholding remedy of forfeiture upon attorney's breach of fiduciary duty). In *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, we stated the principle behind such remedies:

> It is beside the point for [Defendant] to say that [Plaintiff] suffered no damages because it received full value for what it has paid and agreed to pay. . . . It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired. It is the law that in such instances if the fiduciary "takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received."

160 S.W.2d 509, 514 (Tex. 1942) (quoting *United States v. Carter*, 217 U.S. 286, 306 (1910)). We later reiterated that a fiduciary may be punished for breaching his duty: "The main purpose of

forfeiture is not to compensate an injured principal . . . . Rather, the central purpose . . . is to protect relationships of trust by discouraging agents' disloyalty." *Burrow*, 997 S.W.2d at 238.

Accordingly, courts may fashion equitable remedies such as profit disgorgement and fee forfeiture to remedy a breach of fiduciary duty. For instance, courts may disgorge all ill-gotten profits from a fiduciary when a fiduciary agent usurps an opportunity properly belonging to a principal, or competes with a principal. *See, e.g.*, *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002) (stating the rule that courts may disgorge any profit where "an agent diverted an opportunity from the principal or engaged in competition with the principal, [and] the agent or an entity controlled by the agent profited or benefitted in some way"). Similarly, even if a fiduciary does not obtain a benefit from a third party by violating his duty, a fiduciary may be required to forfeit the right to compensation for the fiduciary's work. *See, e.g.*, *Burrow*, 997 S.W.2d at 237 ("[A] person who renders service to another in a relationship of trust may be denied compensation for his service if he breaches that trust."). The difficulty comes in categorizing the damages awarded in this case. Here, the damages awarded by the trial court were not ill-gotten profits from an outside opportunity or external competition, or compensation for work done by the fiduciary. Rather, the trial court returned a significant part of the contractual consideration paid by ERI and Snodgrass to Swinnea as part of the buyout agreement. The situation arises because here the contracting party, Swinnea, was a fiduciary, such that we must consider whether under the circumstances an equitable remedy may cross the line from actual damages for breach of contract or fraud (redressing specific harm) to further, equitable return of contractual consideration.

The trial court found Swinnea liable for fraudulent inducement as to the buyout agreement, and Swinnea does not challenge this liability. The trial court also found that Swinnea owed fiduciary duties both to ERI and to Snodgrass. It follows that Swinnea's actions in fraudulently inducing the buyout agreement contracts were willful breaches of his fiduciary duty. We hold that where willful actions constituting breach of fiduciary duty also amount to fraudulent inducement, the contractual consideration received by the fiduciary is recoverable in equity regardless of whether actual damages are proven, subject to certain limiting principles set out below.

The situation in this case is akin in many respects to the fee forfeiture scenario between a principal and agent, which we discussed at length in *Burrow*, 997 S.W.2d at 237–45. In that case, former clients sued their attorneys alleging breach of fiduciary duty arising from settlement negotiations in a previous lawsuit. *Id.* at 232–33. We held that "a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client." *Id.* at 240. We repeated that "the central purpose of the remedy is to protect relationships of trust from an agent's disloyalty or other misconduct." *Id.* That policy applies equally to the relationship of trust at issue here and the duties Swinnea owed to ERI and Snodgrass. We cited section 469 of the *Restatement (Second) of Agency*, which states that if "conduct [that is a breach of his duty of loyalty] constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned." *Id.* at 237. We also stated:

> [T]he possibility of forfeiture of compensation discourages an agent from taking personal advantage of his position of trust in every situation no matter the circumstances, whether the principal may be injured or not. The remedy of forfeiture removes any incentive for an agent

> to stray from his duty of loyalty based on the possibility that the principal will be unharmed or may have difficulty proving the existence or amount of damages.

Id. at 238. The same principles apply to circumstances where a fiduciary takes advantage of his position of trust to induce a principal to enter into a contract. The remedy of forfeiture is necessary to prevent such abuses of trust, regardless of proof of actual damages.

Although forfeiture of contractual consideration may "have a punitive effect" like forfeiture of compensation, *id.* at 240, it may nevertheless be necessary to protect fiduciary relationships. As we said in the attorney-client context:

> An attorney who has clearly and seriously breached his fiduciary duty to his client should not be insulated from fee forfeiture by his client's ignorance of the matter. Nor should an attorney who has deliberately engaged in professional misconduct be allowed to put his client to the choice of terminating the relationship and risking that the outcome of the litigation may be adversely affected, or continuing the relationship despite the misconduct.

Id. at 244. The same reasoning applies here: a fiduciary who breaches his duty should not be insulated from forfeiture if the party whom he fraudulently induced into contract is ignorant about the fraud, or fails to suffer harm. Likewise, the innocent party should not be put into a difficult choice regarding termination of the contract upon discovering the breach of duty.

Where equitable remedies exist, however, "the remedy of forfeiture must fit the circumstances presented." *Id.* at 241. In *Burrow*, we listed several factors for consideration when fashioning a particular equitable forfeiture remedy in the context of attorney-client relationships:

> "[T]he gravity and timing of the violation, its wilfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies." These factors are to be considered in determining whether a violation is clear and serious, whether forfeiture of any fee should be required, and if so, what amount. The list is not exclusive. The several factors embrace broad considerations which must be weighed together and not mechanically

> applied. For example, the "wilfulness" factor requires consideration of the attorney's culpability generally; it does not simply limit forfeiture to situations in which the attorney's breach of duty was intentional. The adequacy-of-other-remedies factor does not preclude forfeiture when a client can be fully compensated by damages. Even though the main purpose of the remedy is not to compensate the client, if other remedies do not afford the client full compensation for his damages, forfeiture may be considered for that purpose.

Id. at 243–44 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996)). We also cited comment c to section 243 of the *Restatement (Second) of Trusts*:

> It is within the discretion of the court whether the trustee who has committed a breach of trust shall receive full compensation or whether his compensation shall be reduced or denied. In the exercise of the court's discretion the following factors are considered: (1) whether the trustee acted in good faith or not; (2) whether the breach of trust was intentional or negligent or without fault; (3) whether the breach of trust related to the management of the whole trust or related only to a part of the trust property; (4) whether or not the breach of trust occasioned any loss and whether if there has been a loss it has been made good by the trustee; (5) whether the trustee's services were of value to the trust.

Id. at 243. Several of these factors are also relevant in this context. The gravity and timing of the breach of duty, the level of intent or fault, whether the principal received any benefit from the fiduciary despite the breach, the centrality of the breach to the scope of the fiduciary relationship, and any threatened or actual harm to the principal are relevant. Likewise, the adequacy of other remedies—including any punitive damages award—is also relevant. Above all, the remedy must fit the circumstances and work to serve the ultimate goal of protecting relationships of trust.

There is no indication the trial court followed these principles in fashioning its award. Accordingly, we direct the court of appeals to remand the case to the trial court for consideration of

these factors upon resolution of the issues remaining for the court of appeals.[2]

III. Evidence of Contractual Consideration

We next consider whether the trial court properly admitted undisputed testimony offered to show that the lease agreement was intended to be consideration for the buyout agreement, and thus subject to potential forfeiture under our analysis above. The court of appeals concluded that such testimony was "incompetent parol evidence." 236 S.W.3d at 835. We disagree.

The general rule for an unambiguous contract is that evidence of prior or contemporaneous agreements is inadmissible as parol evidence. *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam). However, an exception exists for consistent collateral agreements. As we stated over half a century ago in *Hubacek v. Ennis State Bank*, the parol evidence rule "does not preclude enforcement of prior or contemporaneous agreements which are collateral to an integrated agreement and which are not inconsistent with and do not vary or contradict the express or implied terms or obligations thereof." 317 S.W.2d 30, 32 (Tex. 1958); *accord Haden*, 266 S.W.3d at 451 ("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."). A collateral agreement between parties concerning the relationship of several distinct obligations between them falls within the exception. *See, e.g.*, *Hubacek*, 317 S.W.2d at 34 ("A and B in an integrated contract respectively promise to sell and to buy Blackacre for $3,000.00. A contemporaneous oral agreement between

[2] As we discuss below, certain issues that remain as a result of our holdings in this case are properly before the court of appeals on remand, precluding us from remanding the case directly to the trial court.

them that the price shall be paid partly by discharge of a judgment which B has against A is operative." (quoting with approval RESTATEMENT (FIRST) OF CONTRACTS section 240 cmt. d (1939))). Here, if the parties agreed that the lease obligation was to be additional consideration for the buyout, then such an agreement was a consistent collateral agreement. Nothing in such an agreement would contradict the written contracts. *See id.* at 32 ("If . . . the parol evidence rule precludes enforcement of the oral agreement, it is because the agreement varies or contradicts the terms or obligations of the [written contracts]."). Accordingly, Swinnea's testimony conceding this fact was properly admitted under this long-standing exception to the parol evidence rule. The fact that the lease agreement was consideration for the buyout agreement as a whole is thus established by legally sufficient evidence.

Therefore, as contractual consideration, the lease payments from ERI to Malmeba are subject to forfeiture for Swinnea's breach of fiduciary duty. The trial court should consider whether to include them in fashioning an appropriate equitable forfeiture.

IV. Lost Profit Damages

We turn next to the question of actual damages. Here, where the only actual damages that the trial court awarded were lost profit damages, the issue is whether ERI provided legally sufficient evidence of those lost profits.[3]

The rule concerning adequate evidence of lost profit damages is well established:

[3] We need not distinguish here between ERI's causes of action—common-law and statutory fraud, breach of contract, and breach of fiduciary duty—because ERI's lost profit damages are recoverable for any one of those claims. *See Waite Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184–85 (Tex. 1998) (per curiam) (observing that lost profits are recoverable both as tort and contract damages, subject to the rule precluding double recovery for a single injury).

> Recovery for lost profits does not require that the loss be susceptible of exact calculation. However, the injured party must do more than show that they suffered some lost profits. The amount of the loss must be shown by competent evidence with reasonable certainty. What constitutes reasonably certain evidence of lost profits is a fact intensive determination. As a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained. Although supporting documentation may affect the weight of the evidence, it is not necessary to produce in court the documents supporting the opinions or estimates.

Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 84 (Tex. 1992) (citations omitted).

The trial court awarded $300,000 in lost profits "constituting the loss of income from [ERI's and Snodgrass's] business relationship with Merico." Our legal sufficiency analysis thus reviews whether competent evidence establishes this amount with reasonable certainty. *See id.*

Snodgrass testified that based on information from his in-house accountant, ERI's net profit margin on revenue from Merico was approximately 25%–30%.[4] As a long-time co-owner and then sole owner of ERI—a small, profitable company—Snodgrass was competent to testify as to ERI's estimated profit margin on the Merico account. *Cf. Bowen v. Robinson*, 227 S.W.3d 86, 97 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) ("Competent evidence of lost profits relating to property can be proved by the testimony of an expert or the owner of the property."). Swinnea directs us to no evidence contradicting this testimony concerning ERI's profit margin.[5] ERI also introduced evidence—including dozens of detailed invoices—indicating that from January 2000 through August 2001 (20 months), ERI averaged $19,833.10 in revenue per month from Merico.

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[4] Swinnea did not raise a hearsay objection at trial.

[5] We note that Swinnea's counsel stated on cross-examination of Snodgrass that "if we looked at [ERI's] financials, we could pretty well figure [the profit margin on the Merico account] out." Indeed, Swinnea had the opportunity to attempt to negate Snodgrass's testimony on profit margin with conclusive contrary evidence, if such evidence existed. Yet, Swinnea directs us to no such evidence from which we could determine whether Snodgrass's estimate was mistaken.

Later, from September 2001 through May 2004 (33 months), average revenue dropped to $1,792.59 per month.[6] Contrasting revenue from a time period immediately before the period at issue is an established method of proving revenue for a lost profit damages calculation. *See Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994) ("It is permissible to show the amount of business done by the plaintiff in a corresponding period of time not too remote, and the business during the time for which recovery is sought." (quoting *Sw. Battery Corp. v. Owen*, 115 S.W.2d 1097, 1098–99 (Tex. 1938))). Thus, ERI's method for proving its lost profits in a reasonably certain amount—establishing its lost revenue with comparative evidence from a recent time period, and establishing its profit margin on that revenue by competent testimony of its owner—was legally adequate under *Holt Atherton*.

However, ERI's method does not support a calculation yielding the amount of damages awarded by the trial court. Even assuming a 30% profit margin on the work from Merico, Snodgrass's maximum profit margin estimate, the damages award would be only $178,601.05 for the 33-month period at issue when ERI's profits from Merico declined.[7] ERI's evidence thus fails to meet the minimum requirements for legal sufficiency that we set out in *Holt Atherton* regarding reasonable certainty as to the amount awarded by the trial court—here, $300,000. Up to this point, the court of appeals reached the same conclusions that we have. *See* 236 S.W.3d at 838–39 (reciting

[6] ERI points us to testimony from another ERI employee that its revenue from Merico was $300,000–$400,000 per year, but the accounting statements introduced by ERI as a trial exhibit conclusively establish otherwise. *See City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005) ("[Fact-finders] are not free to believe testimony that is conclusively negated by undisputed facts.")

[7] At trial, ERI put on evidence that its estimated lost revenue over the 33-month period was $595,336.83. Thirty percent of this figure is $178,601.05.

the same evidence and reaching the same conclusion regarding whether such evidence is legally sufficient to prove $300,000 of lost profit damages with reasonable certainty).

Still, while the evidence does not prove $300,000 in lost profits, ERI's evidence is legally sufficient evidence to prove a lesser, ascertainable amount of lost profits with reasonable certainty. In this situation, such a discrepancy between two reasonably certain amounts will not defeat recovery by ERI. *See Sw. Battery,* 115 S.W.2d at 1099 ("[U]ncertainty as to the fact of legal damages is fatal to recovery, but uncertainty as to the amount will not defeat recovery."); *Tex. Instruments*, 877 S.W.2d at 279 (explaining that *Southwest Battery* and subsequent cases required reasonable certainty as to the amount of lost profit damages); *cf. Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 109 (Tex. 2009) (remanding to the court of appeals where there was some evidence of damages, but not enough to support the full amount awarded by the trial court). ERI proved lost profit damages; its entitlement to recover them survives the trial court's error in awarding too much. Accordingly, the appropriate remedy is to remand the case to the court of appeals to consider the possibility for remittitur on lost profit damages. *See* TEX. R. APP. P. 46.3, 46.5 (providing procedures for remittitur by courts of appeals).

Swinnea argues that ERI's lost profits calculation is inadequate because it fails to apply certain credits or deduct certain expenses. First, Swinnea asserts that because ERI's lost profits were on the Merico account, which were in turn lost because of Swinnea's involvement with Air Quality Associates, we must offset any amount that ERI gained by doing business with Air Quality Associates. That is, where the two accounts were mutually exclusive, loss from one must be offset by gain from the other. This argument is unpersuasive in part because the exclusivity arose out of Merico's ultimatum to ERI about Air Quality Associates—"us or them"—not because it was

otherwise impossible for ERI to pursue both business relationships simultaneously. The evidence shows that Merico came to give ERI its ultimatum because of Swinnea. Merico did not object to ERI's work with Air Quality Associates—a competitor of Merico's in asbestos abatement—until it discovered that Swinnea and Power were involved with Air Quality Associates. Nothing suggests that ERI could not have profited from working both with Air Quality Associates (apart from Swinnea) and Merico.[8] Accordingly, because nothing indicates that ERI could not work with both companies, any profits from ERI's work with Air Quality Associates need not be offset against the lost profits from Merico caused by Swinnea's position with Air Quality Associates.

Even assuming that Swinnea is correct that profits from Air Quality Associates must be credited against the lost profits figure, he can point to no evidence to support his assertion that ERI profited from work with Air Quality Associates as a substitute for Merico. The plaintiff bears the burden of providing evidence supporting a single complete calculation of lost profits, which may often require certain credits and expenses. *See Holt Atherton*, 835 S.W.2d at 85 ("Recovery of lost profits must be predicated on one complete calculation."). However, the defendant properly bears the burden of providing at least some evidence suggesting that an otherwise complete lost profits calculation is in fact missing relevant credits. *Cf. Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 936 (Tex. 1980) ("The right of offset is an affirmative defense. The burden of pleading offset and of proving facts necessary to support it are on the party making the assertion."). Were this not so, every facially adequate calculation of lost profits would be susceptible to an unsubstantiated

[8] Swinnea elsewhere points out to us that Air Quality Associates was also doing profitable mold treatment work, while Merico focused on asbestos removal. This suggests that ERI might have had separate consulting opportunities with Air Quality Associates that were unavailable from Merico, meaning it could have consistently worked with both without overlap, as ERI also performed mold assessments. Indeed, ERI began to work with both Merico and Air Quality Associates some time after the period in question.

challenge that something is missing. That subtle distinction is crucial here because Swinnea directs us to nothing in the record proving that ERI profited—in any amount—from working with Air Quality Associates as a substitute for Merico in asbestos abatement; and we can find none.[9] Rather, he simply asserts that ERI does not dispute that it developed a mutually successful relationship with Air Quality Associates. The only evidence in the record indicates that ERI continued to show an overall profit despite the decline in revenue from Merico, and that ERI worked with Air Quality Associates. No evidence shows whether any *profits* from working with Air Quality Associates contributed to ERI's overall profits, as a substitute for Merico or otherwise.[10]

Swinnea also contests that overhead costs and other unspecified expenses were not included in ERI's evidence or calculation. However, it is not necessarily the case that a company will incur increased expense or overhead, especially where—as evidence here suggests—a corporation was already profitable at the time damages began, and evidence supports an inference that it could have performed profitable services using only its existing resources. *See Tex. Instruments*, 877 S.W.2d at 279 ("[P]re-existing profit, together with other facts and circumstances, may indicate with reasonable certainty the amount of profits lost." (quoting *Sw. Battery*, 115 S.W.2d at 1099)). This is not a manufacturing scenario, where production costs necessarily exist. Rather, ERI was a

[9] Swinnea asserts in his brief that where "ERI chose the relationship with AQA [instead of Merico, such] conduct of itself is evidence of ERI's belief that the AQA relationship was the more profitable one." At most, this suggests that ERI might have believed that the Air Quality Associates relationship *would be* the more profitable one, which says nothing about whether it was actually profitable. Swinnea also asserts in his brief that "the AQA relationship was demonstrably . . . lucrative to ERI, as the corporate financial records proved." But Swinnea does not direct us to any such financial records in the record. Further, having reviewed hundreds of ERI's invoices (the majority of which were issued to Merico), as well as other financial records introduced as evidence, we could not find a single piece of evidence in the record proving any profit to ERI from Air Quality Associates.

[10] Indeed, we are left to wonder further whether any such alleged profits were in turn for asbestos projects that Merico might have worked on rather than for mold projects.

consulting company, which wrote plans and specifications, solicited bids for projects, and completed surveys. Evidence suggests that ERI would have been able to perform all of this service work using its existing employees. Power, for instance, testified that he "put in whatever hours it takes to get jobs done." Swinnea himself had begun contributing much less work to ERI, despite having been one of its most productive workers before. Had Swinnea continued to contribute at his prior level, that productivity would only have helped ERI complete additional projects. Furthermore, after Snodgrass fired Swinnea, ERI began to work with Merico again, while still working with Air Quality Associates, without expansion to ERI's staff. Accordingly, Swinnea has not met his burden to provide at least some evidence that ERI's otherwise complete lost profit damages calculation was actually inadequate because of a necessary credit or additional expense.

Swinnea also challenges causation as to ERI's lost profit damages. However, evidence showed that at the end of October 2001, upon concluding a series of conversations about Swinnea's involvement with Air Quality Associates, Merico specifically indicated that it would no longer be working with ERI because of Swinnea's involvement.[11] Swinnea himself testified that his involvement with Air Quality Associates could harm the Merico relationship, and that a severance of ERI's relationship with Merico would negatively affect ERI's revenues. This evidence is legally sufficient to establish a straightforward link between Swinnea's breach of duty and the loss of profits to ERI.

In sum, legally sufficient evidence does not exist to prove the trial court's lost profit damages

[11] We reiterate that Swinnea does not contest liability. The trial court entered specific findings of fact and conclusions of law concerning the impropriety of Swinnea's involvement with Air Quality Associates. Thus, Swinnea's liability extends to any damage caused by his involvement with Air Quality Associates.

award under the minimum requirements of *Holt Atherton*. However, this insufficiency does not extend to reasonable certainty as to *any* amount. Rather, competent evidence exists to establish *some* reasonably certain amount of lost profits—just not the particular amount awarded by the trial court. Unlike a situation where no evidence establishes any amount of lost profit damages with reasonable certainty, the situation here requires a potential reduction, not a take-nothing judgment against the plaintiff. Therefore, we reverse the court of appeals' judgment that ERI recover no lost profit damages and remand the case to that court for further proceedings. Should the court of appeals fail to arrive at a disposition concerning remittitur, it may remand for a new trial on lost profit damages, as we might have if the evidence did not seem conducive to remittitur. *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 51 (Tex. 1998) ("[B]ecause there is no legally sufficient evidence to support the entire amount of damages, but there is some evidence of the correct measure of damages, we reverse the judgment of the court of appeals and remand the cause for a new trial.").

Two additional collateral issues remain: punitive damages and factual sufficiency. The trial court found clear and convincing evidence establishing that Swinnea willfully, maliciously, and intentionally caused injury to ERI and Snodgrass in committing fraud. Accordingly, exemplary damages may be recoverable. *See* TEX. CIV. PRAC. & REM. CODE § 41.003 (providing that exemplary damages are recoverable if clear and convincing evidence shows harm from fraud or malice). Thus, upon resolution of the actual damages (lost profits) question, it is now proper for the courts below to consider any remaining issues concerning the trial court's initial award of $1 million in punitive damages, which Swinnea has continued to contest.

As for factual sufficiency of the lost profits award, however, we observe that there may be

a question of whether Swinnea adequately briefed the issue to the court of appeals. The Texas Rules of Appellate Procedure require adequate briefing. *See* TEX. R. APP. P. 38.1(i) ("The [Appellant's] brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."); *accord Redmon v. Griffith*, 202 S.W.3d 225, 241 (Tex. App.—Tyler 2006, pet. denied) ("In their brief, the [cross-appellants] have not presented much in the way of cogent argument, nor have they cited to any authority in support of their sole issue. . . . We hold that the [cross-appellants] have waived their sole issue by their failure to adequately brief it."); *Murchison v. State*, 93 S.W.3d 239, 254 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (holding that factual sufficiency point concerning criminal trial was waived because "appellants' argument, record citations, and authorities do not address" the point); *Smith v. Tilton*, 3 S.W.3d 77, 84 (Tex. App.—Dallas 1999, no pet.) ("Points of error asserted on appeal but not briefed are waived."). On remand, the court of appeals should consider whether Swinnea adequately raised a factual sufficiency challenge.

V. Liability for Conspiracy

Having found that legally sufficient evidence established lost profit damages in some amount, and that Swinnea may also be liable for punitive damages as well as forfeiture of contractual consideration, we must next address whether Brady Environmental may be jointly liable for these damages as a conspirator.

An actionable civil conspiracy requires specific intent to agree to accomplish an unlawful purpose or a lawful purpose by unlawful means. *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996). One of the elements of conspiracy is a meeting of the minds on the object or course of action.

Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983). Another element is actual damages as the proximate result of the conspiracy. *Id.*

In its live pleading at trial, ERI asserted that Brady Environmental conspired in Swinnea's ongoing fraudulent misrepresentations as well as Swinnea's ongoing breach of fiduciary duty, which among other things damaged existing ERI client relationships. The trial court found that Swinnea's wrongful conduct "continued after the buy-out, including but not limited to his formation of Brady Environmental, Inc." It also found that Brady Environmental "participated in and knowingly accepted the benefits of . . . Swinnea's wrongful conduct," and that Brady Environmental "had actual awareness of the wrongful conduct."

Even assuming those findings are true, there is no evidence that any of the damages awarded by the trial court occurred as the proximate result of any involvement by Brady Environmental. Moreover, no meeting of the minds between Swinnea and Brady Environmental could have occurred involving the actions causing ERI actual harm—lost profits—because Brady Environmental did not yet exist, having been formed approximately six months after Swinnea left Air Quality Associates. Accordingly, Brady Environmental cannot be jointly and severally liable for any lost profit damages discussed above, or any potential punitive damages that follow from them.

Furthermore, while Brady Environmental may have participated in the abuse of trust in Swinnea's ongoing breaches of fiduciary duty and Swinnea's ongoing fraudulent misrepresentations, Brady Environmental had no part in inducing the buyout agreement. As discussed above, the forfeiture of contractual consideration is available as an equitable remedy against a fiduciary who fraudulently induces the contract, regardless of actual harm. Contractual consideration is subject to forfeiture because it was fraudulently bargained for by a fiduciary. Certainly the rule allowing such

equitable remedies to protect relationships of trust encompasses the ability to fashion such remedies against those who would conspire to abuse such relationships. *See Kinzbach*, 160 S.W.2d at 514 ("It is settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such."). Yet, "the remedy of forfeiture must fit the circumstances presented." *Burrow*, 997 S.W.2d at 241. The trial court's award included no equitable remedy tied to conduct in which Brady Environmental participated. Rather, the only equitable award—forfeiture of contractual consideration—arose from a transaction that occurred approximately a year before Brady Environmental existed. Under the circumstances of this particular case, we believe that even if Brady Environmental conspired in later breaches of fiduciary duty or fraud, Brady Environmental is not subject to liability for any particular equitable forfeiture amount from the return of contractual consideration given in the specific transaction at issue. Accordingly, we affirm the court of appeals' judgment that ERI take nothing on its conspiracy claim against Brady Environmental.

VI. Conclusion

We hold that when a fiduciary fraudulently induced a contract, such a breach of fiduciary duty may give rise to equitable forfeiture of contractual consideration. We therefore reverse the portion of the court of appeals' judgment that ERI take nothing in equity. Because trial courts are required to consider certain factors when fashioning a forfeiture remedy, which we have set out, we direct the court of appeals to remand the case to the trial court, in turn, for review of its forfeiture award in light of these principles. Additionally, we conclude that the court of appeals erred in excluding evidence that certain lease payments were contractual consideration subject to forfeiture

because testimony proving this fact was properly admitted under the consistent collateral agreement exception to the parol evidence rule.

We also hold that while legally sufficient evidence does not exist to prove the lost profits awarded by the trial court, legally sufficient evidence does exist to prove some reasonably certain amount of lost profits. We therefore also reverse the portion of the court of appeals' judgment that ERI take nothing on its claims for lost profit damages and punitive damages and remand the case to the court of appeals to consider a remittitur, as well as any other remaining issues, before remanding the case to the trial court.

Finally, we affirm the portion of the court of appeals' judgment that ERI and Snodgrass take nothing on their civil conspiracy claims against Brady Environmental because the actual damages awarded by the trial court were not caused by Brady Environmental's wrongful conduct, and the equitable forfeiture awarded by the trial court arose from a transaction too remote from Brady Environmental's involvement to support liability in equity.

_____

Paul W. Green
Justice

OPINION DELIVERED: May 7, 2010

IN THE SUPREME COURT OF TEXAS

NO. 07-1050

ZACHRY CONSTRUCTION CORPORATION, ET AL., PETITIONERS,

v.

TEXAS A&M UNIVERSITY, RESPONDENT

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

Argued September 8, 2009

PER CURIAM

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JUSTICE WILLETT did not participate in the decision.

We granted review in this personal-injury and wrongful-death case to determine whether Texas A & M University (TAMU) is a responsible third party whose percentage of responsibility must be submitted to the trier of fact. TEX. CIV. PRAC. & REM. CODE § 33.003(4).[1] The plaintiffs

[1] Former section 33.003 provides that the trier of fact shall determine the percentage of responsibility of
(1) each claimant;
(2) each defendant;
(3) each settling person; and
(4) each responsible third party who has been joined under Section 33.004.

Act of May 4, 1995, 74th Leg., R.S., ch. 136, § 1, 1996 Tex. Gen. Laws 971, 972, *amended by* Act of June 1, 2003, 78th

have settled and dismissed their claims against TAMU, and the parties now agree that the trial court may submit TAMU's percentage of responsibility to the jury as a "settling person." Accordingly, without reference to the merits of the court of appeals' decision, we withdraw our order granting the petitions as improvidently granted.

This case arose out of the TAMU bonfire collapse that occurred in 1999. Several injured students and family members of students who were killed in the collapse sued TAMU and others involved in the planning and construction of the bonfire structure, including Zachry Construction Corp. (Zachry) and Scott-Macon, Ltd. (Scott-Macon). The plaintiffs subsequently non-suited their claims against TAMU, and Zachry and Scott-Macon filed separate cross-actions and third-party petitions seeking to have TAMU designated as a responsible third party so that its percentage of responsibility could be submitted to the jury. Zachry and Scott-Macon contend they did not intend to impose actual party status or liability on the University; rather, they sought to have TAMU listed on the jury verdict form for a determination of its proportionate responsibility. TAMU challenged its designation as a responsible third party on sovereign immunity grounds. The trial court rejected TAMU's arguments, but the court of appeals reversed and rendered judgment dismissing all claims against TAMU. 236 S.W. 3rd 801.

Zachry and Scott-Macon filed petitions for review in this Court. Shortly after briefing on the merits was completed, the University entered into a master settlement agreement with the plaintiffs.

Leg., R.S., ch. 204 , § 3.03, 2003 Tex. Gen. Laws 847, 855 (current version at TEX. CIV. PRAC. & REM. CODE § 33.003). All citations to section 33.003 in this opinion refer to this version of the statute.

We granted the petitions for review, but before oral argument TAMU filed a motion to dismiss the case as moot. According to TAMU, because the University is now a "settling person," the issue of whether it will be placed on the jury verdict form is now moot.

TAMU's status as a "settling person" is not in dispute. Pursuant to section 33.003(3) of the Texas Civil Practice and Remedies Code, the jury is required to make a determination of proportionate responsibility as to "each settling person." Therefore, in light of the University's status as a "settling person," and without reference to the merits of the court of appeals' decision, we withdraw our order granting the petitions for review as improvidently granted and deny the petitions for review.

OPINION DELIVERED: November 20, 2009

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.

JUSTICE GUZMAN did not participate in the decision.

We issued an opinion in this case on June 26, 2009. Today, we deny the motion for rehearing filed by respondent Central Expressway Sign Associates, withdraw our prior opinion, and substitute the following.

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

[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

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 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. 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.

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.). 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, which is precisely what Wall did. Wall did state in response to questioning by CESA's counsel that the leasehold itself would only have positive value if the agreed rent was less than the easement's fair rental value, and it was not, but this observation played no part in Wall's valuation of the easement as a whole. Contrary to what CESA and Viacom suggest, Wall appraised the fee simple value of the easement, which included the leasehold interest, and he assigned no separate value to the leasehold

estate. 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.

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Harriet O'Neill
Justice

OPINION DELIVERED: November 20, 2009

IN THE SUPREME COURT OF TEXAS

No. 08-0074

THOMAS O. BENNETT, JR., AND JAMES B. BONHAM CORPORATION, PETITIONERS,

v.

RANDY REYNOLDS, RESPONDENT

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

Argued December 15, 2009

JUSTICE WILLETT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE GUZMAN joined, and in all but Part II(A)(1) of which JUSTICE JOHNSON joined.

JUSTICE JOHNSON filed a concurring opinion.

JUSTICE LEHRMANN did not participate in the decision.

This case involves an extended drought, missing cattle, and feuding neighbors. In 2002 these factors sparked litigation over the auction of thirteen head of wandering cattle, culminating in a judgment for actual and exemplary damages. Today we clarify the standards for reviewing exemplary damages, which the United States Supreme Court has subjected to increasingly strict due-process scrutiny.

* * * * *

Texas is the top cattle-raising state in the nation,[1] home to 13.8 million head that contribute $15 billion to the state economy.[2] The Lone Star State thus looks unkindly on cattle theft, which unfortunately is not a colorful vestige of yesteryear.[3]

This case arose along the Colorado River in San Saba County, where cattle ranching is common and where cattle-raising neighbors Randy Reynolds and Thomas O. Bennett, Jr. nursed a longtime feud. In 2002 Reynolds sued Bennett and a corporate landowner, the James B. Bonham Corporation, of which Bennett served as president, alleging they had sold thirteen head of Reynolds's cattle that had strayed down a dry riverbed and onto Corporation land. Bennett was acquitted of felony theft, but a civil jury found a conversion and assessed $5,327.11 in actual damages (the cattle's market value) plus combined exemplary damages of $1.25 million: $250,000 against Bennett and $1 million against the Corporation. Both insist there is no basis for exemplary damages, and that the exemplary-to-compensatory ratios here — 47:1 as to Bennett and 188:1 as to the Corporation (235:1 combined) — offend the "substantive" limitations of the Due Process Clause of the Fourteenth Amendment.[4] In addition, the Corporation argues that Bennett's acts cannot be imputed to the Corporation.

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[1] TEX. DEPT. OF AGRIC., THE TEXAS LIVESTOCK INDUSTRY: A REVIEW OF CURRENT ECONOMIC CONDITIONS 3 (2008), *available at* http://www.agr.state.tx.us/vgn/tda/files/1848/23296_Texas%20Livestock%20Industry%20Status.pdf.

[2] *Id.*; Tex. S. Res. 545, S. J. of Tex., 81st Leg., R.S. 829, 830 (2009).

[3] Amid tough economic times, livestock crimes have risen in Texas, prompting the Legislature in 2009 to stiffen criminal penalties for stealing cattle and certain other livestock. *See* Act of May 12, 2009, 81st Leg., R.S., ch. 139, § 1, 2009 Tex. Gen. Laws 461, 462 (amending TEX. PEN. CODE § 31.03(e)).

[4] *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417–18 (2003).

We agree with the court of appeals that exemplary damages are justified against both Bennett and Bonham Corporation. That said, we are constrained by governing Supreme Court ratio analysis, which in recent years has repeatedly struck down outsized awards on due-process grounds.[5] The jury's $1.25 million award in this case was similarly excessive, so we remand to the court of appeals for remittitur consistent with controlling ratio analysis.

I. Background

The Colorado River separates the northern edge of San Saba County from Mills County. When the river is flowing, it forms a natural property barrier, and some landowners abutting the Colorado rely on the river to confine their cattle. However, when the river runs dry, as it did in the summer and fall of 2000, cattle in unfenced areas often wander along and across the dried riverbed and wind up in neighboring pastures.[6] The stray cattle are usually located and returned, but occasionally they escape for good.

The Bonham Corporation owns the 914-acre Bennett Ranch along the Colorado. Sisters Brenda Bennett and Julie Munden purportedly own the Corporation,[7] and their father, Thomas Bennett (Bennett), is the unsalaried and non-shareholder president who lives on the ranch in a Corporation-owned home. The Corporation owns no cattle, but Bennett does, and he runs them on

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[5] *See generally Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm*, 538 U.S. 408; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

[6] As the court of appeals noted, San Saba County is an "open range" county, meaning ranchers are not required to fence in their cattle. 242 S.W.3d 866, 870.

[7] There is some uncertainty as to who owns the Corporation. Thomas Bennett produced two stock certificates, one for each daughter. But those certificates were not the first ones issued, and Bennett claimed he had lost all the other records.

the Corporation's property. Upriver and on the same side, Randy Reynolds runs cattle on a 320-acre pasture leased from his mother-in-law.

The Bennett-Reynolds dispute dates back to a 1996 quarrel over construction costs for a new barbed-wire fence dividing their properties. Reynolds discovered Bennett and a Corporation work crew bulldozing a section of old fence, and Bennett suggested they split rebuilding costs. Reynolds declined, and Bennett eventually filed a small-claims suit against Reynolds in December 2000. Reynolds prevailed at trial and, while still in the courtroom, mentioned to Bennett he was missing some cattle and asked if Bennett had seen them. Bennett immediately went upstairs to the sheriff's office and accused Reynolds of stealing *his* cattle. Reynolds in turn reported his own cattle missing. That same day, the sheriff accompanied Bennett to the Reynolds property, and a deputy joined Reynolds at the Bennett place. No missing cattle were found.[8]

Reynolds says Bennett knowingly led the officers on a wild goose chase — "searching for cattle he knew were long gone" — because Bennett three months earlier had already rounded up and auctioned Reynolds's strays. In October 2000 Reynolds noticed that 23 head of cattle were missing.[9] Reynolds spotted six of them next door at the Bennett Ranch and retrieved them. Unable to find the others, he reported them missing to the Texas and Southwestern Cattle Raisers Association

[8] Reynolds insists that "Bennett attempted the despicable, trying to send the innocent victim of his crime to prison." But Reynolds was never criminally charged, nor did he sue Bennett for besmirching his name. The matter was resolved swiftly and conclusively within hours.

[9] This was not uncommon; Reynolds noted a dozen-plus times when drought conditions facilitated cattle escapes, though he recovered most of the strays.

(TSCRA).[10] Also around that time, Bennett ordered two Bonham Corporation ranch hands to help him round up and load cattle Bennett had identified for auction; they trailered and sold thirteen head, which netted $5,327.11. At the time, both ranch hands raised concerns with Bennett that the cattle were not his.

Roughly a year later, one of the ranch hands, Larry Grant, told Reynolds he suspected Bennett had auctioned some of Reynolds's cattle. While driving to the auction, Grant purchased a disposable camera and took photographs of the cattle, some of which bore a brand registered to Reynolds. Grant gave the photographs to TSCRA after he quit his job with the Corporation, shortly after the auction.

In early 2002 Bennett was indicted for cattle theft. Upon Bennett's indictment, Reynolds sued him and Bonham Corporation for conversion and sought exemplary damages in excess of the statutory caps, alleging their misconduct was malicious and constituted third-degree felony theft under Chapter 31 of the Penal Code.[11]

Bennett was acquitted of the criminal charges in 2003, but the civil case proceeded, and Bennett counterclaimed, alleging Reynolds had conspired with Larry Grant to falsely accuse Bennett

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[10] TSCRA "is a grass roots organization composed of cattle producers and operators of all sizes located primarily in Texas and Oklahoma." TSCRA Homepage, http://www.texascattleraisers.org/aboutTSCRA.asp (last visited June 21, 2010). One of TSCRA's services is stationing livestock theft investigators who are commissioned as special rangers by the Texas Department of Public Safety and "assist in recovering stolen livestock and equipment and apprehending the thieves." *Id.*

[11] At the time, Section 31.03(e)(5)(A) of the Penal Code provided that stealing "10 or more head of cattle . . . stolen during a single transaction and having an aggregate value of less than $100,000" constituted a third-degree felony. Act of May 29, 1995, 74th Leg., R.S., ch. 318, § 9, 1995 Tex. Gen. Laws 2734, 2738, *amended by* Act of May 12, 2009, 81st Leg., R.S., ch. 139, § 1, 2009 Tex. Gen. Laws 461, 462. *See also* TEX. CIV. PRAC. & REM. CODE § 41.008(c)(13) (exempting such conduct from the statutory caps on exemplary damages).

of cattle theft. While neither side disputed that Bennett had directed two ranch hands to sell thirteen head of cattle and that the sale netted $5,327.11, the parties disputed everything else. They disputed whether Bennett or Reynolds owned the cattle, Bennett's state of mind regarding who owned the cattle, and the culpability of Bonham Corporation for any wrongdoing by Bennett.

The jury sided with Reynolds, finding (1) Bennett and the Corporation both converted Reynolds's cattle, (2) they did so with malice, and (3) they committed felony theft. The jury assessed $5,327.11 in compensatory damages (imposed jointly and severally by the trial-court judgment) plus exemplary damages of $250,000 against Bennett and $1 million against the Corporation. The court of appeals affirmed.[12]

II. Discussion

Bennett and the Corporation attack the $1.25 million in exemplary damages on two grounds:

1. The award "is unwarranted under Texas law and exceeds constitutional bounds"; and

2. "Liability for punitive damages cannot be imputed to the Corporation."

A. Whether the Exemplary Damages are Statutorily Unwarranted and Constitutionally Excessive

Bennett and Bonham Corporation lodge both statutory and constitutional objections. First, they assert the court of appeals "grossly contorted" and "dangerously expanded" the statutory predicate for exemplary damages (malice) in a way that invites such damages in all cases of

[12] 242 S.W.3d at 907.

intentional misconduct. Alternatively, they argue the award flouts the Supreme Court's due-process framework in several respects.

1. The Statutory Predicate of Malice

Bennett contends the evidence was legally insufficient to support a finding of malice. Chapter 41 of the Civil Practice and Remedies Code permits exemplary damages where the plaintiff proves by clear and convincing evidence that harm resulted from "malice." In the version of Chapter 41 applicable here, malice covers intentional torts and gross negligence.[13] As to intentional torts, malice denotes "a specific intent by the defendant to cause substantial injury to the claimant."[14]

Bennett argues no evidence of malice exists because he "merely sold some cattle that were not his." He says intentionally selling another's stray livestock as one's own and pocketing the proceeds falls short of malice. Here, the jury charge properly defined malice to include "a specific

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[13] The applicable version of Section 41.003(a) made exemplary damages available if "the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from . . . malice . . . ." Act of April 11, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 110. Section 41.001(7) defined malice as

> (A) a specific intent by the defendant to cause substantial injury to the claimant; or
> (B) an act or omission:
>
> > (i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
> > (ii) 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.

Id. at 109. The current version of Chapter 41 retains these requirements, although Section 41.003 now provides that exemplary damages are available in cases of "malice" and "gross negligence." "Malice" covers intentional torts where, under Section 41.001(7), there is "a specific intent by the defendant to cause substantial injury or harm to the claimant," essentially the same definition found in subpart (A) of the earlier version of Section 41.001(7) quoted above. "Gross negligence" is now defined in Section 41.001(11), using the same language found in subpart (B) of the earlier version of Section 41.001(7) quoted above. *See Dillard Dep't Stores, Inc. v. Silva*, 148 S.W.3d 370, 373 (Tex. 2004) (describing subpart (B) of the earlier version of Section 41.001(7) as "an alternative gross negligence component" of malice).

[14] Act of April 11, 1995, 74th Leg., R.S., ch. 19, § 1, sec. 41.001(7)(A), 1995 Tex. Gen. Laws 108, 109.

intent by Defendant Bennett to cause substantial injury to Plaintiff." The jury heard testimony that Bennett ordered the sale of Reynolds's cattle despite being warned when they were penned and loaded that they belonged to someone else. The jury could have reasonably formed a firm belief or conviction,[15] from the theft itself and from the ongoing hostilities between the parties, that there was nothing accidental about Bennett's conduct and that he specifically intended to injure Reynolds by taking his property. Bennett concedes in this Court that "there is legally sufficient evidence that the cattle were Reynolds's and Bennett knew it." This record, viewed in the light most favorable to the jury's finding of malice, amply demonstrates Bennett's awareness and intent to convert Reynolds's cattle and then cover his tracks; such evidence implies willfulness, not inadvertence or an honest mistake.

This is a money-damages case, and certainly cases involving death, physical injury, or financial ruin might warrant "greater punishment"[16] than cases lacking such harms. However, exemplary damages are not reserved solely for cases that inflict ruinous physical or fiscal calamity.

Further, there was legally sufficient evidence that Bennett intended to cause "substantial" injury to Reynolds. Under the Penal Code, the theft of thirteen head of cattle constitutes a third-degree felony,[17] punishable by a fine of up to $10,000 and up to a decade behind bars.[18] While the

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[15] *See Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 609 (Tex. 2004) ("[I]n reviewing the legal sufficiency of evidence to support a finding that must be proved by clear and convincing evidence, an appellate court must '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.'" (quoting *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002))).

[16] *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310 (Tex. 2006).

[17] *See* TEX. PEN. CODE § 31.03(e)(5)(A).

[18] *See id.* § 12.34.

criminal jury acquitted Bennett, the civil jury found his actions constituted cattle theft, thus triggering the felony exception to the exemplary-damages cap.[19] Texas law, both civil and criminal, thus reflects the Legislature's policy judgment that stealing cattle inflicts substantial harm and merits harsh punishment. Moreover, the loss of livestock with a market value exceeding $5,000 was not trivial or de minimis to Reynolds. Bennett concedes in his opening brief that the market value of the stolen cattle "is not nominal," and in his reply brief that "it is certainly clear that the compensatory damages award of $5,327.11 here is *not* small." We have recognized that the term "'substantial' has two basic components: real vs. merely perceived, and significant vs. trivial."[20] The injury here was both real and significant.

2. Constitutional Due-Process Limits

Bennett and Bonham next argue the award is unconstitutionally excessive because it violates due-process constraints. For many years, the United States Supreme Court has reined in awards it deems excessive. In 1989, the Court rejected the argument that the Excessive Fines Clause of the Eighth Amendment limits exemplary damages,[21] but reserved for "another day" whether "the Due

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[19] TEX. CIV. PRAC. & REM. CODE § 41.008(c)(13).

[20] *Barr v. City of Sinton*, 295 S.W.3d 287, 301 (Tex. 2009).

[21] *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). Many academics argue the Excessive Fines Clause *should* apply, *see, e.g.*, Stephen R. McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 U. KAN. L. REV. 761 (1995), particularly given the "quasi-criminal" nature of exemplary damages, *see, e.g.*, John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 151 (1986); Michael I. Krauss, *Punitive Damages and the Supreme Court: A Tragedy in Five Acts*, 2007 CATO SUP. CT. REV. 315, 323 (contending exemplary awards "cross the line to become public ordering and are therefore excessive fines").

Process Clause places outer limits on the size of a civil damages award."[22] That day arrived two years later when the Court identified such limits and held that boundless discretion "may invite extreme results that jar one's constitutional sensibilities."[23] Conceding it could not formulate "a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable,"[24] the Court upheld a 4:1 ratio of exemplary-to-actual damages, but admonished that 4:1 "may be close to the line . . . . of constitutional impropriety."[25]

In the intervening two decades, the Court has steadily restricted exemplary damages and tightened the due-process standards by which courts assess them. The prevailing principle is that a "grossly excessive" award offends due process because it "furthers no legitimate purpose and constitutes an arbitrary deprivation of property."[26]

The first case to invalidate an award of exemplary damages on due-process grounds was the landmark 1996 decision *BMW of North America, Inc. v. Gore,*[27] a case involving BMW's concealment of pre-delivery damage to new vehicles. *Gore* introduced a three-part framework to

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[22] *Browning-Ferris*, 492 U.S. at 276-77.

[23] *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

[24] *Id.*

[25] *Id.* at 23–24.

[26] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

[27] 517 U.S. 559 (1996).

"illuminate the character of the standard that will identify unconstitutionally excessive awards."[28]

The Court refined the *Gore* guideposts in *State Farm Mutual Automobile Insurance Co. v. Campbell*:

1. "the degree of reprehensibility of the defendant's conduct";

2. "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award"; and

3. "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[29]

a. Reprehensibility

Gore described this first guidepost, focused on the "enormity" of the misconduct, as "the most important indicium of the reasonableness of a punitive damages award."[30] Elaborating, the Court has urged consideration of five nonexclusive factors — whether:

1. the harm inflicted was physical rather than economic;

2. the tortious conduct showed "an indifference to or a reckless disregard for the health or safety of others";

3. "the target of the conduct had financial vulnerability";

4. "the conduct involved repeated actions," not just "an isolated incident"; and

5. the harm resulted from "intentional malice, trickery, or deceit," as opposed to "mere accident."[31]

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[28] *Id*. at 568 (internal quotation marks omitted); *see also id*. at 575, 580, 583.

[29] *State Farm*, 538 U.S. at 418.

[30] *Gore*, 517 U.S. at 575.

[31] *State Farm*, 538 U.S. at 419; *see also Gore*, 517 U.S. at 576–77.

One factor alone "may not be sufficient to sustain a punitive damages award, and the absence of all of them renders any award suspect."[32] And though we must presume that "a plaintiff has been made whole for his injuries by compensatory damages,"[33] exemplary damages are permitted if the wrongdoing "is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."[34]

This case poses a critical threshold matter: whether Bennett's actions beyond the conversion itself may factor into the reprehensibility analysis. Reynolds paints a picture of unalloyed Bennett corruption, alleging a "scheme of deception" aimed at tainting both the civil and criminal trials: "attempting to bring false charges against Reynolds, threatening physical harm to a witness, attempting to bribe witnesses, and encouraging witnesses to lie about the round up and sale of Reynolds's cattle." The theft "should not be examined in a vacuum," says Reynolds, nor should the Court divorce the underlying tort from the overall "criminal escapade," conduct that Reynolds likens to outright legal thuggery.

Bennett disputes *any* exemplary-damages liability, saying his misdeed "inflicted solely economic harm, for which compensatory damages were awarded" and that no other reprehensibility factor is present. His conversion may have been intentional rather than inadvertent, Bennett says, but it was not malicious. As for the alleged efforts to conceal his wrongdoing, Bennett says dissimilar misconduct separate and apart from the conversion itself has no role in the punitives

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[32] *State Farm*, 538 U.S. at 419.

[33] *Id.*

[34] *Id.*

analysis; only the isolated act of selling the cattle matters. He argues that so-called concealment evidence, to support exemplary damages, must go to the harm inflicted by the underlying malfeasance. Bennett asserts a disconnect here, contending the award was premised on conduct external to what the jury was empaneled to decide and involving people not before the jury.

The Supreme Court has offered limited guidance as to the range of the defendant's conduct that should be considered in evaluating reprehensibility. In *State Farm*, the Court held that exemplary damages cannot be wielded "to punish and deter conduct that bore no relation to the [plaintiff's] harm."[35] That is, reprehensibility analysis "does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance."[36] On the other hand, the Court made clear that related conduct "may be probative when it demonstrates the deliberateness and culpability of the defendant's action," provided that the conduct bears "a nexus to the specific harm suffered by the plaintiff."[37] Obviously, a tortfeasor's attempts to cover his tracks and escape responsibility can imply willfulness. In addition, the Supreme Court in *Gore* suggested it may be proper to consider wrongdoing of the type Reynolds alleges, noting "the record . . . discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive . . . ."[38]

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[35] *Id.* at 422.

[36] *Id.* at 424.

[37] *Id.* at 422.

[38] *Gore*, 517 U.S. at 579.

We align generally with Reynolds that Bennett's alleged extra-conversion misdeeds (at least most of them) count properly toward reprehensibility, as they relate back to the underlying theft and sought to extend and exacerbate harm to Reynolds. We recognize as a general matter that exemplary damages are not meant to redress wrongdoing that *occurs* in litigation, but to redress wrongdoing that *results* in litigation. They should center on the unsavoriness of the acts, not the actor. That said, while Bennett's alleged "scheme of deception" is not why he was sued, much of it is interlaced with the theft itself and thus aimed to worsen the damage inflicted on Reynolds.

The Court's openness to surrounding conduct is consistent with the approach taken in the Second Restatement of Torts:

> In determining the amount of punitive damages, as well as in deciding whether they should be given at all, the trier of fact can properly consider not merely the act itself but all the circumstances including the motives of the wrongdoer, the relations between the parties and the provocation or want of provocation for the act.[39]

A reprehensibility analysis can therefore consider, to some extent, surrounding circumstances beyond the underlying tort. Some of Bennett's furtive actions may go to motive, underscore the parties' animosity, shed light on provocation, demonstrate deliberateness and culpability, and otherwise show heightened reprehensibility. In short, most of Bennett's non-theft wrongdoing, while perhaps separately redressable via court-ordered sanctions or other legal proceedings, is sufficiently entwined with the theft to enter the exemplary-damages calculus. However, this other malfeasance, however related, does not transform this conversion claim into one that warrants a double- or triple-digit ratio.

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[39] RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1979).

Against that backdrop, we determine that the following allegations may properly inform the reprehensibility analysis:

Bribing A Witness and Urging Him to Lie. Reynolds offered evidence that when Bennett learned that former ranch hand Larry Grant had taken incriminating photographs of the stolen cattle, Bennett urged Grant to lie about what he had seen. Bennett then offered Grant a lucrative job and later some money under the guise of helping Grant's family after a car accident.

Threatening a Witness. Reynolds points to testimony that a former Corporation ranch hand attempted to threaten bodily harm to Grant. Allegedly, this former employee tried to call and threaten Grant, but instead reached Grant's brother-in-law, thinking that person was Grant.

The Supreme Court in *State Farm* disapproved of letting juries punish alleged torts against third parties.[40] Though the Court stressed that exemplary damages cannot be used to punish extraneous acts or harm against nonparties, that principle seems inapposite when a physical threat (here a blundered threat that apparently never reached its intended target) aims to hide the complained-of malfeasance and evade responsibility. Moreover, the Court stated in *Philip Morris USA v. Williams* that harm to nonparties may enter the reprehensibility analysis,[41] *but* a jury cannot

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[40] The Court explained:

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . .

State Farm, 538 U.S. at 422-23.

[41] 549 U.S. 346, 355 (2007). In today's case, the conversion and related conduct inflicted no actual harm on third parties, only alleged potential or theoretical harm, and all redressable in other civil or criminal proceedings.

use exemplary damages to punish a defendant for harming nonparties.[42] However indistinct this distinction might be,[43] it seems sensible that harm inflicted or threatened on third parties can be part of the reprehensibility equation when such harm actually targets the plaintiff and the instant litigation. Here, though, the alleged threat went off course, and the record does not show it was ever communicated to Grant; in reality no one was actually endangered. Nonetheless, while this misdirected threat threatened nobody, it attempted to cover Bennett's tracks and foil efforts — not just by Reynolds but by the legal system itself — to unearth the truth.

Photograph Tampering. The evidence at both the civil and criminal trials included some of the photographs taken by ranch hand Grant, who suspected that the trailered cattle were not Bennett's. Reynolds alleges that Bennett doctored some of Grant's photographs to bolster his criminal defense and offered perjured testimony in that trial. Moreover, Reynolds asserted in the civil suit that the photographs had been altered to conceal evidence of Bennett's conversion.

Litigation Against Grant. Bennett filed a $50,000 slander suit against ranch hand Grant. Reynolds says these "intimidation techniques" showed "that Bennett intended to inflict as much financial pain on Grant as possible." Here, too, the jury could reasonably have deemed this slander

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[42] *Id.* at 353, 355.

[43] Justice Stevens voiced a similar reaction: "This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm." *Id.* at 360 (Stevens, J., dissenting). *See also* Erwin Chemerinsky, *More Questions About Punitive Damages*, TRIAL, May 2007, at 72, 72 ("Trial judges are likely to struggle for years with formulating jury instructions that simultaneously tell the jury to consider *and* not consider harm to people other than the plaintiffs."); Michael P. Allen, *Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance of* Philip Morris v. Williams, 63 N.Y.U. ANN. SURV. AM. L. 343, 359 (2008) ("I have read this passage scores of times. . . . How can the jury consider conduct toward others to determine reprehensibility but not to punish the defendant?").

suit, though filed against Grant, part of a pattern of intentional malice, trickery, and deceit to cover up Bennett's wrongdoing and subvert Reynolds's lawsuit.

Meddling With Reynolds's Brand. The County and District Clerk of San Saba County testified that Bennett once attempted to register Reynolds's brand as his own. This cover-up evidence shows "deliberateness and culpability" and can enhance exemplary damages given its "nexus to the specific harm suffered by the plaintiff."[44] We have previously held that certain cover-up efforts can show reprehensibility, as when a manufacturer of asbestos-containing products continues selling what it knows is dangerous.[45]

At heart, though, this is an economic-injury, actual-harm case seeking recovery for the conversion of thirteen head of cattle. Reynolds alleges a broader "criminal escapade" that aimed to ruin him, but the theoretical possibilities of greater harm strike us as marginally relevant at best in assessing exemplary damages, absent proof of the likelihood of such harms. Bennett's tort was not part of a wider plan to steal Reynolds's entire herd or to bankrupt him. Nor is there evidence that Bennett was a recidivist cattle thief rather than a first-time offender.[46] This lawsuit has a narrower focus, and the jury's findings focus on conversion.

Summing up, Reynolds's evidence of a malicious cattle theft and various furtive acts to conceal it satisfies one of the five *State Farm* reprehensibility factors: the harm resulted from intentional malice, trickery, or deceit. As discussed below, the other factors are essentially absent,

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[44] *State Farm*, 538 U.S. at 422.

[45] *See Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 46 (Tex. 1998).

[46] *See Gore*, 517 U.S. at 577; *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 309 & n.48 (Tex. 2006).

and there is no other justification for $1.25 million in exemplary damages. Accordingly, the Supreme Court's ratio analysis must be assiduously followed.

b. Ratio Between Exemplary and Compensatory Damages

In *State Farm*, the Court "decline[d] again to impose a bright-line ratio" of exemplary to actual damages, but stated that "in practice, few awards exceeding a single-digit ratio . . . will satisfy due process" and that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."[47]

Drawing on *State Farm* and other authority, we held, in *Tony Gullo Motors I, L.P. v. Chapa*,[48] that a ratio of 4.33 to 1 exceeded constitutional limits where only the fifth of the five reprehensibility factors favored exemplary damages. In that case, the plaintiff claimed that an automobile dealer had committed fraud by promising to deliver a certain model and delivering instead a less-luxurious model. The dealer's bait-and-switch included various deceptions, including forged signatures of the plaintiff and her deceased husband. The jury awarded economic damages of $7,213, the difference in the values of the two models, and mental-anguish damages of $21,639 (three times economic damages). Considering the first four reprehensibility factors, we concluded that the defendant's conduct did not cause physical harm, did not threaten the health or safety of others, did not involve repeated actions, and did not threaten financial ruin.[49] Only the fifth factor

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[47] 538 U.S. at 425. The Court derived a 4:1 ratio from the 700-year-long Anglo-American tradition of lawmakers imposing "double, treble, or quadruple damages to deter and punish." *Id.*

[48] 212 S.W.3d 299 (Tex. 2006).

[49] *Id.* at 308.

favored exemplary damages because the conduct was deceitful rather than accidental.[50] We then stressed *State Farm*'s admonition that any ratio above 4:1 "might be close to the line of constitutional impropriety."[51] Noting that a 4.33 multiplier "at least pushes against, if not exceeds, the constitutional limits,"[52] we ultimately held:

> Pushing exemplary damages to the absolute constitutional limit in a case like this leaves no room for greater punishment in cases involving death, grievous physical injury, financial ruin, or actions that endanger a large segment of the public. On this record, Gullo Motors' conduct merited exemplary damages, but the amount assessed by the court of appeals exceeds constitutional limits.[53]

In short, 4.33 times actual damages was constitutionally excessive.

The facts of today's case are not meaningfully distinguishable from those in *Gullo Motors*. Under the first four reprehensibility factors, as interpreted in *Gullo Motors*, Bennett's conduct did not cause physical harm, did not endanger the health or safety of others,[54] did not involve repeated

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[50] *Id.*

[51] *Id.* (quoting *State Farm*, 538 U.S. at 425).

[52] *Id.* at 309.

[53] *Id.* at 310 (footnote omitted).

[54] As noted above, there was testimony about a single incident where one of Bennett's employees attempted to threaten Larry Grant. However, the phone call was made to the wrong number, reaching Grant's brother-in-law instead. The employee, Don Rogers, flatly denied ever threatening Grant. The brother-in-law, Mack Maxcey, either did not take the call seriously or was not intimidated, telling Rogers to "quit talking and start the bodily harm." Reynolds points to no proof that the misdirected threat was ever communicated to Grant himself or, if so, that Grant took it seriously, or that Rogers seriously intended to carry out the threat. In short, this incident concerns a single alleged phone call threat from a Bennett employee that (1) the employee vigorously denied ever making, (2) was botched in that it was made to the wrong person, (3) was apparently discounted by the person who received the call, and (4) apparently never reached Grant, the intended target. This evidence does not meaningfully implicate the second reprehensibility factor — that the defendant's conduct showed indifference to or reckless disregard for the health or safety of others.

actions,[55] and did not threaten financial ruin. Only the fifth factor favors exemplary damages, in that Bennett's conduct was the result of intentional malice rather than mere accident. We are bound by *Gullo Motors* and accordingly hold that both ratios in this case were excessive.

However, we pause to note that rigid application of a 4:1 ratio is not universally required. *State Farm* recognized that "ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'"[56] Reynolds insists this case fits that upward-departure exception. The court of appeals agreed, acknowledging "these ratios appear superficially dramatic,"[57] but concluding this was a case where especially abhorrent conduct inflicted only modest economic harm.[58] We disagree.

As discussed above with respect to the statutory malice requirement, the economic damages of $5,327.11 were substantial and cannot fairly be characterized as nominal or trivial. Reynolds cannot successfully argue that actual damages were substantial for state statutory purposes (thus allowing exemplary damages) but were insubstantial for federal constitutional purposes (thus

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[55] As described above, Reynolds complains of a course of conduct, but the only harm for which he sued and recovered damages was the single act of conversion of his cattle. Similarly, the plaintiff in *Gullo Motors* complained of a course of conduct by the defendant that included forging documents, a failure to install promised items, and various representations by and confrontations with the defendant's agents, *see* 212 S.W.3d at 316–17 (O'Neill, J., dissenting), but we nevertheless held that the conduct "did not involve repeated acts," *id.* at 308, because that factor "refers to recidivism," *id.* at 309. The alleged course of conduct in today's case resulted in a single economic loss to Reynolds and under *Gullo Motors* it did not involve repeated, recidivist acts under the fourth reprehensibility factor.

[56] *State Farm*, 538 U.S. at 425 (quoting *Gore*, 517 U.S. at 582).

[57] 242 S.W.3d at 904.

[58] *Id.* ("This is such a case.").

allowing *large* exemplary damages). Though dwarfed by the punitive damages, $5,327.11 is not trivial; it is the amount the jury believed would redress the concrete loss that Reynolds suffered.

Even assuming that $5,327.11 is "small," the other part of the exception — "a particularly egregious act"[59] — is absent here just as in *Gore*, where the Court rejected $2 million in exemplary damages on $4,000 in actual damages. We cannot characterize the conversion here as qualitatively or quantitatively more egregious that the fraud in *Gullo Motors*. By one objective measure, Bennett's misconduct was *less* egregious: Reynolds sought no damages for mental anguish, unlike the plaintiff in *Gullo Motors*, whose mental-anguish damages were three times her economic damages. The only actual harm Reynolds pled and proved were economic damages.

If courts fail to diligently police the "particularly egregious" exception, they insulate from due-process review precisely those cases where judicial review matters most: those involving unsympathetic defendants where juries are most likely to grant arbitrary and excessive awards.[60] Allowing a freewheeling reprehensibility exception would subvert the constraining power of the ratio guidepost.

The Fifth Circuit has twice upheld triple-digit ratios post-*State Farm*: (1) 110:1 in a housing-discrimination case where compensatory damages were only $500;[61] and (2) 150:1 in a civil-rights

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[59] *State Farm*, 538 U.S. at 425 (quoting *Gore*, 517 U.S. at 582).

[60] *See Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979) ("[I]t cannot be ignored that punitive damages may be employed to punish unpopular defendants.").

[61] *Lincoln v. Case*, 340 F.3d 283, 287, 294–95 (5th Cir. 2003) (remitting the jury's $100,000 exemplary-damages award to $55,000).

case where nominal damages were only $100.[62] Both cases are distinguishable. The former turned on two key facts not present here: (1) there were "inherently low or hard-to-determine actual injuries"[63] (*Gore*'s other upward-departure exception),[64] and, (2) there was a $55,000 statutory maximum civil penalty for a comparable first-time offense, which the court held "offers the appropriate award on this record."[65] The latter case is also inapposite given its civil-rights nature: "Because actions seeking vindication of constitutional rights are more likely to result only in nominal damages, strict proportionality would defeat the ability to award punitive damages at all."[66]

In sum, Bennett's wrongdoing is blameworthy enough to warrant exemplary damages, but under federal law "a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives."[67] We commend the court of appeals' careful and extensive analysis, but we disagree that this case falls within the *Gore/State Farm* exception that leaves room for a higher multiplier.[68] Following our analysis in *Gullo Motors*, the exemplary damages here were

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[62] *Williams v. Kaufman County*, 343 F.3d 689, 711 & n.75 (5th Cir. 2003) (affirming exemplary damages of $15,000).

[63] *Lincoln*, 340 F.3d at 293.

[64] *Gore*, 517 U.S. at 582.

[65] *Lincoln*, 340 F.3d at 294.

[66] *Williams*, 343 F.3d at 711.

[67] *State Farm*, 538 U.S. at 419-20.

[68] Today's case is also qualitatively different from a notable case that upheld a 37:1 ratio based on "particularly reprehensible" conduct. In *Mathias v. Accor Economy Lodging, Inc.*, Judge Posner wrote for the Seventh Circuit in affirming $186,000 in punitive damages, more than 37 times the $5,000 actual damages. 347 F.3d 672 (7th Cir. 2003). A brother and sister were bitten by bedbugs while staying at a downtown Chicago hotel. The hotel had known about the bedbug infestation for years, rejected a $500 bid to exterminate, and told desk clerks to pass off the bedbugs as ticks. The jury found the hotel's conduct "willful and wanton," and the court of appeals deemed it "outrageous," saying the infestation reached "farcical proportions" and that infested rooms were rented nightly to unsuspecting customers despite

unconstitutionally excessive. As "the amount of a suggested remittitur is in the first instance a matter for the courts of appeals,"[69] we remand to that court.

c. Legislative Penalties for Similar Misconduct

The final guidepost compares the exemplary damages with legislatively authorized civil sanctions.[70] In this case we need not discuss the "comparable sanctions" guidepost at all, as unconstitutional excessiveness is aptly demonstrated under the ratio guidepost above.[71] But we add this brief word.

This factor fortifies the notion that legislatures make policy and are well positioned to define and deter undesired behavior. Accordingly, reviewing courts "should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue."[72] In cases where applicable civil penalties exist, this guidepost gives bad actors fair notice of what is forbidden and of potential penalties. Today's case, however, is not ordinary, given the absence of civil penalties

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being on "Do not rent, bugs in room" status. *Id.* at 674–75, 677. As Judge Posner noted, it was probably no coincidence that the $191,000 total award per plaintiff amounted to $1,000 for each of the hotel's 191 rooms. *Id.* at 678.

This bedbug case differs significantly from today's cattle case. The bedbugs preyed on unwary guests nightly, leaving them with painful and unsightly red welts and bites — all told, countless health-endangering episodes that could have ended years earlier with a quick $500 extermination. The hotel recklessly disregarded and lied about a known health risk, deliberately exposing its guests to an insect infestation, conduct that "amounted to fraud and probably to battery as well." *Id.* at 675.

[69] *Gullo Motors*, 212 S.W.3d at 310.

[70] *State Farm*, 538 U.S. at 418.

[71] Many courts exclude the "comparable sanctions" factor altogether once they conclude the ratio violated due process. *E.g.*, *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 408 (5th Cir. 2000) ("Having found that the award fails to satisfy the second requirement, we need not examine the third prong of the *BMW* test."); *Borne v. Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903, 916–17 (Mass. App. 2003) (considering only the first and second guideposts); *McClain v. Metabolife Int'l, Inc.*, 259 F.Supp.2d 1225 (N.D. Ala. 2003) (ignoring comparable sanctions).

[72] *Gore*, 517 U.S. at 583 (internal quotation marks omitted).

and the presence of criminal ones. The two are incommensurate, and incarceration does not translate meaningfully to a dollar-figure fine.[73]

The court of appeals looked to both civil and criminal statutes. On the criminal side, it noted the Penal Code provisions on third-degree felony theft (punishable by two to ten years imprisonment)[74] and witness tampering (punishable by six months to two years).[75] The Supreme Court in *Haslip* and *Gore* "also looked to criminal penalties that could be imposed,"[76] since "[t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action."[77] But in *State Farm* the Court added this caution: "When used to determine the dollar amount of the award, however, the criminal penalty has less utility."[78] The Court explained that "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."[79] *State Farm* reflects the Court's evolving view of exemplary damages and stresses the limited usefulness of criminal

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[73] Some commentators argue that comparing economic sanctions with jail time "would effectively eviscerate" the guidepost altogether because "[a]ny nontrivial potential term of imprisonment would likely justify almost any size punitive damages awards." Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the* Gore/State Farm *Guideposts*, 37 U. MICH. J.L. REFORM 441, 479-80 (2004).

[74] 242 S.W.3d at 906 (citing TEX. PEN. CODE §§ 31.03(e)(5)(A) and 12.34).

[75] *Id*. (citing TEX. PEN. CODE §§ 36.05 and 12.35).

[76] *State Farm*, 538 U.S. at 428 (citing *Gore*, 517 U.S. at 583, and *Haslip*, 499 U.S. at 23).

[77] *Id*.

[78] *Id*.

[79] *Id*.

penalties, but notably *State Farm* and *Gore* mention that legislative sanctions often take the form of double, treble, or quadruple damages.[80]

Here, the criminal jury acquitted Bennett of cattle theft, but the civil jury found that he and the Corporation did "commit theft of 10 or more head of cattle during a single transaction and . . . the aggregate value of those cattle [was] less than $100,000.00." This finding tracks (1) the then-applicable Penal Code definition of third-degree felony theft,[81] which aside from a possible decade-long incarceration permits a fine "not to exceed $10,000,"[82] and (2) the felony theft exception to the statutory cap on exemplary damages.[83]

On the civil side, the court of appeals emphasized

> the Texas Legislature's policy choice to exempt conduct constituting third-degree felony theft from the caps otherwise applicable to punitive damages awards. . . . [B]arring contrary constitutional impediments, the legislature has deemed such conduct so serious as to remove the state statutory limitations otherwise restricting the amount of punitive damage awards for such conduct.[84]

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[80] *See State Farm*, 538 U.S. at 425; *Gore*, 517 U.S. at 581 & n.33.

[81] *See supra* note 11.

[82] TEX. PEN. CODE § 12.34(b). Interestingly, stealing 100 head of cattle (or theoretically, even 1,000) is criminally no riskier than stealing ten so long as the value remains less than $100,000. And while incarceration ratchets up for higher-grade felonies involving higher-dollar losses, the maximum fine for first- and second-degree felonies remains $10,000. *Id.* §§ 12.32–.33. Also, outside the context of cattle and certain other animals, third-degree felony theft only applies to property worth at least $20,000. *Id.* § 31.03(e)(5). If stolen cattle were treated like other stolen property, the thief would sometimes face less jail time. For example, if someone converts not cattle worth $5,327.11 but a Remington cattle *sculpture* worth $5,327.11, he would confront not a third-degree felony but a less-serious state jail felony (180 days to two years in state jail), though the same potential $10,000 fine would apply. *Id.* § 12.35. And once the "third-degree" label attaches, stealing $99,999.99 worth of cattle is criminally no worse than stealing $99,999.99 worth of cattle feed.

[83] TEX. CIV. PRAC. & REM. CODE § 41.008(c)(13).

[84] 242 S.W.3d at 906.

In ordinary civil cases, Section 41.008 of the Civil Practice and Remedies Code caps exemplary damages at an amount not to exceed the greater of (1) $200,000 or (2) noneconomic damages (up to $750,000) plus two times economic damages.[85] However, the Legislature makes this statutory ceiling inapplicable to conduct constituting third-degree (and higher) felony theft, like stealing cattle.

The Legislature inarguably has discretion to deem certain crimes more detestable than others and thus deserving of harsher punishment.[86] But that does not prevent due process from mandating a lower award. As we emphasized in *Gullo Motors*, the Supreme Court requires us to look to civil penalties "'imposed in *comparable* cases.'"[87] We cannot conclude that the general $200,000 ceiling reflects the Legislature's judgment that this amount, much less a higher uncapped amount, is thus constitutionally permissible. Lifting the $200,000 cap in some cases does not demonstrate constitutional propriety in this case. Indeed, even an award well *below* the statutory ceiling can offend due process.[88]

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[85] TEX. CIV. PRAC. & REM. CODE § 41.008(b).

[86] Two commentators argue that the highest comparable fine should set a presumptive limit on punitive damages. Chanenson & Gotanda, *supra* note 73, at 444. By "setting the statutory maximum fine that fixes the presumptive limit, the relevant legislature has spoken to the misconduct's reprehensibility already." *Id.* at 478. However, capping exemplary damages at the $10,000 maximum fine may seem disproportionately low in certain high-dollar contexts — for example, in a case of first-degree felony theft where the property stolen is worth $200,000 or more. *See* TEX. PEN. CODE §§ 12.32(b), 31.03(e)(7).

[87] *Gullo Motors*, 212 S.W.3d at 309 (quoting *Gore*, 517 U.S. at 575).

[88] *See id.* at 307; *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.12 (1996); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 45 (Tex. 1998) ("[E]ven if an assessment of punitive damages is not deemed excessive under governing state law, it may violate a party's substantive due process right to protection from 'grossly excessive' punitive damages awards." (quoting *Gore*, 517 U.S. at 568)).

In sum, the "comparable sanctions" guidepost offers little guidance — there are no on-point civil penalties — though pegging punitives to the $10,000 criminal fine would produce a 1.877 ratio.

d. The Exemplary-Damages Award Violated Due Process

Our settled practice is not to remit unconstitutional awards ourselves or to prescribe a required ratio, though on this record, even 4:1 seems a stretch: "Pushing exemplary damages to the absolute constitutional limit in a case like this leaves no room for greater punishment in cases involving death, grievous physical injury, financial ruin, or actions that endanger a large segment of the public."[89] The award in this case cannot be squared with our on-point *Gullo Motors* decision, another "scheme of deception" case.

The Supreme Court is decidedly hands-on when scrutinizing high-dollar exemplary-damages awards, and we are confident the Court would conclude this award "was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant."[90]

B. Corporate Liability for Exemplary Damages

Bonham Corporation contends it cannot be assessed exemplary damages for Bennett's conduct. We disagree.

Section 41.005(c) of the Civil Practice and Remedies Code addresses the imposition of exemplary damages against a defendant for the criminal act of another. The jury charge tracked this statutory provision, which states:

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[89] *Gullo Motors*, 212 S.W.3d at 310.

[90] *State Farm*, 538 U.S. at 429.

> In an action arising out of a criminal act committed by an employee, the employer may be liable for punitive damages but only if:
>
> (1) the principal authorized the doing and the manner of the act;
>
> (2) the agent was unfit and the principal acted with malice in employing or retaining him;
>
> (3) the agent was employed in a managerial capacity and was acting in the scope of employment; or
>
> (4) the employer or a manager of the employer ratified or approved the act.

The jury imposed exemplary damages against the Corporation but was not asked to specify which subpart of the statute it found applicable. The evidence was legally sufficient to uphold exemplary damages under subpart (1), which imposes liability if "the principal authorized the doing and the manner of the act."

Corporations, of course, "can act only through human agents."[91] Corporate decisions, likewise, are ultimately made by human agents. In deciding whether exemplary damages can be assessed against a corporation, we have focused on the concept of a vice-principal. In *Hammerly Oaks, Inc. v. Edwards*, we explained that acts of a vice-principal are deemed to be acts of the corporation for purposes of exemplary damages because the vice-principal "represents the corporation in its corporate capacity."[92] As we explained in *GTE Southwest, Inc. v. Bruce*:

> When actions are taken by a vice-principal of a corporation, those acts may be deemed to be the acts of the corporation itself. A vice-principal represents the corporation in its corporate capacity, and includes persons who have authority to

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[91] *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 188 (Tex. 2007).

[92] 958 S.W.2d 387, 391 (Tex. 1997).

> employ, direct, and discharge servants of the master, and those to whom a master has confided the management of the whole or a department or division of his business.[93]

In *Chrysler Insurance Co. v. Greenspoint Dodge of Houston, Inc.*, we further explained that a vice-principal includes four classes of human agents:

> (a) Corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom a master has confided the management of the whole or a department or division of his business.[94]

Under these formulations, not only was Bennett indisputably a vice-principal of Bonham Corporation, he was most likely the only vice-principal and the only person whose conduct and decisions could subject the corporation to exemplary damages.

Bennett was the highest corporate officer, the president. Further, he was not a corporate officer in name only. Regarding the Ranch operations, Bennett testified: "I make the decisions," and "I run the ranch." There was no evidence that he had ever received a single order from his daughters, the putative owners, regarding how to conduct Corporation business.

In addition to Bennett's de facto control over Ranch operations, he was formally vested with control over the Corporation. The corporate charter and bylaws gave him broad authority to act as the Corporation, including "such powers and duties as are commonly incident to his office" as "the chief executive officer of the corporation." According to a resolution from a 1991 shareholder meeting, Bennett was:

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[93] 998 S.W.2d 605, 618 (Tex. 1999) (citation omitted).

[94] 297 S.W.3d 248, 250 n.1 (Tex. 2009) (quoting *Hammerly Oaks*, 958 S.W.2d at 391).

> authorized to transact business on behalf of the corporation. He shall be fully authorized to sign deeds, notes, deed of trust, mineral deeds, royalty contracts, oil and gas leases, and all other legal papers and documents in the name of and on behalf of the corporation. Also, he shall be entitled to run his personal livestock on any corporate land.

Not only did Bennett direct ranch operations generally, but he used his authority to direct corporate employees, on corporation time, to load Reynolds's cattle and sell them at auction, the specific tortious conduct that led to the assessment of exemplary damages. The cattle were on Corporation-owned land, and Bennett used Corporation-owned trucks to accomplish the conversion. The corporate charter states that its purposes include "development" of the Ranch property. Insofar as Bennett exercised control over the use or development of the property by removing Reynolds's cattle, he was acting in a corporate capacity. Further, Bennett testified that he received no salary from the Corporation to serve as its president, but did receive a lease to run his cattle as payment for his service. Bennett may have personally received the funds from the conversion of Reynold's cattle, but the receipt of those funds was made possible by Bennett's cattle lease, which in turn was his compensation for serving as Corporation president.

Bennett argues there must be some "nexus between the act and the scope of the agent's duties or the corporation's authorization." Generally, "[w]hen actions are taken by a vice-principal of a corporation, those acts may be deemed to be the acts of the corporation itself," and "status as a vice-principal of the corporation is sufficient to impute liability to [the corporation] with regard to his actions taken in the workplace."[95] We agree the Corporation cannot be liable for exemplary damages

[95] *Bruce*, 998 S.W.2d at 618.

if the vice-principal's misconduct occurred while he was acting in a personal capacity unrelated to his authority as a corporate vice-principal. But here, Bennett used corporate authority over corporate employees, on corporate land, to convert cattle using corporate equipment. There is ample evidence that Bennett was acting in a corporate capacity.

Section 41.005(c)(1) permits exemplary damages if the Corporation "authorized the doing and the manner of the act." As a vice-principal acting in a corporate capacity, Bennett inarguably authorized and approved his own act of converting the cattle. The record is devoid of evidence that anyone else could have authorized it. The Corporation, therefore, authorized the doing and manner of the conversion, and Bennett's conduct was chargeable to the Corporation for purposes of exemplary damages.

III. Conclusion

Robert Frost wrote elegantly of rural life, and made famous an old proverb: "Good fences make good neighbours,"[96] an apt aphorism for Texas cattle ranchers along the drought-prone Colorado River.

The Supreme Court has placed a constitutional fence around exemplary damages, one that lower courts must police to prevent the "acute danger of arbitrary deprivation of property."[97] As the Court counseled almost a century ago, the power to award exemplary damages "is limited by the obligation to administer justice."[98] We concede the constitutional lines are somewhat opaque,

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[96] Robert Frost, *Mending Wall*, *in* NORTH OF BOSTON 11, 12 (Henry Holt & Co. 1917) (1914).

[97] *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994).

[98] *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 286 (1912).

making the required balancing "necessarily unscientific."[99] Indeed, the role of exemplary-damages "gatekeeper" has been called "one of the most challenging that has been placed upon appellate judges in civil cases."[100] "[T]ime and again,"[101] though, the Supreme Court has disapproved of awards "that dwarf the corresponding compensatories."[102]

We agree with the court of appeals that "Texans know better than to steal cattle,"[103] an offense once redressed beneath a tree rather than inside a courtroom. That said, the 47:1 and 188:1 ratios here exceed the outermost limit permitted by due process. We thus remand to the court of appeals to reconsider exemplary damages in line with this opinion and prevailing ratio analysis.

_____

Don R. Willett
Justice

OPINION DELIVERED: June 25, 2010

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[99] *Williams v. Kaufman County*, 343 F.3d 689, 712 n.77 (5th Cir. 2003).

[100] *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 450 (3rd Cir. 1999).

[101] *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 475 (1993) (O'Connor, J., dissenting).

[102] *Exxon Shipping Co. v. Baker*, 128 S. Ct 2605, 2625 (2008).

[103] 242 S.W.3d at 907.

IN THE SUPREME COURT OF TEXAS

No. 08-0074

THOMAS O. BENNETT, JR., AND JAMES B. BONHAM CORPORATION, PETITIONERS,

v.

RANDY REYNOLDS, RESPONDENT

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

Argued December 15, 2009

JUSTICE JOHNSON, concurring.

The jury found that Randy Reynolds suffered actual damages of $5,327.11 for the loss of thirteen cattle. Bennett admittedly intended to sell the cattle, although he maintained they were his and denied intending to injure Reynolds, much less to seriously or substantially harm him. The jury found that Bennett's conversion of the cattle was done with malice even though his actions in rounding up and selling them were peaceable, no one was hurt, and no one was threatened when the deed was accomplished. The parties seem to agree that the jury based its $1,250,000 exemplary damages award to a large degree on actions Bennett took separately from his actions in converting the cattle, although Reynolds only claimed, and the jury only awarded, actual damages because of the conversion. As opposed to justifying the exemplary damages by referencing actions showing

Bennett intended to cause Reynolds substantial injury by his actions in converting the cattle, Reynolds references actions by Bennett that were not directly related to the conversion as "reprehensible" actions that justify the large award.

As applicable to this case, former section 41.003(a) of the Texas Civil Practice and Remedies Code allows recovery of exemplary damages if "the harm with respect to which the claimant seeks recovery of exemplary damages results from" malice. Act of April 11, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 110. The trial court charged the jury to find whether "the harm to [Reynolds] resulted from malice by Defendant Bennett," and defined "malice" according to the statute as:

> (a) a specific intent by Defendant Bennett to cause substantial injury to Plaintiff; or
>
> (b) an act or omission by Defendant Bennett;
>
> > (i) which, when viewed objectively from the standpoint of Defendant Bennett at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
> >
> > (ii) of which Defendant Bennett had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Evidentiary support for a finding of malice under subpart (a) of the definition must be by evidence that the harm to Reynolds—the conversion of his cattle—resulted from a specific intent by Bennett to cause Reynolds not just injury, but *substantial* injury. A finding of malice under subpart (b) of the definition, which corresponds to the definition of gross negligence, requires evidence that Bennett's actions were likely to cause "serious injury" to Reynolds. *See Smith v. O'Donnell*, 288

S.W.3d 417, 423 (Tex. 2009) ("'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."); *Universal Servs. Co., Inc. v. Ung*, 904 S.W.2d 638, 641 (Tex. 1995) ("Objectively, the defendant's conduct must create 'an extreme degree of risk.' . . . [T]he defendant's conduct must create the 'likelihood of serious injury' to the plaintiff."); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 22 (Tex. 1994) ("Only if the defendant's act or omission is unjustifiable and likely to cause serious harm can it be grossly negligent.").

For two reasons, I address only part (a) of the jury charge that defined malice as a specific intent to cause substantial injury to the plaintiff. First, the Court addresses only that part of the malice definition. Second, it is not clear that part (b) of the definition even applies in intentional tort cases. *See Dillard Dep't Stores, Inc. v. Silva*, 148 S.W.3d 370, 373 (Tex. 2004) (noting that a question exists about whether subsection (b) of the malice definition applies in an intentional tort setting).[1]

The Court cites *Barr v. City of Sinton*, 295 S.W.3d 287, 301 (Tex. 2009) for the proposition that the term "substantial" has two basic components: real vs. perceived and significant vs. trivial. ___ S.W.3d at ___. In *Barr*, the Court was construing the Texas Religious Freedom Restoration Act (TRFRA) that provides a governmental entity 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

[1] As the Court notes, Chapter 41 has been amended and now distinguishes between "malice" and "gross negligence." ___ S.W.3d ___ n.12; *see* TEX. CIV. PRAC. & REM. CODE §§ 41.001(7), (11), 41.003.

that interest." 295 S.W.3d at 289. The Court noted that the terms "substantially" and "substantial" were not defined in the TRFRA, nor were they seemingly defined elsewhere in Texas statutes. *Id.* at 301. Referencing the ordinary meaning of "substantial" as found in Webster's Third International Dictionary, the Court noted the two basic components of "substantial." The Court also noted that as defined, the "real vs. merely perceived, and significant vs. trivial" limitations "leave a broad range of things covered." *Id.* The Court declined to craft a bright-line rule to apply in every context to determine when a person's free exercise of religion has been substantially burdened; rather, the Court concluded that each case requires a fact-specific inquiry and the question of substantial burden is to be determined from the perspective of the person whose exercise of religion is in question. *Id.* at 301-02.

As to whether Bennett's intent was to cause "substantial" injury, it seems appropriate for the analysis to be similar to the analysis applied in *Barr*. The determination should not be according to a bright-line rule, but should be focused on and entail a fact-specific analysis of Bennett's knowledge and intent in regard to Reynolds's situation at the time of the conversion. For example, stealing cattle has traditionally been considered a serious matter in Texas. It might be classified as a substantial, significant injury without further analysis, especially in light of the fact that it is a criminal offense. *See* TEX. PENAL CODE § 31.03(e)(5)(A). But in considering the statutory definition of malice, it is hard to see how Bennett could have specifically intended to cause Reynolds substantial injury if, for example, Reynolds owned, or if Bennett believed Reynolds owned, a thousand cattle at the time Bennett converted thirteen of them. On the other hand, if (1) Reynolds owned only twenty cattle, (2) those cattle comprised a large part of Reynolds's net worth, and (3)

Bennett knew it when he converted thirteen head of them, it would be easier to infer that Bennett specifically intended to cause substantial injury to Reynolds.

As to the magnitude of the injury Bennett intended to cause and the jury's finding that he converted the cattle with malice, two evidentiary factors stand out and in my view comprise legally sufficient evidence that Bennett had a specific intent to cause Reynolds substantial injury by converting his cattle. First, as the Court notes, under the Penal Code, the theft of thirteen cattle is a third degree felony. *See id.* While Bennett was not convicted for theft of the cattle, the penal provision nevertheless reflects the seriousness of taking thirteen head of cattle that belong to someone else. That weighs more in favor of the conversion being a significant injury than the conversion being a lesser injury. Second, there is evidence that before Bennett converted the cattle he was told by Reynolds that Reynolds could not afford to pay approximately $4,500 as a share of the cost for replacing the fence between the Bonham ranch and the land where Reynolds kept his cattle. Evidence that Reynolds made such a statement about his financial condition supports an inference that Bennett knew the loss of over $5,000 worth of cattle would be a significant injury to Reynolds and that Bennett intended to cause such an injury.

I join the Court's judgment and opinion, except for the analysis as to the legal sufficiency of the evidence to support the jury's finding that Bennett converted Reynolds's cattle with malice. For the reasons expressed above, however, I agree the evidence is legally sufficient to support the finding and concur in the Court's conclusion as to that issue.

Phil Johnson
Justice

OPINION DELIVERED: June 25, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0121

CITY OF WACO, PETITIONER,

v.

DEBRA KIRWAN, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF BRAD MCGEHEE, DECEASED, RESPONDENT

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

Argued February 3, 2009

JUSTICE GREEN delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE JOHNSON, JUSTICE WILLETT, and JUSTICE GUZMAN joined as to Parts I–V, and in which CHIEF JUSTICE JEFFERSON joined as to Part IV.

The recreational use statute, when applicable, "raises the burden of proof [in a premises liability case] by classifying the recreational user of [government]-owned property as a trespasser and requiring proof of gross negligence, malicious intent, or bad faith" on the part of the governmental unit. *State v. Shumake*, 199 S.W.3d 279, 281 (Tex. 2006). But if the law imposes no duty upon the landowner with respect to the allegedly dangerous condition, then this burden of proof does not come into play. In this case, we consider whether a landowner owes a duty, under the recreational use statute, to recreational users to warn or protect recreational users against the danger

of a naturally occurring condition or otherwise refrain from gross negligence with respect to the condition. We hold, consistent with the purpose of the statute, that a landowner generally owes no such duty, and therefore reverse the court of appeals' judgment and dismiss the case with prejudice.

I

On April 24, 2004, college student Brad McGehee was watching boat races in Cameron Park, a municipal park located in the City of Waco. McGehee was sitting on top of a cliff in an area known as Circle Point, when the plaintiffs allege the solid rock ground collapsed underneath him, causing him to fall approximately sixty feet to his death. Rusty Black, Municipal Services Director for the City of Waco, swore in an affidavit that the cliff was a naturally occurring cliff consisting of loose rock and natural cracks, that it was not created by the City of Waco, nor had the City altered, modified, or excavated the limestone cliff beyond the stone wall in front of the cliff. Attached to his affidavit were photographs of the cliff, which clearly demonstrate that the cliff is a natural condition altered only by nature. The photographs show a rock wall constructed by the City situated in front of the cliff, accompanied by a sign warning, "FOR YOUR SAFETY DO NOT GO BEYOND WALL." McGehee had crossed the wall and was beyond the warning sign when he fell to his death. There was no evidence that the City modified the cliff from which McGehee fell in any way.

On February 4, 2005, Debra Kirwan, individually and as representative of the Estate of Brad McGehee, filed a premises liability suit against the City of Waco, alleging that McGehee's death was proximately caused by the gross negligence of the City, thus waiving the City's immunity against suit and liability under the Texas Tort Claims Act. After the original petition was filed, the parties agreed to abate the case until this Court issued its decision in *State v. Shumake*, 199 S.W.3d 279

(Tex. 2006)—a case which addressed the recreational use statute. Following the *Shumake* decision, Kirwan filed an amended petition, alleging that McGehee's death and Kirwan's damages were directly and proximately caused by the gross negligence of the City of Waco in connection with the condition of its real property. *See Shumake*, 199 S.W.3d at 287 (defining gross negligence as "an act or omission involving subjective awareness of an extreme degree of risk, indicating conscious indifference to the rights, safety, or welfare of others"). As evidence of the City's subjective awareness of the cliff's alleged extreme degree of risk, Kirwan relied on a student report, which had been submitted to the City, and had warned of falling rocks in Cameron Park and had recommended the use of warning signs. As evidence of the City's alleged conscious indifference to these risks, Kirwan cited the lack of any sign specifically warning of the risk of fatality resulting from the condition of the Cameron Park premise and evidence showing that despite the fact that other park patrons had died or been seriously injured by the condition of the premises, the City continued to allow park patrons into the areas with the unstable rock.

The City responded by filing a Second Amended Plea to the Jurisdiction, arguing that Kirwan's pleadings affirmatively negated the court's jurisdiction, or, in the alterative, that the undisputed evidence established a lack of jurisdiction. Specifically, the City relied on *Shumake* to argue that, as a matter of law, a landowner may not be grossly negligent for failing to warn of the inherent dangers of nature. The trial court agreed and signed an order dismissing the case against the City.

A divided court of appeals reversed the trial court's judgment and remanded, reasoning that "[w]e do not read *Shumake* to suggest that all natural conditions are *per se* open and obvious or that

a natural condition may *never* serve as the basis for a premises defect claim"; instead, it held that "the recreational use statute permits premises defect claims based on natural conditions as long as the condition is not open and obvious and the plaintiff furnishes evidence of the defendant's alleged gross negligence." 249 S.W.3d 544, 552 (emphasis in original).[1] The court of appeals then concluded that Kirwan's pleadings and evidence raised fact issues as to the City's alleged gross negligence. *Id*. at 557. We granted the City's petition for review to determine whether, under the recreational use statute, a landowner owes a duty to warn or protect recreational users against the dangers of naturally occurring conditions. 52 Tex. Sup. Ct. J. 122 (Tex. Nov. 21, 2008).

II

A plea to the jurisdiction seeks to dismiss a case for want of jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004). When reviewing whether a plea was properly granted, we first look to the pleadings to determine if jurisdiction is proper, construing them liberally in favor of the plaintiffs and looking to the pleader's intent. *Id*. at 226. The allegations found in the pleadings may either affirmatively demonstrate or negate the court's jurisdiction. *Id*. at 226–27. If the pleadings do neither, it is an issue of pleading sufficiency and the plaintiff should be given an opportunity to amend the pleadings. *Id*. "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," even where those facts may implicate the merits of the cause of action. *Id*. at 227. If that evidence creates a fact issue as to the

[1] Chief Justice Gray dissented, without issuing a separate opinion. *Id*.

jurisdictional issue, then it is for the fact-finder to decide. *Id*. at 227-28. "However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law." *Id*. at 228. In considering this evidence, we "take as true all evidence favorable to the nonmovant" and "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Id*.

The City claims Kirwan's pleadings affirmatively negate the trial court's jurisdiction because she failed to allege the City was grossly negligent "in creating a condition that a recreational user would not reasonably expect to encounter on the property in the course of permitted use." *Shumake*, 199 S.W.3d at 288. Alternatively, the City argues that, even if the pleadings do not affirmatively negate jurisdiction on their face, then the undisputed evidence establishes as a matter of law a lack of jurisdictional facts to support a waiver of governmental immunity. Both arguments present the question of whether, under the recreational use statute, a landowner owes a duty to warn or protect recreational users against the dangers of naturally occurring conditions on the landowner's property. The City argues that we answered this question in *Shumake*, where we stated:

> [W]e do not hold, or even imply, that a landowner may be grossly negligent for failing to warn of the inherent dangers of nature. A landowner has no duty to warn or protect trespassers from obvious defects or conditions. Thus, the owner may assume that the recreational user needs no warning to appreciate the dangers of natural conditions, such as a sheer cliff, a rushing river, or even a concealed rattlesnake. But a landowner can be liable for gross negligence in creating a condition that a recreational user would not reasonably expect to encounter on the property in the course of the permitted use.

199 S.W.3d 288 (citations omitted). Kirwan and the court of appeals disagree, arguing that this statement addressed open and obvious conditions only, and that *Shumake* merely provided examples

of open and obvious conditions which happen to be naturally occurring. We agree that, while *Shumake* may have provided some guidance, it did not directly answer the question presented here. The condition in *Shumake* was not a naturally occurring one. *See id*. at 281 (addressing liability for danger from man-made culvert). Here, however, the facts present a condition alleged to be both natural and not open and obvious. Thus, the question left open by *Shumake* is properly before us.

III

A

Under the Texas Tort Claims Act, the government waives immunity from suit to the extent of liability under the Act. TEX. CIV. PRAC. & REM. CODE § 101.025. The government is liable under the Act for "personal injury and death so caused by a condition . . . of . . . real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." *Id.* § 101.021(2). The Act also sets the duty owed in premises liability cases: "[i]f 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." *Id*. § 101.022(a). However, the recreational use statute, applicable here, modifies this duty further, setting the standard as that owed to a trespasser. *Id*. § 75.002(c)(2). We recognized in *Shumake*, however, that although the recreational use statute references a trespasser standard, it actually creates a specialized standard of care, one not exactly consistent with the common-law trespasser standard. 199 S.W.3d at 286–87. This specialized standard dictates that landowners must refrain from gross negligence, or from acting with malicious intent or in bad faith. *Id*.; TEX. CIV. PRAC. & REM. CODE § 75.002(d). Gross negligence is not defined in the statute, so we apply its commonly-accepted legal

meaning, which is "an act or omission involving subjective awareness of an extreme degree of risk, indicating conscious indifference to the rights, safety, or welfare of others." *Shumake*, 199 S.W.3d at 287 (citing cases and TEX. CIV. PRAC. & REM. CODE § 41.001(11)).

As with negligence actions, *see, e.g.*, *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 217 (Tex. 2008), a defendant may be liable for gross negligence only to the extent that it owed the plaintiff a legal duty. *See Shumake*, 199 S.W.3d at 287–88 (discussing "under what conditions a failure to guard or warn against a dangerous condition may be considered grossly negligent, malicious or willful"); *Morris v. Tex. Parks & Wildlife Dep't*, 226 S.W.3d 720, 727 (Tex. App.—Corpus Christi 2007, no pet.) (examining whether park owed a duty, under recreational use statute, to ensure the safety of a campsite). For example, we have held that "[a] landowner has no duty to warn or protect trespassers from obvious defects or conditions." *Shumake*, 199 S.W.3d at 288; *see also Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 659–60 (Tex. 2007). We have discussed, but never fully addressed, whether a duty arises with respect to natural conditions, whether they be open and obvious or not. *See Shumake*, 199 S.W.3d at 288 ("[W]e do not hold, or even imply, that a landowner may be grossly negligent for failing to warn of the inherent dangers of nature."); *Miranda*, 133 S.W.3d at 234 (Jefferson, J., dissenting) ("Texas law does not impose on landowners a duty to warn trespassers about all conceivable dangers inherent in nature.") (emphasis removed).

If we apply common-law principles with regard to trespassers, the answer to this question is that the landowner owes no duty to warn or protect against natural conditions. *See Shumake*, 199 S.W.3d at 285–86 (discussing limited exception to common-law trespasser rule where the landowner created a dangerous condition); *see also, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 333–339 (1977)

(stating general rule of no liability to trespassers, but providing limited exceptions for activities, controllable forces, and artificial conditions). But, as explained in *Shumake*, the common-law trespasser standard does not dictate the answer to this duty question. 199 S.W.3d at 286–87. Instead, the statutory standard controls. *Id*. And, while it does not wholly adopt the common-law trespasser standard, it does adopt the common-law gross negligence standard. *Id*. Thus, we refer to our traditional, common-law duty analysis, "consider[ing] 'several interrelated factors, including 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 the consequences of placing the burden on the defendant.'" *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 544 (Tex. 1998) (quoting *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex.1990)). However, unique to this analysis is the fact that liability here is premised on a statute; therefore, we must be especially mindful of its text and purpose. *See F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683–84 (Tex. 2007) (applying statutory construction principles when considering legislatively-created duty owed by alcohol providers to third parties).

B

Nature is full of risks and it is certainly foreseeable that human interaction with nature may lead to injuries and possibly even death. Our state parks and lands are covered by numerous potentially dangerous natural conditions: cliffs; caves; waterfalls; swamps and other wetlands; mountains and canyons; surf; and various animals and creatures. Landowners likely know of the types of animals and natural formations on their property, and will no doubt, as a general rule, foresee the risks which will accompany human interaction with these natural conditions. Reasonable

recreational users who choose to visit a property for recreational purposes will also have, or in the very least should have, awareness of the inherent risks involved in interacting with nature. *See Shumake*, 199 S.W.3d at 288 ("[An] owner may assume that the recreational user needs no warning to appreciate the dangers of natural conditions. . . ."). Therefore, the risks inherent in a natural condition will ordinarily be foreseeable not only to the landowner but to the recreational user as well. This is especially true where a natural condition is of the sort one would reasonably expect to find on a property. *Id.*

A cliff, like the one here, is the sort of dangerous natural condition that both a landowner and recreational user could foresee would pose a risk. Indeed, the City had erected a wall and posted a sign warning visitors to stay away from the cliff's edge. The cliff also consisted of loose rocks and cracks that would have been visible to any patron who stood at its edge. However, even assuming that the particular risk at the cliff's edge—the alleged crumbling of a large section of the cliff—was not necessarily foreseeable, the general risk of a cliff's edge is. *See Walker v. Harris*, 924 S.W.2d 375, 377 (1996) ("Foreseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable."); *Lofton v. Tex. Brine Corp.*, 777 S.W.2d 384, 387 (Tex. 1989).

While foreseeability of the risk "is the foremost and dominant consideration," *Greater Houston Transp. Co.*, 801 S.W.2d at 525 (internal quotations omitted), "foreseeability alone is not sufficient to justify the imposition of a duty," *Golden Spread Council, Inc. v. Atkins*, 926 S.W.2d 287, 290–91 (Tex. 1996). We must consider other factors, including the likelihood of injury and the burden of imposing a duty of care. *See Tex. Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 33 (Tex.

2002) (observing that question of legal duty is multifaceted and requires a balance of several factors). The likelihood of harm where a natural condition is concerned will inevitably vary depending on the location and type of condition. For example, if a coastal area possesses a severe undertow, the likelihood of harm would be great. The likelihood would increase if the area was heavily populated by tourists wishing to swim in the water. The likelihood of harm at a cliff's edge, and in particular the cliff in this case, has the potential to be great as well—a cliff is an inherently dangerous condition. However, while some evidence showed the existence of past injuries at the cliffs in Cameron Park, none appeared to have involved a large piece of earth falling from a cliff as allegedly happened in this case, or even a rock fall in general. Benjamin Samarripa, Captain of the City of Waco Fire Department and the emergency first responder to the scene of the accident, testified that he was aware of six incidents involving falls from the cliffs in Cameron Park, including the incident involving McGehee, but was not aware of any other injuries caused by crumbling rocks.[2] However, Samarripa did testify that along the trails one could see where rocks had fallen over the years. Kirwan additionally offered as evidence a report by a Baylor University student which detailed the possibility of rock falls at Cameron Park, but the report did not concern the possibility of a person actually falling from the top of a cliff due to a cliff losing a section of its edge. Instead, the report concerned the danger to pedestrians on trails below due to rocks falling from the cliffs. Still, in the

[2] Samarripa testified that three of the other falls involved park patrons either jumping from the cliffs or falling while attempting to climb the cliffs. He did not explain the manner in which the other two falls occurred. Rusty Black additionally testified that he was aware of four incidents where falls had occurred at the cliffs at Cameron Park. However, he did not explain the circumstances of these incidents.

aggregate, the evidence shows that the likelihood of harm at the cliff's edge was significant, which is why the City had posted a sign warning visitors to stay away from the cliff's edge.

Finally, we consider the public policy implications of imposing a duty of care on the City. *Peavy*, 89 S.W.3d at 39. In so doing, we balance the social utility of the City's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the City, against the risk, foreseeability, and likelihood of harm. *Fletcher*, 975 S.W.2d at 544; *see also* PROSSER AND KEETON ON THE LAW OF TORTS (W. Page Keeton, et. al. eds., 5th ed. 1984) § 32, at 173 ("It . . . is fundamental that the standard of conduct which is the basis of the law of negligence is usually determined upon a risk-benefit form of analysis: by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued."). We must consider what actions a landowner, such as the City, must take to avoid showing "conscious indifference to the rights, safety, or welfare of others." *Shumake*, 199 S.W.3d at 287. As a practical matter, landowners would err on the side of avoiding obvious harm to others from dangers on their property by posting a sign, fencing off an area, or closing the area altogether. But these actions, while desirable in many contexts, do not generally comport with the purpose of the recreational use statute, which is to encourage landowners to make their lands available to visitors. *See Shumake*, 199 S.W.3d at 284; *Flynn*, 228 S.W.3d at 658.

It is generally unreasonable and unduly burdensome to ask a landowner to seek out every naturally occurring condition that might be dangerous and then warn of the condition or make it safe. In most circumstances, the magnitude of the burden in requiring a landowner to make perfectly safe,

or post signs warning of, every potentially dangerous naturally occurring condition on his property would be immense. For example, must a landowner provide signs along every stretch of beach warning of the dangers of the surf? Or post warnings throughout Big Bend Ranch State Park concerning the dangers of rattlesnakes and mountain lions? As a matter of policy, we would hope that a landowner would err on the side of safety by warning visitors of an especially dangerous natural condition he is aware of on his property. But, when considering whether the landowner owes a duty of care in determining liability under the statute, the magnitude of this sort of burden will generally outweigh the foreseeability of the risk of harm where the condition is naturally occurring.

This is not to say that the risk of harm may never outweigh the burden of imposing a duty of care on landowners to warn or protect others against the dangers of natural conditions on the land. In the instant case, one could reasonably expect a cliff to impose a risk of harm: a "recreational user needs no warning to appreciate the dangers of natural conditions, such as a sheer cliff, a rushing river, or even a concealed rattlesnake." *Shumake*, 199 S.W.3d at 288. The loose rocks and cracks at the cliff's edge could have alerted a recreational user of the possibility of crumbling rocks. Moreover, it would be obvious to reasonable recreational users that many cliffs have the potential to crumble. The risk of harm was therefore foreseeable not just to the City but to McGehee as well. However, we can envision a circumstance where a landowner knows of a hidden and dangerous natural condition that is located in an area frequented by recreational users, where the landowner is aware of deaths or injuries related to that particular condition, and where the danger is such that a reasonable recreational user would not expect to encounter it on the property. In those

circumstances, the foreseeability and likelihood of the risk of harm might outweigh the burden of imposing a duty of care on the landowner. But such a situation is not present in this case.

The recreational use statute was enacted to encourage government and private parties to open their land to the public. *See Flynn*, 228 S.W.3d at 658. It expressly provides that the landowner does not "assure that the premises are safe for [recreational] purpose[s]." TEX. CIV. PRAC. & REM. CODE § 75.002(c)(1). The Legislature, through the recreational use statute, sought to encourage landowners to open their lands to the public by limiting their potential liability. We must respect that legislative decision and apply the statute to this case in a manner that furthers that policy. Thus, we hold that a landowner, lessee, or occupant, under the recreational use statute, does not generally owe a duty to others to protect or warn against the dangers of natural conditions on the land, and therefore may not ordinarily be held to have been grossly negligent for failing to have done so.

C

Kirwan argues that, in *Miranda*, we implicitly held that a claim may be premised on an injury caused by a naturally occurring condition. *See Miranda*, 133 S.W.3d at 229–30 (alleging Department of Parks and Wildlife was grossly negligent where it failed to warn or protect against falling branches). As stated above, we agree that a claim may be premised on an injury caused by a naturally occurring condition under limited circumstances. However, we hold today that, under the recreational use statute, a landowner generally owes no duty where a claim is premised on an injury caused by a naturally occurring condition. We do not believe that this holding runs afoul of our holding in *Miranda. See id.* at 221. First, we did not directly address the duty question in *Miranda*. *See id.* Moreover, only a plurality of the Court joined the part of the opinion which held

that Miranda alleged sufficient facts for a gross negligence claim under the recreational use statute. *Id*. at 220, 229–31 (Part III.C.1.).

D

As discussed above, we do not hold that a party may never be liable for gross negligence related to a natural condition—under some circumstances not present in this case, a landowner may be liable. While we have previously held that the recreational use statute imposes a duty with respect to artificially created conditions in many instances, *see Shumake*, 199 S.W.3d at 288, we do not strive today to define which conditions are transformed from "natural" to "artificial" due to a landowner's modifications. The facts here do not require it. Nor do we hold that a party may escape liability if it acts with malice or in bad faith, even if the conduct relates to a natural condition. Also, it is possible a duty may be imposed on a landowner who has undertaken affirmative acts related to natural conditions, such as recommending a certain area or assuring a patron as to the condition's safety. *See Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837–38 (Tex. 2000) (explaining standard for negligent undertaking claim); *Wilson v. Tex. Parks & Wildlife Dep't*, 8 S.W.3d 634, 636 (Tex. 1999) (per curiam) (remanding for trial on undertaking theory where Department "put up signs around the park notifying visitors that they should leave the river area immediately whenever they heard the flood warning sirens," but then the siren failed to alert the plaintiffs of a flood).

The Legislature has left decisions about what size human footprint should be left on our state's lands to landowners, park rangers, and patrons. The recreational use statute imposes duties and liability in some instances as discussed above, but exhibits an overall policy choice to leave wild lands as they are and trust visitors to use reasonable caution.

IV

We further emphasize that the City had constructed a wall and posted a prominent sign in front of the cliff stating, "FOR YOUR SAFETY DO NOT GO BEYOND WALL." As discussed above, the recreational use statute" requir[es] proof of gross negligence, malicious intent, or bad faith" on the part of the governmental unit in order to invoke liability. *Shumake*, 199 S.W.3d at 281. Kirwan alleged gross negligence. Even assuming that the City owed McGehee a duty, which we hold today that it did not, and assuming that the City knew of an "extreme degree of risk," we fail to see how the City showed "conscious indifference to the rights, safety, or welfare of others" as required under the statute. *See Shumake*, 199 S.W.3d at 287 (defining gross negligence as an act or omission involving subjective awareness of an extreme degree of risk, indicating conscious indifference to the rights, safety, or welfare of others). In previous opinions, we have held that what separates ordinary negligence and gross negligence is the defendant's state of mind—the plaintiff must show that the defendant knew about the risk, but the defendant's acts or omissions show that he did not care. *La. Pac. Corp. v. Andrade*, 19 S.W.3d 245, 246–47 (Tex. 1999). However, "some evidence of care does not defeat a gross-negligence finding." *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001); *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 595 (Tex. 1999).

The wall and sign do not indicate simply "some evidence of care." *Harrison*, 70 S.W.3d at 785. Instead, the wall provided a barrier in front of the cliff to prevent patrons from accessing the cliff's edge, and the sign warned patrons to stay away from the cliff by instructing them not to go beyond the wall. Kirwan contends that the sign was inadequate in that it failed to identify the particular hazard applicable to this case, namely the risk of fatality resulting from the condition of

the Cameron Park premises. Kirwan also contends that the City demonstrated conscious indifference by continuing to allow park patrons into the areas with the unstable rock. For support, Kirwan cites various premises liability "adequacy of warning" cases under the Texas Torts Claims Act where the courts of appeals found a warning inadequate. *See, e.g.*, *Tex. Dep't of Transp. v. Gutierrez*, 243 S.W.3d 127, 136 (Tex.App.—San Antonio 2007, no pet.); *State v. McBride*, 601 S.W.2d 552, 557 (Tex.App.—Waco 1980, writ ref'd n.r.e.). However, these cases did not construe gross negligence under the recreational use statute and did not concern naturally occurring conditions. Moreover, the City did not actually allow park patrons into the areas with the unstable rock; rather, the City had constructed a wall and posted a sign warning visitors not to enter the specific area of the cliff. Given that the purpose of the statute is to encourage landowners to open their land to recreational users, and the attendant burden of requiring landowners to warn of or make safe each naturally occurring condition on the land, we refuse to require a landowner who posts a sign warning of a natural condition to detail each possible dangerous scenario concerning that condition. This is especially the case where the landowner has also constructed a barrier around the condition. We do not intend to discourage landowners from posting detailed warning signs where necessary, but a barrier and a sign warning a recreational user to stay away from a dangerous natural condition generally will be sufficient to avoid a showing of "conscious indifference to the rights, safety, and welfare of others" under the statute. Accordingly, we hold that Kirwan's pleadings and evidence fail to raise a fact question as to whether the City acted with conscious indifference.

V

We have determined that, with some exceptions that do not apply here, a landowner generally owes no duty under the recreational use statute to warn or protect against the dangers of natural conditions, and that the City did not owe McGehee a duty in this case. We have further determined that even if the City did owe McGehee a duty, the City was not grossly negligent. We now consider the City's plea to the jurisdiction. As discussed above, Kirwan's pleadings allege on their face that: "[McGehee] was watching boat races on the edge of a popular path in the park sitting on solid ground, which is open to the public and well and heavily used. Suddenly and without warning, the solid rock ground collapsed underneath him plunging [McGehee] more than 60 feet . . . ." This statement does not, in itself, affirmatively negate the trial court's jurisdiction. *See Miranda*, 133 S.W.3d at 226–27. However, the City also challenged the existence of jurisdictional facts, including whether the area where McGehee was sitting was an artificial condition created by the City.[3] Upon review of the jurisdictional evidence, which we discussed above, it is clear that the cliff upon which McGehee was sitting when he fell was a natural condition. The rock wall and sign situated in front of the cliff are man-made conditions, but they are not part of the cliff; the cliff from which McGehee fell was beyond the wall. Moreover, as discussed above, under some narrow circumstances a landowner might owe a duty to warn or protect against the dangers of a condition even where the condition is naturally occurring, but the undisputed facts of this case do not rise to that level.

[3] The City did not file special exceptions or claim that the pleadings failed either to negate or demonstrate jurisdiction. *See Miranda*, 133 S.W.3d at 226–27 (holding that if the pleadings neither affirmatively demonstrate nor negate jurisdiction, "the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend" the pleadings).

Finally, the evidence failed to show a factual dispute concerning the City's alleged "conscious indifference to the rights, safety, or welfare" of a recreational user at Circle Point: the City had built a rock wall in front of the cliff and posted a sign warning visitors not to go beyond the wall. Because the undisputed facts do not rise to the necessary level that waives the City's immunity from liability, neither, therefore, is its immunity from suit waived. *See* TEX. CIV. PRAC. & REM. CODE § 101.025.

* * * * *

For these reasons, we reverse the court of appeals' judgment and dismiss the case with prejudice.

_____
Paul W. Green
Justice

OPINION DELIVERED: November 20, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0148

REGAL FINANCE COMPANY, LTD. AND REGAL FINANCE COMPANY II, LTD., PETITIONERS,

v.

TEX STAR MOTORS, INC., RESPONDENT

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

Argued September 9, 2009

JUSTICE MEDINA delivered the opinion of the Court in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE GREEN, JUSTICE WILLETT, JUSTICE GUZMAN, and JUSTICE LEHRMANN joined.

JUSTICE JOHNSON filed a dissenting opinion.

Under Article 9 of the Uniform Commercial Code, a secured creditor may repossess collateral after a default, dispose of it, and then sue for any deficiency that remains after the proceeds from the collateral are applied to the debt. A secured creditor that seeks to recover a deficiency, however, must prove that it acted in a "commercially reasonable" manner in disposing of collateral. In this case, the secured creditor proved that to the satisfaction of the jury, who awarded it a deficiency judgment. The court of appeals, however, set the verdict aside, finding no evidence of commercial reasonableness. 246 S.W.3d 745, 751–52 & n.9.

The court concluded that the jury instructions on commercial reasonableness here required proof of a particular industry standard, regardless of whether Article 9 required such proof. *Id.* Because the secured creditor failed to produce any evidence of this standard, the court further concluded there was no evidence of commercial reasonableness and therefore no basis for a deficiency judgment against the debtor. *Id.* We, however, disagree that the jury charge altered the standard for commercial reasonableness under Article 9. We further conclude that evidence of commercial reasonableness here is legally sufficient to support the jury's verdict. Accordingly, we reverse the court of appeals' judgment and remand the case to that court for its further consideration.

I

In 1996, Tex Star Motors, a used-car dealer, signed a Retail Installment Contract Purchase and Sales Agreement ("PSA") with Regal Finance Company, Ltd. and, in 1999, another PSA (collectively, the "PSAs") with Regal Finance Company II, Ltd. (collectively, "Regal"). The PSAs obligated Tex Star to offer each secured automobile installment note it generated through consumer sales to Regal, which could then purchase the note at its discretion. Under these agreements, Tex Star sold the notes to Regal with "full recourse," meaning Regal could require Tex Star to repurchase any non-performing loans. The PSAs also created a dealer-reserve fund, titled the "Holdback Reserve[,]" capitalized by Regal withholding $750 from the amount it paid Tex Star when purchasing each note. While maintained by Regal, the Holdback Reserve belonged to Tex Star. Its primary purpose was to finance Tex Star's note-repurchase obligations if any loans became non-performing. In practice, Regal paid Tex Star $2,000 from the Holdback Reserve when Tex Star

repurchased a non-performing note. After payment of all notes purchased from Tex Star, Regal was to return any remaining amount in the dealer reserve to Tex Star.

As its business with Tex Star expanded, Regal outgrew its existing lending relationships with smaller banks. In 1999, Regal obtained a three-year, $25,000,000 revolving line of credit with Bank One. The Bank One loan agreement required Regal to maintain a dealer-reserve fund that equaled 5% of the principal balances of Regal's outstanding notes.

Regal and Tex Star never agreed in writing who would be responsible for keeping the dealer-reserve fund compliant with the Bank One loan agreement. Regal's manager testified that Tex Star orally agreed to maintain the dealer-reserve fund because it meant more financing for Tex Star without any additional personal liability for Tex Star's owners. Tex Star denied the existence of any oral agreement. Nevertheless over the next two and a half years, Tex Star deposited a total sum of $975,000 to maintain the dealer reserve at the level dictated by the Bank One loan agreement.[1]

By 2002, Bank One had decided to exit sub-prime auto lending and notified Regal that it would not renew its credit line. Regal, in turn, informed Tex Star that it would not be buying Tex Star's automobile notes for at least a year while it procured alternate financing. Around the same time, Regal sought $386,000 from Tex Star to bring the dealer-reserve fund into compliance with the Bank One loan agreement.

Tex Star's attorney advised that neither the PSAs nor the Bank One loan agreement obligated Tex Star to maintain the reserve levels mandated by the Bank One loan agreement. Heeding this

[1] This was in addition to the PSA-mandated $750 Regal withheld when purchasing the notes from Tex Star.

advice, Tex Star refused to fund the $386,000. Tex Star did, however, continue to repurchase non-performing notes from Regal over the next few months, but Regal quit paying Tex Star $2,000 per note from the Holdback Reserve.

In November 2002, Tex Star notified Regal it was suspending performance under the PSAs and would no longer collect notes, or repossess and sell vehicles, on Regal's behalf. Rather than hire another company to provide these services, Regal decided to handle these matters itself.

In early December 2002, Regal established a location to service its notes' portfolio and handle repossessions. Within three days of opening this location, Regal accepted 100 repossessed vehicles from Tex Star, followed by 2,400 loan files over the next two weeks. Having little expertise in the used-car business, Regal hired James Wright, an automobile sales professional who had bought and sold several thousand used vehicles over a 29-year period. Regal required Wright to evaluate and liquidate the repossessed vehicles.

II

After selling 906 repossessed vehicles for less than the outstanding loan balances, Regal sued Tex Star for the deficiency. Tex Star filed a counterclaim, seeking the funds held in the dealer-reserve fund, monies allegedly owed under the PSAs for notes it repurchased, and statutory damages for Regal's alleged failure to provide notice and to conduct the vehicle sales in good faith and in a commercially reasonable manner.

The case was tried to a jury, which found that Tex Star failed to comply with the PSAs and was liable for some, but not all, of the deficiencies Regal sought. In answering the damages question, the jury was instructed to consider only the loans relating to vehicles that Regal sold in

good faith and in a commercially reasonable manner. Jury instructions also provided additional information on the meaning of these terms.

Finding Regal sold some vehicles in good faith and in a commercially reasonable manner, the jury awarded Regal $4,000,000 in deficiency damages. The jury also found that Tex Star had agreed to maintain the dealer-reserve fund at the level required by the Bank One loan agreement and that $975,000 in that fund belonged to Tex Star. The trial court rendered judgment on the verdict, in part, awarding Regal $4,136,000 in damages plus attorney's fees and interest. The court further denied all Tex Star's claims, including its claim to monies held in the dealer-reserve fund. Regarding the $975,000 from that fund awarded to Tex Star by the jury, the trial court rendered judgment notwithstanding the verdict.

The court of appeals reversed the trial court's judgment, vacating the deficiency judgment in Regal's favor and awarding Tex Star the $975,000 held by Regal in the dealer-reserve fund. 246 S.W.3d at 755–56. In setting aside Regal's favorable verdict, the court concluded there was no evidence of commercial reasonableness in the vehicles' dispositions, at least when measured against the jury instructions. *Id*. at 752.

III

Article 9 of the Uniform Commercial Code requires that a secured creditor act in good faith and in a commercially reasonable manner, and, in most cases, provide reasonable notification when disposing of repossessed collateral. *See* TEX. BUS. & COM. CODE § 9.625 cmt. 2. A secured creditor must prove it disposed of the collateral in a commercially reasonable manner before it may recover any deficiency. *See id.* § 9.610; *see also Greathouse v. Charter Nat'l Bank-Sw.*, 851 S.W.2d 173,

176 (Tex. 1992). Every aspect of a collateral disposition must be commercially reasonable, "including the method, manner, time, place, and other terms." TEX. BUS. & COM. CODE § 9.610(b). Article 9 provides several examples of commercially reasonable dispositions, commonly referred to as safe harbors. These safe harbors include:

> (1) dispositions "made in the usual manner on any recognized market;"
>
> (2) dispositions made "at the price current in any recognized market at the time of the disposition[s];"
>
> (3) dispositions made "in conformity with reasonable commercial practice among dealers in the type of property that was the subject of the disposition[s]."

Id. § 9.627(b)(1)–(3). However, a comment to Article 9 explains that these safe harbors are not the exclusive means of proving commercial reasonableness. *Id.*§ 9.627 cmt. 3; *Havins v. First Nat'l Bank of Paducah*, 919 S.W.2d 177, 181 (Tex. App.—Amarillo 1996, no writ) (citing a substantively similar section 9.507 before it was recodified as section 9.627).

A

The trial court instructed the jury on the meaning of good faith and commercial reasonableness in the following instructions contained in Question 6 of the jury charge:

> In answering this question, consider only Loans relating to vehicles that [Regal] sold in good faith and in a commercially reasonable manner. Good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing.
>
> Every aspect of the disposition, including method, manner, time, place and other terms must be commercially reasonable. A sale is commercially reasonable *if* it conforms to reasonable commercial practices among dealers in the type of property that was the subject of the sale.
>
> The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that

> selected by [Regal] is not of itself sufficient to preclude [Regal] from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.

(emphasis added). The instruction's second paragraph appears to track the language of Article 9, specifically sections 9.610(b) and 9.627(b)(3).[2]

The court of appeals concluded that the above instruction required Regal to prove its sales conformed to a reasonable dealer standard, or in the words of the instruction, "conform[ed] to reasonable commercial practices among dealers in the type of property that was the subject of the sale." By reading the "if" in the instruction's second paragraph to mean "only if," the court converted one of Article 9's safe harbor provisions into a mandatory condition of proof. *See id.* § 9.627(b)(3). And, because there was no evidence that Regal's sales conformed to this reasonable dealer standard, the court reversed and rendered. 246 S.W.3d at 751–52.

Regal complains that the court's understanding of the instruction on commercial reasonableness is mistaken. More specifically, Regal submits the court has failed to interpret the word "if" in the context of the instruction. Regal further complains that this misinterpretation led the court to alter Regal's burden of proof, contrary both to the requirements of Article 9 and the plain meaning of the instruction itself. We agree.

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[2] Section 9.610(b) reads, "Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." TEX. BUS. & COM. CODE § 9.610(b). Section 9.627(b)(3), one of the safe harbor provisions, states, "A disposition of collateral is made in a commercially reasonable manner if the disposition is made . . . in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." *Id.* § 9.627(b)(3).

The word "if" can hold different meanings in different contexts. It ordinarily describes a non-mandatory condition.[3] The clearest expression of a mandatory condition is to say "only if".[4] In some contexts, where only one option exists to satisfy the condition, "if" can present a mandatory condition without being preceded by the word "only".[5] It is more common, however, for the word to introduce a non-exclusive condition, like the following example:

> The Texas Supreme Court has jurisdiction over an interlocutory appeal "if" there is a dissent in the court of appeals.

This sentence read in isolation would only grant jurisdiction if there were a dissent in the court of appeals. However, in the context of the Texas Government Code, the Court has jurisdiction if a court of appeals justice dissented, but the Court would also have jurisdiction if other statutory conditions exist, even without a dissent. Based on this context, the sentence cannot accurately be read in isolation without sacrificing the balance of the statute's meaning.

In the context of the this jury charge, "if" cannot mean "only if" without sacrificing the meaning of other parts of the instruction. The instruction's second paragraph begins with a general

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[3] *See, e.g.*, COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1370–71 (1971); WEBSTER'S II NEW COLLEGE DICTIONARY 549 (1995).

[4] *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 414 (2d ed. 1995) (stating the phrases "if, and only if" and "if, but only if" are unnecessary way of saying "only if," but not stating those phrases are another way of saying "if"). The Webster's II New College Dictionary defines "if" different ways, but when it gives an example for the mandatory "on condition that" definition it uses "if" preceded by the word "only[.]" WEBSTER'S II NEW COLLEGE DICTIONARY 549 (1995).

[5] The court of appeals quotes a litany of one sentence pattern jury charges to illustrate this point. 246 S.W.3d at 751 n.4. In this limited, single sentence context, "if" creates a mandatory condition. The jury instruction in this case exists in no such vacuum and needs to be read in context.

description of commercial reasonableness.[6] The next sentence supplies a specific method for proving commercial reasonableness.[7] The following paragraph implies that other disposition methods outside those practices among dealers may still be commercially reasonable.[8] If the second sentence provided the exclusive method of proving commercial reasonableness, the preceding sentence and the following paragraph would be superfluous.

We have said that a jury charge submitting liability under a statute should track the statutory language as closely as possible. *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994)(citing *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980)). The language may be slightly altered to conform the issue to the evidence presented in the case, *Brown*, 601 S.W.2d at 937, but a court should not burden a jury with surplus instructions, *Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 116 (Tex. 1984).

The instruction here closely tracked the language of sections 9.610(b) and 9.627(b)(3). This is not to say that the instruction perfectly conveyed Article 9's requirements. Qualifying the second sentence as a non-exclusive method of proving commercial reasonableness would have clarified its purpose. But read in context, the first sentence conveys the general rule, the second sentence offers

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[6] "Every aspect of the disposition, including method, manner, time, place and other terms must be commercially reasonable."

[7] "A sale is commercially reasonable if it conforms to reasonable commercial practices among dealers in the type of property that was the subject of the sale."

[8] "The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by [Regal] is not of itself sufficient to preclude [Regal] from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner."

an alternative method to prove commercial reasonableness, and the following paragraph allows that other commercially reasonable methods may be used.

The dissent characterizes our analysis as a departure from the well-established rule that evidential sufficiency be measured against the jury charge. To the contrary, we agree that the evidence must be measured against the charge. We simply disagree about what the charge requires. The dissent reads the second sentence's mention of reasonable commercial practices among dealers as an exclusive definition, providing the only method by which the jury could measure commercial reasonableness. In the context of the instruction, however, we read it as merely an example of one method for determining commercial reasonableness. Although the second sentence, in isolation, lacks qualifying language, the preceding sentence and concluding paragraph inform that the dealer standard is not the exclusive means of establishing commercial reasonableness.

We conclude then that the court of appeals erred in reading the jury instruction on commercial reasonableness to require evidence of a reasonable dealer standard. At a minimum, however, the instruction required some evidence of the method, manner, time, place, and other terms of sale from which the jury might find commercial reasonableness.

B

Although commercial reasonableness is not precisely defined in Article 9, courts have considered a number of non-exclusive factors when addressing the term, such as: (1) whether the secured party endeavored to obtain the best price possible; (2) whether the collateral was sold in bulk or piecemeal; (3) whether it was sold via private or public sale; (4) whether it was available for inspection before the sale; (5) whether it was sold at a propitious time; (6) whether the expenses

incurred during the sale were reasonable and necessary; (7) whether the sale was advertised; (8) whether multiple bids were received; (9) what state the collateral was in; and (10) where the sale was conducted. *See, e.g.*, *Havins*, 919 S.W.2d at 181 (citing *Pruske v. Nat'l Bank of Commerce of San Antonio*, 533 S.W.2d 931, 937 n.1 (Tex. Civ. App.—San Antonio 1976, no writ)). As these factors imply, commercial reasonableness is a fact-based inquiry that requires a balance of Article 9's two competing policies: (1) protecting debtors against creditor dishonesty and (2) minimizing interference in honest dispositions. *Pruske*, 533 S.W.2d at 937 (citing William E. Hogan, *The Secured Party in Default Proceedings Under the UCC*, 47 MINN. L. REV. 205, 219–20 (1962)). The inquiry's ultimate purpose, however, is to ensure the creditor realizes a satisfactory price. 4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 34–11(b) (6th ed. 2010). But, a satisfactory price is not necessarily the highest price, and it is recognized that secured creditors frequently sell in the low end of wholesale markets. *Id.* § 34–11(c).

At trial, several witnesses testified about Regal's dispositions of the repossessed vehicles. However, James Wright, the individual hired by Regal to evaluate and dispose of the vehicles, provided most testimony regarding the method and manner of disposition. Wright testified he would inspect each car, fill out a condition report, and use this information to produce a separate report that included the vehicle's features and an estimated value. He would compare this report to the vehicles, ensuring the vehicles had the same features, then attempt to solicit at least two bids from wholesalers.[9] Wright testified that most sales were made privately to a small number of trusted

[9] Another experienced buyer and seller of used vehicles opined that this sealed bid method was an appropriate way to sell repossessed vehicles.

automobile wholesalers.[10] He justified this practice by describing that the generally poor condition and high mileage of the vehicles limited the price that could be obtained by selling to non-wholesalers. Wright also testified that Regal, as a finance company, did not have the facilities, nor the license to sell the vehicles retail. Wright further testified Regal auctioned a small number of vehicles to test that method's effectiveness, but discontinued utilizing auctions when it determined the practice to be expensive and ineffective, garnering lower prices than private sales. Wright also testified that the pure volume of repossessed vehicles and the need to timely dispose of the collateral meant that some procedures, notably receiving at least two bids on each vehicle, were not always followed. However, Wright emphasized his substantial experience selling automobiles when attesting that Regal strove to achieve the highest selling price, under the circumstances, on all 906 dispositions.

Additionally, Regal entered the 906 loan files as evidence of the time, place, and other terms of each disposition. Not all loan files were complete, but a complete file would contain the loan note, a certificate of title (copy), a loan payment record, a repossession affidavit, a vehicle condition report, an NADA form estimating value, and any bids tendered for the vehicles. Copies of various negotiable instruments containing the date, time, price, and identifying the collateral's buyer were also entered into evidence.

In rebuttal, Tex Star emphasized other evidence suggesting that Regal could have obtained a superior price for the vehicles it sold and that Regal did not sell all the vehicles in a commercially

[10] Notably, Tex Star was one of the buyers, bidding on 109 vehicles, but submitting the highest bid only twenty times.

reasonable manner. Specifically, Tex Star introduced evidence that some wholesaler buyers resold Regal's repossessed vehicles at a profit through subsequent auctions. Tex Star also presented a wholesaler, John Thorpe, Jr., as a witness. Thorpe testified he unsuccessfully bid on some of Regal's vehicles, then subsequently paid the winning wholesalers the same amount as his original bids. Further, Tex Star disputed Regal's account of its unsuccessful auctions by comparing information in the loan files to the auction results. On cross examination, Wright admitted not receiving at least two bids on every vehicle and that the 906 loan files were not always complete. Additionally, testimony showed the vehicles were not publicly advertised for sale and other evidence revealed a large average deficiency per sale.

Legally sufficient evidence is that which "would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). When reviewing whether evidence is legally sufficient to support a verdict, we "must view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Id.* at 807. Evidence is legally insufficient "when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). Evidence that is "'so weak as to do no more than create a mere surmise or suspicion' that the fact exists" is less than a scintilla. *Kroger Tex., Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006) (quoting *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex.

2004)). For evidence to conclusively establish the opposite of a vital fact, the evidence must be the type that could not lead reasonable people to different conclusions. *City of Keller*, 168 S.W.3d at 815-16.

Regal's testimony on the method and manner of its sales coupled with the loan files evidencing time, place, and other terms creates more than a suspicion or surmise that at least a portion of Regal's sales were commercially reasonable. Tex Star challenges and contradicts much of Regal's evidence, but its substance is not such as to prevent reasonable people from drawing different conclusions. Because the conflicting evidence created a fact issue upon which reasonable minds could differ, we must reject Tex Star's legal sufficiency challenge.

In the court of appeals, Tex Star also challenged the factual sufficiency of the evidence. The court of appeals, however, did not reach the issue, having determined there to be no evidence of commercial reasonableness under its erroneous view of the charge. Because a review of the evidence for factual sufficiency is a power committed exclusively to the court of appeals, we must remand the issue to that court. *See* TEX. CONST. art. V, § 6(a); *see also Bic Pen Corp. v. Carter,* 251 S.W.3d 500, 509 (Tex. 2008). We merely hold that there is some evidence of commercial reasonableness in this record and that the jury instruction did not negate its existence. The other issues in the case are remanded to the court of appeals.

* * * * *

The judgment of the court of appeals is reversed and the cause is remanded to that court for its further consideration.

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David M. Medina
Justice

OPINION DELIVERED: August 20, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0148

REGAL FINANCE COMPANY, LTD. AND REGAL FINANCE COMPANY II, LTD., PETITIONERS,

v.

TEX STAR MOTORS, INC., RESPONDENT

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

Argued September 9, 2009

JUSTICE JOHNSON, dissenting.

The Court concludes there is some evidence to support the jury's findings of damages based on Regal's disposal of repossessed vehicles in a commercially reasonable manner, even though there is no evidence the dispositions conformed to standards in the one jury instruction setting out how sales could be commercially reasonable. The Court's holding effectively approves the jury's having decided on its own what the standards are for commercially reasonable dispositions of repossessed automobiles. It then remands the case for the court of appeals to measure the factual sufficiency of the evidence against that unknown standard.

The Court's analysis is flawed in two major ways. First, the Court does not adhere to the rule that sufficiency of the evidence must be measured against definitions as they are given in the jury charge, even if the definitions are incomplete or incorrect. Second, lay jurors are not presumed to

know the meaning of legal terms such as "commercially reasonable." So even assuming it would have been proper for the jury to determine whether Regal's sales of vehicles were commercially reasonable using a standard other than the definition given in the charge, the only way the jury would have known another standard would have been through evidence such as properly qualified expert testimony regarding the other standard. There was no such evidence. Accordingly, I disagree with the Court's conclusion that there is legally sufficient evidence Regal's sales were commercially reasonable and thus disagree with its holding that there is legally sufficient evidence of Regal's damages to the extent those damages were based on commercially reasonable sales.

I. The Jury Charge Defined "Commercially Reasonable"

The jury charge contained standard instructions, including the instruction that "[w]hen words are used in this charge in a sense that 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." *See* TEX. R. CIV. P. 226a. A trial court must submit "such instructions and definitions as shall be proper to enable the jury to render a verdict." TEX. R. CIV. P. 277. Jury charges are directed to lay jurors untrained in the law, thus charge language is evaluated from the perspective of such a juror. *See Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 862 (Tex. 2009); *Galveston, H. & S.A. Ry. Co. v. Washington*, 63 S.W. 534, 538 (Tex. 1901).

Neither of the parties nor the Court maintains that laypersons have a common understanding of the legal term "commercially reasonable" as it is used in the Uniform Commercial Code (UCC). Thus, the term is one that should have been defined in the charge. *See Tex. & P. Ry. Co. v. Mercer*, 90 S.W.2d 557, 560 (Tex. 1936) (explaining that "proximate cause" is a legal phrase requiring

definition); *Magnolia Petroleum Co. v. Long*, 86 S.W.2d 450, 455 (Tex. 1935); *Reliable Consultants, Inc. v. Jaquez*, 25 S.W.3d 336, 344 (Tex. App.—Austin 2000, pet. denied); *Mayes v. Stewart*, 11 S.W.3d 440, 455 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) ("While the trial court must explain legal or technical terms, its discretion in determining the sufficiency of such explanations is broad."); *Johnson v. Whitehurst*, 652 S.W.2d 441, 447 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) ("The only requirement to be observed is that the trial court must give definitions of legal and other technical terms.").

The issue arises from Question 6 of the charge which submitted Regal's alleged damages. The question began by asking what sum of money, if any, would fairly and reasonably compensate Regal for its damages. The question had four parts with separate elements of damages submitted in each part. Parts (a) and (b) and their accompanying instructions are the parts relevant to the Court's decision. In those parts, the jury was instructed to find Regal's damages measured by

> a. The difference, if any, between the unpaid balance on all Loans that Tex Star has not guaranteed and the amount received by [Regal] upon the sale of the vehicles that served as collateral for such Loans.
>
> In answering this question, consider only Loans relating to vehicles that [Regal] sold *in good faith and in a commercially reasonable manner*. *Good faith* means honesty in fact and the observance of reasonable commercial standards of fair dealing.
>
> Every aspect of the disposition, including the method, manner, time, place and other terms must be commercially reasonable. *A sale is commercially reasonable* if it conforms to reasonable commercial practices among dealers in the type of property that was the subject of the sale.
>
> The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by [Regal] is not of itself sufficient to preclude [Regal] from establishing

> that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.
>
> . . . .
>
> b. The difference, if any, between the unpaid balance on all Loans that Tex Star has not guaranteed and the amount received by [Regal] upon the sale of the vehicles that served as collateral for such Loans. For purposes of this question, consider only Loans relating to vehicles that [Regal] sold *in good faith and in a commercially reasonable manner as those terms are defined in the preceding paragraphs*, and after giving reasonable notice to Tex Star.

(emphasis added).

In regard to the second paragraph of instructions to (a) the Court says "read in context, the first sentence ["Every aspect of the disposition, including the method, manner, time, place and other terms must be commercially reasonable"] conveys the general rule, the second sentence ["A sale is commercially reasonable if it conforms to reasonable commercial practices among dealers in the type of property that was the subject of the sale"] offers an alternative method to prove commercial reasonableness, and the following paragraph ["The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method"] allows that other commercially reasonable methods may be used." ___ S.W.3d ___. But under this record, the second sentence does not merely set out an *alternative* method by which the jury could determine whether the sales were commercially reasonable, as the Court says it does; it gives the only method in the charge for evaluating whether Regal's sales were commercially reasonable and therefore defined the term. Thus, for purposes of this case, the second sentence told the jury what the term "commercially reasonable" means, and it can hardly be disputed that lay persons understand that what a word or term means is a definition of the term. *See also* BLACK'S

LAW DICTIONARY 455 (8th ed. 2004) ("define" means to state or explain explicitly, to fix or establish, to set forth the meaning of a word or phrase; "definition" means the meaning of a word as explicitly stated in a drafted document); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 327 (11th ed. 2003) ("definition" is a statement expressing the essential nature of something or a statement of the meaning of a word or word group or a sign or symbol). As a definition of the term, the second sentence set forth the only standard in the charge by which the jury could evaluate whether Regal's sales were commercially reasonable and still follow the charge, regardless of whether the definition was a complete statement of the law. Therefore, the sufficiency of the evidence of a commercially reasonable sale must be measured against the definition in the charge. *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 221 (Tex. 2005) ("The sufficiency of the evidence must be measured by the jury charge when, as here, there has been no objection to it."); *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 71 (Tex. 2000) ("Since neither party objected to this instruction, we are bound to review the evidence in light of this definition."); *Osterberg v. Peca*, 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.").

The text of Question 6 supports the conclusion that it defines the term "commercially reasonable" as used in the charge. Although the term could have been defined in different ways pursuant to the UCC and cases cited by the Court, it was not;[1] it was defined in one way. The trial

[1] For example, Tex Star submitted a proposed instruction setting out numerous factors the jury could consider in determining if Regal's disposition methods were commercially reasonable. The proposed instruction included language allowing reasonable commercial practices among dealers in the type of property that was the subject of the sale to be considered as a factor. The trial court refused the instruction.

court did not include words qualifying the definition as one of several alternative ways Regal could have proven its sales were commercially reasonable. *See* TEX. BUS. & COMM. CODE § 9.627(b)(3). Further, the structure of the sentence militates in favor of using the definition as a complete definition, and against the jury's considering the definition as one of several alternatives. The foregoing is also consistent with the specific language in (b) that refers to definitions of "good faith" and "commercially reasonable" in (a). The instruction in (b) inquired about damages Regal incurred due to unpaid balances on "Loans relating to vehicles that [Regal] sold in good faith and in a commercially reasonable manner, *as those terms are defined* in the preceding paragraphs." (emphasis added).

And, contrary to the Court's statement, the third paragraph of (a) does not imply to the jury that there are other methods of determining whether dispositions of collateral are commercially reasonable or offer any guidance for what would comprise a commercially reasonable sale. It neither adds to nor detracts from the definition of "commercially reasonable" in the preceding paragraph. Rather, the third paragraph merely emphasizes that the process of a disposition is what must be commercially reasonable, and that the end result—the price received for the collateral—should not by itself dictate a finding that a disposition did not conform to commercially reasonable methods.

Further supporting the conclusion that the sentence "A sale is commercially reasonable if it conforms to reasonable commercial practices among dealers in the type of property that was the subject of the sale" defines "commercially reasonable" as opposed to merely offering the jury an alternative method to make its findings is the fact that the structure of the sentence is consistent with that of other definitions throughout the charge. The charge contained a separate "Definitions"

section and also included definitions in connection with individual jury questions, although they were not always labeled as definitions. Several examples illustrate the point. In the "Definitions" section, "apparent authority" was among the words and phrases defined. The definition did not contain language such as "When the term 'apparent authority' is used, it means . . ." or "'Apparent authority' is defined as . . ." but it nevertheless clearly was a definition both because of its being in the "Definitions" section and because it substantively would be understood by a lay jury as defining the term:

> Apparent authority exists if a party (1) knowingly permits another to hold himself out as having authority or, (2) through lack of ordinary care, bestows on another such indications of authority that lead a reasonably prudent person to rely on the apparent existence of authority to his detriment. Only the acts of the party sought to be charged with responsibility for the conduct of another may be considered in determining whether apparent authority exists.

See BLACK'S LAW DICTIONARY 455 (8th ed. 2004); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 327 (11th ed. 2003).

Next, Question 1 inquired whether Regal and Tex Star agreed Tex Star would maintain a dealer reserve account, and the jury was instructed that it could consider "any earlier course of dealing" between Regal and Tex Star. The immediately following instruction set out the essential legal nature of the term "course of dealing" and could only be construed as a definition even though it was not identified as such:

> A course of dealing is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

And in Question 3 the jury was asked: "Did Regal partly perform?" An accompanying instruction did not specify that it was defining "partial performance" but it manifestly did so because it set out the meaning of the term:

> Partial performance occurs when—
>
> a. a party takes actions that can only be explained as reliance on an oral promise;
> b. the party acting in reliance on the contract has suffered a substantial detriment for which it has no adequate remedy; and
> c. failure to enforce the oral promise would award an unearned benefit to the other party.

In Question 9 inquiring whether Tex Star and its principals committed fraud, "fraud" was defined by an instruction that was not specifically identified as a definition:

> Fraud occurs when—
>
> a. a party makes a material misrepresentation,
> b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,
> c. the misrepresentation is made with the intention that it should be acted on by the other party, and
> d. the other party justifiably relies on the misrepresentation and thereby suffers injury.

The foregoing demonstrate that within the charge there were three structural concepts relevant to the issues on this appeal. First, whether a jury instruction was a definition depended on the instruction's context and substance rather than on whether the instruction was labeled as a definition. Second, definitions in the charge typically did not include language limiting the meaning of the word or term defined to the enumerated elements and no other elements. Third, the trial court's general instruction that the jury was bound to accept and apply the definitions given in the

charge required the jury to make its findings according to the substance and essential elements set out by the definitions in the charge even though the large majority of instructions that defined terms did not limit the definitions to the words used in defining the terms by including language such as "only if" or "if but only if."

Citing Texas Business and Commerce Code section 9.627(b)(1)-(3) and comment 3, the Court says "Article Nine provides several examples of commercially reasonable dispositions, commonly referred to as safe harbors," then lists three examples from the statute. ___ S.W.3d ___. The Court further notes that "a comment to Article Nine explains that these safe harbors are not the exclusive means of proving commercial reasonableness." ___ S.W.3d ___ The Court also lists ten factors, noting "[a]lthough commercial reasonableness is not precisely defined in Article Nine, courts have considered a number of non-exclusive factors when addressing the term." ___ S.W.3d ___. The Court recites evidence of several different methods that Regal used to sell the vehicles, such as soliciting bids from wholesalers, private sales to a small number of trusted wholesalers, and auction, and concludes that Regal's evidence on the method and manner of its sales, together with the loan files and their contents, creates more than a suspicion or surmise that at least a portion of Regal's sales were commercially reasonable. The problem is, the jury did not have (1) the benefit of the Court's knowledge of the UCC; (2) access to the appellate opinions the Court cites; or (3) knowledge of the various factors the Court says could be considered when the jury was determining whether Regal's sales were commercially reasonable, because the information was not included in the charge and there was no evidence such as expert testimony that those factors should be considered and if so, how. Even if some of the jurors had the benefit of the Court's knowledge of the UCC and the

appellate opinions the Court cites, unless the charge instructed the jury that such law or particular aspects of it was applicable or the law was injected into the trial through evidence, the jury could not use it in making its decisions. That is because the jury was bound and limited by the charge language and, in matters beyond the common knowledge and understanding of lay jurors, by the charge and evidence admitted at trial, such as testimony from experts. *See, e.g.*, *Mack Trucks v. Tamez*, 206 S.W.3d 572, 583 (Tex. 2006); *FFE Transp. Servs. v. Fulgham*, 154 S.W.3d 84, 89 (Tex. 2004).

The three paragraphs of instructions and definitions in (a), when read as a lay jury would read them, seamlessly and in a logical manner told the jury what evidence was required for Regal to have proven its damages. Paragraph two of (a) begins by instructing the jury to consider only loans relating to vehicles Regal sold (1) in good faith and (2) in a commercially reasonable manner. That paragraph, by the next sentence, defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." The next paragraph then defines "commercially reasonable manner" by telling the jury that in order for a disposition to be in a commercially reasonable manner, every aspect of the disposition must be commercially reasonable. The following sentence defines "commercially reasonable": "A sale is commercially reasonable if it conforms to reasonable commercial practices among dealers in the same type of property that was the subject of the sale." But nowhere did the charge tell the jury what factors or elements would be considered reasonable among dealers in repossessed automobiles or otherwise constitute commercial reasonableness. Because the trial court did not tell the jury what those factors or elements were, the only way the lay jury would have known what they were would have been from evidence such as testimony by someone with expertise in the subject. Without being instructed as to factors or

elements of a commercially reasonable sale or having expert evidence of them, the jury could only speculate as to what the factors were and how to tell if the evidence met legal requirements.

The Court says that by the court of appeals' reading of the second sentence of the second paragraph—"A sale is commercially reasonable if it conforms to reasonable commercial practices among dealers in the type of property that was the subject of the sale"—the court of appeals converted one of UCC Article 9's safe harbor provisions into a mandatory condition of proof. The Court reasons that "if" cannot mean "only if" because then the first sentence of the second paragraph and the third paragraph of (a) would be superfluous. Respectfully, I disagree with the Court's reasoning. First, reading the "if" to be "only if" merely reinforces the fact that the sentence is a definition. Second, reading "if" in such manner simply does not make the first sentence of the second paragraph and the third paragraph of (a) superfluous. Rather, as is noted above, such a reading makes the instruction and definitions under (a) a clear, understandable, and logical set of instructions by which the jury could measure the evidence. Third, if there was an erroneous conversion of a safe harbor provision into a mandatory condition of proof, it was done by the trial court in its charge, in a question on which Regal had the burden of proof, and without objection from Regal. Regal, however, maintains in this Court that the instructions under (a) are legally correct.

The real difficulty here is that Regal did not have a qualified expert witness testify as to what were reasonable commercial practices among dealers in the same type of property that Regal was liquidating, or that Regal's actions conformed to such practices. The jury and the parties were bound by the charge. This Court should be also.

Contrary to the Court's characterization of the court of appeals' opinion, the court of appeals adhered to the record before it, the jury charge as given, and well-established principles in reaching its result. The court of appeals' analysis that the third paragraph defines "commercially reasonable" fits with the surrounding instructions in (a) and is logical:

> [T]he charge submitted in this case states that a sale is commercially reasonable if it conforms to the dealer standard. The plain meaning of this language does not suggest that the dealer standard is either a safe harbor or an otherwise optional standard, or that any other factors may even be considered, let alone balanced, but instead that a sale is commercially reasonable if (and thus, only if) the dealer standard is met. Regal's contention would thus not only render the *definition* submitted in the charge meaningless, it would authorize a reviewing court to measure the sufficiency of evidence against a different standard than was submitted to the jury . . . .

246 S.W.3d at 750-51 (emphasis added).

In sum, under this record I would hold that the instruction that a commercially reasonable disposition was one that conformed to reasonable commercial practices among dealers in the type of property involved in the sale was a definition. The jury was bound to use that definition. Because there was no evidence that Regal's sales were commercially reasonable as defined by the charge, I would affirm the court of appeals' judgment on that issue.

II. Evidence to Prove Another Standard for Commercial Reasonableness

Even if the Court is correct and the charge did not define "commercially reasonable" sales but only provided an alternative way in which they could be proven, then evidence such as testimony from an expert would have been necessary for the jury to know if Regal's sales were commercially

reasonable.[2] That is because, as previously noted, the issue involves matters beyond jurors' common understanding and there is no other standard expressed in the charge. *See Mack Trucks*, 206 S.W.3d at 583; *Fulgham*, 154 S.W.3d at 89; *Turbines, Inc. v. Dardis*, 1 S.W.3d 726, 738 (Tex. App.—Amarillo 1999, pet. denied). Because the jury was allowed to determine Regal's sales were commercially reasonable in the absence of evidence from which it could properly tell whether "Every aspect of [each] disposition, including the method, manner, time, place and other terms" conformed to reasonable commercial practices among dealers in repossessed vehicles, and in the further absence of evidence establishing either another standard for commercially reasonable sales or from which it could properly tell how to determine if Regal's sales were commercially reasonable, then the jury's finding can only have been based on some unknown standard at which it arrived by speculation.

The evidence showed how James Wright disposed of the automobiles for Regal, that Wright had used those sales methods for many years, that he had previously sold a great number of vehicles using some or all of the methods, and that some of the general methods he used, such as auction or private sale, were acceptable to other witnesses. But more was required. There must have been evidence that Wright's general methods were commercially reasonable and also that "[e]very aspect of [each] disposition, including the method, manner, time, place and other terms" was commercially reasonable. There was no way for the jury to know if his methods and every aspect of them were commercially reasonable because it was not given standards by which it could tell if they were.

[2] I agree with the court of appeals that sales might be proven commercially reasonable under some combinations of facts and jury charge language absent expert witness testimony. 246 S.W.3d at 752 n.9. Such a combination of facts and charge language is not present here.

Accordingly, I would hold that the evidence is legally insufficient to support a finding that Regal's sales were commercially reasonable, even apart from the lack of evidence to support a finding that Regal's sales were commercially reasonable under the definition in the charge.

III. Conclusion

I would affirm the judgment of the court of appeals as to damages Regal claims based on the jury's answers to Questions 6(a) and 6(b) and consider the remainder of the issues presented by the parties.

_____

Phil Johnson
Justice

OPINION DELIVERED: August 20, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0169

TANGIE WALTERS, PETITIONER,

v.

CLEVELAND REGIONAL MEDICAL CENTER, SHIRLEY KIEFER, AND KEITH SPOONER, M.D., RESPONDENTS

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

Argued September 9, 2009

JUSTICE WILLETT delivered the opinion of the Court.

This is one of two "surgical sponge" cases decided today regarding the time limits placed on medical-malpractice suits.[1] The issue here: did Tangie Walters raise a fact issue as to whether she could avail herself of the Open Courts provision[2] as an exception to the two-year statute of limitations?[3] We answer the same way we did twenty-five years ago with regard to the claimant in

[1] The companion case, an Open Courts challenge to the ten-year statute of repose, is *Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin*, __ S.W.3d __ (Tex. 2010).

[2] TEX. CONST. art. I, § 13.

[3] TEX. CIV. PRAC. & REM. CODE § 74.251(a) (requiring medical-malpractice claims to be brought within two years of the date of the tort).

Neagle v. Nelson: yes.[4] The Texas Constitution grants foreign-object claimants a reasonable opportunity to discover their injuries and file suit,[5] even if the two-year limitations period has run (though not, as in today's companion case,[6] if the ten-year *repose* period has run). And here, Walters has raised a fact issue as to whether the Open Courts provision applies.

Sponge cases constitute a unique class of malpractice claims, thus meriting unique Open Courts treatment: (1) such injuries are notoriously hard to discover; (2) the existence of wrongdoing (and the identity of the wrongdoer) are usually undisputed; and (3) an absolute two-year cutoff would render superfluous the Legislature's ten-year statute of repose.

Today's result is consistent not only with *Neagle*, which held that the Open Courts provision barred application of a two-year statute of limitations in a sponge case, but also with the later-enacted repose statute, which declares ten years as the last-chance deadline for *all* malpractice cases, including, we hold today, foreign-object cases.[7] This outer-boundary deadline would be surplusage if the limitations statute were itself a no-exceptions cutoff.

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

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[4] 685 S.W.2d 11, 12 (Tex. 1985).

[5] *Id.*; *see also Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 785 (Tex. 2007); *Shah v. Moss*, 67 S.W.3d 836, 842 (Tex. 2001); *Morrison v. Chan*, 699 S.W.2d 205, 207 (Tex. 1985) (quoting *Nelson v. Krusen*, 678 S.W.2d 918, 923 (Tex. 1984)).

[6] *Rankin*, __ S.W.3d at __.

[7] *Id.*; TEX. CIV. PRAC. & REM. CODE § 74.251(b) ("A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim.").

I. Background

In December 1995, Dr. Keith Spooner performed a tubal ligation on Tangie Walters immediately following the birth of a child. Dr. Spooner performed the procedure at Cleveland Regional Medical Center with the help of Shirley Kiefer, a surgical assistant. The official count of surgical items indicated that all sponges were accounted for, but a sponge of the type used in the procedure was found inside Walters some nine-and-a-half years later.

Following the surgery, Walters experienced abdominal cramping. A nurse told her the pain was from childbirth and having gas pumped into her abdomen. At her follow-up appointments with Dr. Spooner a few weeks after surgery, he told her the cramping she continued to experience resulted from uterine contractions that accompany nursing. Walters experienced intermittent pain thereafter, which she attributed to a preexisting health problem that had troubled her periodically. Her next doctor's visit, prompted by abdominal pain, came in March 1998, approximately twenty-seven months after her surgery. From that point on, Walters visited family physicians for a litany of ailments: severe fatigue, insomnia, headaches, infections, uterine problems, bladder problems, urination issues, cysts, and chronic and increasingly severe pain in the area where the sponge was ultimately discovered. For those and other problems, Walters received a host of different diagnoses: cystitis, an aphthous ulcer, boils, pharyngitis, fatigue, stomatitis, cholecystitis, and so on. Her doctors ordered numerous tests, including an x-ray, urine tests, and blood tests. The record indicates that while Walters endured intermittent pain during the years following her operation, especially during menstruation, the pain became progressively worse until the sponge was discovered.

In April 2005, Walters visited Dr. Mary Garnepudi, a gynecologist. Garnepudi discovered an unusual lump while examining Walters. Garnepudi referred Walters to a surgeon, who, with the help of a second surgeon, operated on Walters and found the sponge. It was lodged against Walters's small intestine and encapsulated in fibrous tissue, suggesting the sponge had been there for years.

In August 2005, less than two months after the sponge was discovered, Walters sued Cleveland Regional Medical Center, Dr. Spooner, and Shirley Kiefer. Walters alleges the sponge was responsible for the near-decade of medical problems she experienced since the 1995 tubal ligation. The three defendants moved for summary judgment, contending Walters's claim was barred by section 74.251(a) of the Civil Practice and Remedies Code, the two-year statute of limitations for healthcare-liability claims. The trial court agreed and granted summary judgment. The court of appeals affirmed, holding that Walters had not established that the limitations statute violated Open Courts.[8]

II. Analysis

Under the Open Courts provision, "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[9] In *Yancy v. United Surgical Partners International, Inc.*, we elaborated on what a claimant must show to establish an Open Courts violation:

> Unlike the discovery rule, which defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the claim, the open courts provision merely gives litigants a reasonable time to

[8] 264 S.W.3d 154, 159.

[9] TEX. CONST. art. I, § 13.

> discover their injuries and file suit. Because the open courts guarantee does not toll limitations, courts must determine what constitutes a reasonable time for a claimant to discover her injuries and file suit.[10]

In the summary judgment context, the burden is on the plaintiff asserting an Open Courts exception to the statute of limitations to raise a fact issue demonstrating that she did not have a reasonable opportunity to discover the alleged wrong and bring suit before the limitations period expired.[11]

Following *Neagle*, our 1985 sponge case that upheld an Open Courts challenge to the two-year limitations period, we hold that Walters has at least raised a fact issue as to whether she discovered the sponge and brought her suit within a reasonable time.

A. *Neagle v. Nelson*

Neagle addressed errant sponges and the Open Courts guarantee, and nothing dispositive distinguishes *Neagle* from today's case. The two cases share the same procedural posture: the claimant lost on summary judgment at the trial court, lost again at the court of appeals, and appealed here. They also involve substantially the same statute of limitations.[12] There are other similarities: (1) the sponge was discovered after the limitations period had expired; and (2) only after someone found a lump and performed exploratory surgery.[13]

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[10] 236 S.W.3d at 784 (internal citations omitted).

[11] *Shah*, 67 S.W.3d at 846–47.

[12] *See Neagle*, 685 S.W.2d at 12 (quoting statute of limitations).

[13] *Id.* ("Discovery of the sponge occurred . . . more than two years after the appendectomy, when, after feeling a mass in his abdomen, [the claimant] submitted to exploratory surgery.").

B. Walters Raised a Fact Issue

The court of appeals focused on two facts, namely that (1) Walters experienced pain and various ailments immediately after her surgery and for years thereafter, well before the sponge was discovered; and (2) she did not see a doctor for more than two years after her surgery,[14] which may have also been true of the claimant in *Neagle*.[15]

We must review the summary judgment record in the light most favorable to Walters, indulging reasonable inferences and resolving doubts in her favor.[16] Walters raised a genuine issue of material fact as to whether she discovered the sponge and brought her suit within a reasonable time. Walters did not rebuff providers' attempts to discover her injury (for example, by rejecting efforts to diagnose the cause of her pain and various ailments) nor did she unreasonably delay filing suit once the sponge was discovered.[17] There is record evidence that Walters experienced pain in the years following her surgery, but this evidence does not necessarily show that Walters should have discovered the sponge within the limitations period. In this case, the pain may have been related to a prior condition, and regardless, Walters sought medical help as the pain got worse. Moreover, the record indicates that (1) a nurse and Dr. Spooner told Walters her abdominal pain was not indicative of a problem with her surgery, but was instead caused by gas used to inflate her abdomen during

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[14] 264 S.W.3d at 156, 159.

[15] *See Neagle*, 685 S.W.2d at 12.

[16] *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 756 (Tex. 2007).

[17] "A plaintiff may not obtain relief under the open courts provision if he does not use due diligence and sue within a reasonable time after learning about the alleged wrong." *Yancy*, 236 S.W.3d at 785 (emphasis omitted) (quoting *Shah*, 67 S.W.3d at 847).

surgery and later by nursing, and (2) years later, and in the course of her worsening condition, at least one other physician was repeatedly apprised of her complaints of abdominal cramping and related symptoms and did not diagnose a foreign object or recommend further testing or referral to a specialist. On Walters's own initiative she eventually went to a gynecologist, who referred her to the surgeons who discovered the sponge. As we have noted in another sponge case:

> All of the procedures for placing objects in and removing them from the body are in the control of the surgeon. It is a virtual certainty that the patient has no knowledge on the day following the surgery—nor for a long time thereafter—that a foreign object was left in the incision.[18]

C. The Singularity of Sponge Cases

Sponge cases stand alone in the healthcare-liability context. First, they are rare. Second, surgical instruments do not remain inside patients absent negligence. Third, errant items like sponges are exceedingly difficult to discover.[19] In three of our sponge cases — *Neagle*, *Rankin*, and this case — the sponge was only discovered after a lump was noticed on the claimant's body.[20] As a result, foreign-object cases often invite *res ipsa loquitur* treatment, and some legislatures explicitly exempt

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[18] *Gaddis v. Smith,* 417 S.W.2d 577, 580 (Tex. 1967), *superseded by statute,* Professional Liability Insurance for Physicians, Podiatrists, and Hospitals Act of 1975, 64th Leg., R.S., ch. 330, § 1, 1975 Tex. Gen. Laws 864, 865*, as stated in Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985).

[19] *See id.*

[20] We have decided two other sponge cases. In *Gaddis*, where we created the discovery rule, a sponge was discovered after exploratory surgery for what was believed to be a tumor but turned out to be a sponge (perhaps because a lump was perceived; it is unclear). *Id.* at 578. In *Bradford v. Sullivan*, 683 S.W.2d 697 (Tex. 1985) (per curiam), we reversed a summary judgment in a sponge case that had been granted on limitations grounds, but we gave few details about the discovery of the sponge.

such cases from statutes of limitations and repose.[21] Sometimes, these cases are the *lone* exception, while a few states also give special treatment to claims involving fraudulent concealment[22] or minors[23] (as in Texas).[24] The Texas limitations statute does not explicitly save sponge cases, but, as explained below, the Texas repose statute implicitly urges us to.

D. Giving Meaning to the Statute of Repose

By its terms, the repose statute is a final-is-final deadline for medical-malpractice claims: "This subsection is intended as a statute of repose so that all claims must be brought within 10 years

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[21] *See, e.g.*, CAL. CIV. PROC. CODE § 340.5 (West 2010) (excepting foreign-object claims from the repose period); COLO. REV. STAT. § 13-80-102.5(3)(b) (2009) (excepting foreign-object claims from the repose period and giving claimant two years after discovery to file suit); MASS. GEN. LAWS ANN. ch. 260, § 4 (West 2010) (excepting foreign-object claims from a seven-year statute of repose); MISS. CODE ANN. § 15-1-36(2)(a) (2009) (exempting foreign-object claims from statute of limitations and also from seven-year repose limit); OHIO REV. CODE ANN. § 2305.113(D)(2) (LexisNexis 2010) (exempting foreign-object claims from repose period); S.C. CODE ANN. § 15-3-545(B) (2009) (excepting foreign-object claims from repose limit); TENN. CODE ANN. § 29-26-116(a)(4) (2009) (exempting foreign-object claims from repose period); VT. STAT. ANN. tit. 12, § 521 (2009) (exempting foreign-object claims from repose period); WASH. REV. CODE ANN. § 4.16.350 (West 2010) (excepting foreign-object cases from the statute of limitations and repose). The Texas Legislature has not expressly addressed sponge cases, but *Neagle* was issued before the current statute of repose was enacted.

[22] *See, e.g.*, CAL. CIV. PROC. CODE § 340.5 (West 2010) (excepting from the healthcare-liability repose period claims involving fraud, intentional concealment, and presence of a foreign body); COLO. REV. STAT. § 13-80-102.5(3)(a) (2009) (excepting actions that were knowingly concealed from the repose period); MISS. CODE ANN. § 15-1-36(2)(a)–(b) (2009) (excepting only claims where there was fraudulent concealment and foreign-object claims); TENN. CODE ANN. 29-26-116(a)(3)-(4) (2009) (excepting only claims where there was fraudulent concealment and foreign-object claims); VT. STAT. ANN. tit. 12, § 521 (2009) (excepting only claims where there was fraudulent concealment and foreign-object claims); WASH. REV. CODE ANN. § 4.16.350 (West 2010) (excepting only claims involving fraud, intentional concealment, and presence of a foreign body); WIS. STAT. ANN. § 893.55(1m)(2)–(3) (West 2009) (excepting only claims where there was fraudulent concealment and foreign-object claims).

[23] *See, e.g.*, 40 PA. CONS. STAT. ANN. § 1303.513(b)–(c) (West 2009) (excepting only claims by minors and foreign-object claims).

[24] *See* TEX. CIV. PRAC. & REM. CODE § 74.251(a) (giving minors under the age of twelve years old until their fourteenth birthday to file claim).

or they are time barred."[25] Texas, unlike some other states,[26] does not expressly exempt foreign-body claims from its limitations statute; perhaps lawmakers thought it unnecessary given our holding in *Neagle*. Regardless, Texas does have a catch-all repose statute that contemplates it is at least possible for certain claims to be brought up to eight years after limitations expires.

In 2003, eighteen years after *Neagle*, the Legislature took a fresh look at the healthcare-liability landscape and, among other things, revisited time limits in malpractice suits.[27] Although lawmakers did not address *Neagle*, they added a new ten-year repose period, and did so even though the limitations period itself seems absolute: "Notwithstanding any other law," actions must be filed within two years.[28]

The repose statute, however, indicates that the limitations statute — notwithstanding its "[n]otwithstanding any other law" preamble — is not totally exception-free. The Legislature in 2003 was attempting a top-to-bottom overhaul of the State's tort system,[29] against a legal backdrop that

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[25] TEX. CIV. PRAC. & REM. CODE § 74.251(b).

[26] *See, e.g.*, *supra* note 21.

[27] *See Rankin*, ___ S.W.3d at ___ (discussing the addition of a repose limit in 2003).

[28] *See* TEX. CIV. PRAC. & REM. CODE § 74.251. It is undeniable that the statute of limitations contains no discovery rule. We fashioned such a rule in a 1967 sponge case to suspend an earlier limitations provision. *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex. 1967). The Legislature in 1975 abrogated the court-fashioned discovery rule. *See Sax v. Votteler*, 648 S.W.2d 661, 663 n.1 (Tex. 1983) (discussing the Professional Liability Insurance for Physicians, Podiatrists, and Hospitals Act of 1975, 64th Leg., R.S., ch. 330, § 1, 1975 Tex. Gen. Laws 864, 865, which removed the "accrual" language that had led the Court to find a discovery rule embedded within the statute). Accordingly, in a 1985 case, this Court acknowledged that the Legislature had abrogated the discovery rule. *Morrison v. Chan*, 699 S.W.2d 205, 208 ("[In *Gaddis*, we] held that a cause of action does not accrue until the plaintiff knows, or has reason to know, of his injury. In contrast, article 5.82, section 4 contains no accrual language and thus imposes an absolute two-year statute of limitations regardless of when the injury was discovered.") (emphasis omitted) (quoting *Nelson v. Krusen*, 678 S.W.2d 918, 920 (Tex. 1984)).

[29] *See Rankin*, ___ S.W.3d at ___.

included *Neagle*, where we held two years can be too short for sponge cases. The repose statute appears to be a legislative recognition that while two years may be constitutionally too short for some claims, ten years may be constitutionally enough for all claims.

Put simply, a ten-year repose period has no purpose unless the two-year limitations period has exceptions, as for *Neagle*-like claims. There is no need for repose *unless* there exists a narrow class of claims that reach beyond the two-year limitations period.

III. Conclusion

Sponge cases are *sui generis*. They rarely occur, they never occur absent negligence, and when they do occur, laypeople are hard-pressed to discover the wrong. Our cases recognize this, as do many legislatures, which exempt foreign-object claims from limitations and repose periods. Our own Legislature imposed a reasonable ten-year repose period on *all* malpractice claims — with no carve-out for sponge cases — a statute we uphold today in *Rankin* against an Open Courts challenge. The Legislature did nothing to alter courts' treatment of late-filed sponge cases following *Neagle*, where we allowed an Open Courts challenge to limitations. Treating the two-year limitations period as absolute in all circumstances would render the new statute of repose meaningless. And on this record, we are unwilling to conclude that Walters failed to raise a fact issue as to whether she discovered the sponge and brought suit within a reasonable time.

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

_____

Don R. Willett
Justice

OPINION DELIVERED: March 12, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0175

WHIRLPOOL CORPORATION, PETITIONER,

v.

MARGARITA CAMACHO, ET AL., RESPONDENTS

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

Argued March 10, 2009

JUSTICE JOHNSON delivered the opinion of the Court.

JUSTICE GUZMAN did not participate in the decision.

In this products liability case the jury found that a design defect in an electric Whirlpool clothes dryer caused a fatal fire. We must decide whether there is legally sufficient evidence that the dryer's design was defective because it incorporated a corrugated lint transport tube as part of its air circulation system. Because we conclude that the expert testimony of design defect is legally insufficient to support the verdict, we reverse the judgment of the court of appeals and render judgment for Whirlpool.

I. Background

A. General

In October 2002, Santos and Margarita Camacho purchased a used electric Whirlpool Easy Clean 100 clothes dryer from their daughter and installed it in their trailer home. Late in the evening of February 10, 2003, Margarita started the dryer and then lay down in an adjacent bedroom. Sometime later her teenage son Joab came into the bedroom to go to bed so Margarita moved to the living room. On her way, she opened the dryer door. At trial she did not recall whether the dryer had stopped running by that time, but she recalled that she did not notice anything unusual, nor did she see or smell smoke or fire.[1] Later, while she was in the living room, Margarita smelled smoke. She testified that she looked into the hallway, saw fire "coming from the rear part of the dryer and from inside the dryer," and began yelling to alert the family. The fire destroyed the trailer home. All the family escaped except Joab, who was trapped in his bedroom and was killed.

The fire was investigated by local fire department and law enforcement officials, federal alcohol, tobacco, and firearms agents, and two experts hired by the Camachos' attorneys. Several months later, Whirlpool was notified of the claim that the fire started in its dryer, and it also investigated. By that time the fire scene had been largely cleaned up and cleared and relevant debris, including the dryer, removed. Various theories were advanced for the fire's cause, and different conclusions were drawn about whether the fire started in the dryer. The fire marshal concluded that

[1] On cross-examination Margarita acknowledged that in her deposition she testified the dryer had stopped running before she opened the door and that after she opened the door she checked the clothes, which were dry.

it did not; the experts hired by the Camachos' attorneys concluded that it did; Whirlpool concluded that it did not.

Margarita and Santos, individually and on behalf of Joab's estate and on behalf of their other sons, sued Whirlpool. They claimed that Whirlpool's use of a corrugated tube in the dryer's air circulation system was a design defect. Allegedly, the tube became clogged and caused lint to be discharged into the dryer cabinet where lint particles were ignited by the dryer's heater element and ignited particles were circulated into the dryer drum where they ignited the clothes. The Camachos asserted that the fire escaped the dryer drum through the back of the dryer cabinet and caught the trailer on fire. To prove their design defect claim, the Camachos relied on testimony from Judd Clayton, an electrical engineer.

B. The Clothes Dryer

A brief explanation of how a Whirlpool Easy Clean 100 clothes dryer operates will aid in understanding the parties' contentions and the testimony.[2]

When the drying cycle is started, a drum inside the dryer cabinet begins rotating, causing the clothes in it to tumble. Air is circulated through the drum, and a heating element is energized to heat the circulating air. At the end of the drying cycle, the heating element turns off and the dryer enters a cool-down cycle during which the drum continues rotating, the clothes continue tumbling, and the blower circulates unheated ambient air through the clothes. At the end of the cool-down cycle, the dryer automatically shuts off completely.

[2] See Appendix A for a diagram of the relevant parts of the dryer.

The dryer's air circulation system is designed so that a sealed blower fan draws air into and through the circulation system at a high speed and eventually expels the air through an exhaust vent at the rear of the dryer. The sealed blower fan is located in the lower back part of the cabinet. Air drawn into the circulation system passes through a heater box that is mounted on the lower rear part of the dryer opposite the blower assembly. The heater box is essentially an elongated rectangular-shaped metal box positioned vertically and open at its lower end so air from inside the dryer cabinet is drawn into the box at the lower end. The air travels vertically past the heater element, then continues vertically for several inches to a grill-covered inlet that opens into the dryer drum. The air passes through the inlet grill into the rotating dryer drum, flows through the dryer drum and tumbling clothes, exits through an outlet grill similar in configuration to the inlet grill, and passes into an enclosed lint chute assembly where it is drawn vertically down the back of the dryer cabinet to the blower assembly. When the air reaches the blower assembly at the base of the dryer, the lint is routed into a lint transport tube and carried vertically by airflow to a lint trap on top of the dryer. A screen in the lint trap filters lint from the circulating air. The circulating air then returns to the lint chute, travels back to the blower assembly, and is discharged out of the dryer through the exhaust vent by the blower. The exhaust of the Camachos' dryer was properly vented through the floor of the trailer.

C. Design Defect

Clayton's testimony was the only evidence of a design defect.[3] He opined that the fire started when the clothes in the dryer drum were ignited by smoldering lint particles. Clayton's opinion was that the corrugated tube allowed lint to hang up on the inside of the tube and clog it.[4] Even though both the blower assembly and the corrugated lint transport tube on the Camachos' dryer were consumed in the fire and not available for examination, Clayton was of the opinion that the tube was clogged and caused lint to back up into the blower housing assembly from where excessive amounts of it escaped by being blown through a gasket-like seal between the lint chute and the blower housing (the "lint chute seal") into the dryer cabinet. He theorized that the lint was forced through the lint chute seal, became airborne, and was drawn into the heater box. He reasoned that some airborne lint particles then passed through the heater box, were ignited as they passed by the heater element, and traveled vertically to the inlet grill. There they either entered the drum or came into contact with and ignited other lint that had become attached to the inlet grill, and then the newly-ignited lint entered the rotating drum. Basing his opinion on pretrial statements by Margarita that the dryer had shut off before she opened the dryer door, Clayton's opinion was that once the ignited

[3] At trial, Eduardo Sanchez, a fire and explosives investigator hired by the Camachos, also testified. Relying on Clayton's investigation, opinions, and expertise with dryers, Sanchez concluded that the fire originated inside the dryer cabinet when lint was somehow ignited by the heating element. He did not express any opinion as to how the heating element ignited the lint or that the fire started because clothes in the dryer's drum were ignited. He did not find any burnt lint inside the Camacho dryer cabinet base beneath the heating element, on the dryer's heating element, on the inlet screen to the dryer drum, or in the dryer drum itself. He did not opine on the dryer's design.

[4] Whirlpool presented evidence that a smooth lint transport tube had initially been used in the Easy Clean 100 model, but the smooth tube could become dislodged from the blower housing. A corrugated tube was then used, which fixed the problem.

lint was in the dryer drum, it landed in the drying, tumbling clothes,[5] and smoldered there through the remainder of the drying and cool-down cycles and the period of time after the dryer shut off until Margarita opened the dryer door. He believed that when she opened the door, oxygen entered the drum and the increased oxygen level allowed the smoldering lint and clothes to burst into flames. His opinion was that the fire then escaped through the back of the dryer and ignited the Camachos' home.

Clayton also opined that a safer alternative design would have been to (1) use a smooth lint transport tube to prevent lint buildup in the tube, along with a different type of material for the lint chute seal and (2) mount a mesh lint filter of some nature over the airway entry to the heater box.

Whirlpool challenged almost every assertion made by the Camachos as to both liability and damages, including Clayton's assertion that lint particles ignited by the heating element ignited clothes in the dryer drum. Among its challenges, Whirlpool questioned whether there actually was fire inside the dryer drum and dryer cabinet independent of the fire that destroyed the Camachos' home. Whirlpool contended that there was no credible evidence of lint in the Camachos' dryer cabinet or in the dryer's heater element before the fire and that, even if blackened materials Clayton identified in a photograph as charred lint inside the cabinet had in fact been burnt lint, the charring was not evidence that the fire started inside the dryer cabinet or clothes drum because any lint present would have been charred by the intense heat of the fire, just as the rest of the trailer was.

[5] Clayton agreed that the dryer would have been operating in its drying cycle if the heating element was energized so that lint was ignited by it.

Whirlpool objected to admission of Clayton's opinions as to design defect and safer alternative design on the ground that they were not reliable. It also challenged the legal sufficiency of the evidence to support the jury submission of design defect on the basis that Clayton's testimony was the only support for the submission and his testimony was not reliable, was based on unfounded assumptions, and was conclusory.

The jury found that a design defect in the dryer was a producing cause of the fire and Joab's death. Based on the verdict, the trial court entered judgment against Whirlpool.

D. Appeal

The court of appeals affirmed. 251 S.W.3d 88. The court acknowledged Whirlpool's legal sufficiency challenge to the evidence of a design defect, but then addressed the issue as a challenge to the admissibility of the testimony for unreliability. *Id*. at 98. In doing so, the court reviewed Clayton's testimony to determine whether the trial court abused its discretion in admitting it and determined that it did not. *Id*. Moreover, in reviewing the reliability of Clayton's testimony, the court of appeals concluded that his opinions were based on his experience, so its review was limited to determining whether an analytical gap existed between the data he used and his conclusions. *Id*. at 96. The review did not incorporate reliability factors such as those we referenced in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995).

In this Court, Whirlpool renews its argument that (1) the evidence is legally insufficient to support the jury's findings of design defect and safer alternative design, (2) the evidence is legally insufficient to support the damages awarded, and (3) the trial court erred in denying Whirlpool's requested spoliation instruction in regard to the scene of the fire. Whirlpool also contends that the

court of appeals incorrectly analyzed the legal sufficiency of Clayton's expert testimony by (1) applying an abuse of discretion standard rather than a "de novo-like" review and (2) considering only whether there was an analytical gap in Clayton's methodology instead of also applying other relevant factors. *See id.*

The Camachos assert that the court of appeals conducted a sufficient review of Whirlpool's legal sufficiency challenge to Clayton's design defect testimony. They base their argument on the fact that after the appeals court concluded the trial court did not abuse its discretion in admitting Clayton's testimony, the court considered whether Whirlpool conclusively disproved the validity of Clayton's opinions and conclusions. 251 S.W.3d at 100. For the reasons set out below, we disagree that the appeals court conducted a proper legal sufficiency review of the evidence as to design defect.

II. Law

A. Expert Testimony

An expert witness may testify regarding scientific, technical, or other specialized matters if the expert is qualified, the expert's opinion is relevant, the opinion is reliable, and the opinion is based on a reliable foundation. *See* TEX. R. EVID. 702; *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006); *Robinson*, 923 S.W.2d at 556. Conclusory or speculative opinion testimony is not relevant evidence because it does not tend to make the existence of material facts more probable or less probable. *See* TEX. R. EVID. 401; *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004).

When expert testimony is involved, courts are to rigorously examine the validity of facts and assumptions on which the testimony is based, as well as the principles, research, and methodology

underlying the expert's conclusions and the manner in which the principles and methodologies are applied by the expert to reach the conclusions. *See Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002). An expert's opinion might be unreliable, for example, if it is based on assumed facts that vary from the actual facts, *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995), or it might be conclusory because it is based on tests or data that do not support the conclusions reached. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009). In either instance, the opinion is not probative evidence.

Further, each material part of an expert's theory must be reliable. For example, the issue in *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897, 902 (Tex. 2004), was whether a wheel that separated from a car's axle was the cause or the result of an accident. An expert testified that a bearing defect in the wheel assembly caused the wheel to separate from the axle. *Id.* at 904. Tests conducted by the experts related to how the bearing failed, but the expert did not explain how the wheel remained in the wheel well as the car crossed a median, collided with another car, and spun around. *Id.* at 905-06. The tests did not support the expert's opinion that the wheel remained with the car for an extended period despite the bearing's failure having caused the wheel to separate from the axle early in the accident sequence. *Id.*; *see also Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 805 (Tex. 2006) (noting that an expert who testified a tire was defective when it left the manufacturing plant offered no theory regarding how the tire could be used for 30,000 miles and suffer a nail puncture without failing). We determined that the expert's opinion was unreliable because the expert failed to explain how the wheel remained in the wheel well throughout the accident sequence. *Volkswagen*, 159 S.W.3d at 906.

B. Standard of Review

Generally, rulings on objections as to admissibility of evidence, including whether expert testimony is reliable, are reviewed for abuse of discretion. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001). But a party may assert on appeal that unreliable scientific evidence or expert testimony is not only inadmissible, but also that its unreliability makes it legally insufficient to support a verdict. *See Volkswagen*, 159 S.W.3d at 903.

Unlike review of a trial court's ruling as to admissibility of evidence where the ruling is reviewed for abuse of discretion, in a no-evidence review we independently consider whether the evidence at trial would enable reasonable and fair-minded jurors to reach the verdict. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Further, a no-evidence review encompasses the entire record, including contrary evidence tending to show the expert opinion is incompetent or unreliable. *Id.* at 814.

In determining whether expert testimony is reliable, a court may consider the factors set out by the Court in *Robinson*[6] and the expert's experience. *See Gammill v. Jack Williams Chevrolet, Inc*., 972 S.W.2d 713, 724 (Tex. 1998). However, in very few cases will the evidence be such that the trial court's reliability determination can properly be based only on the experience of a qualified expert to the exclusion of factors such as those set out in *Robinson*, or, on the other hand, properly be based only on factors such as those set out in *Robinson* to the exclusion of considerations based

[6] *Robinson* set out the following list of nonexclusive factors: (1) the extent to which the theory has been or can be tested, (2) the extent to which the technique relies upon the subjective interpretation of the expert, (3) whether the theory has been subjected to peer review and/or publication, (4) the technique's potential rate of error, (5) whether the theory or technique has been generally accepted as valid by the relevant scientific community, and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557.

on a qualified expert's experience. *See Mack Trucks*, 206 S.W.3d at 579 (noting that the criteria to be used to evaluate the reliability of expert testimony depends on the nature of the evidence); *Gammill*, 972 S.W.2d at 726.

C. The Court of Appeals' Review

The court of appeals noted that Whirlpool challenged the legal sufficiency of the evidence as to design defect and that Whirlpool's argument, in part, was that the Camachos' expert testimony was not relevant and reliable. 251 S.W.3d at 95-96. The court then concluded, however, that Whirlpool's first three issues—challenges to relevance and reliability of evidence as to design defect, admissibility of a Consumer Product Safety Commission (CPSC) report, and admissibility of an exemplar dryer—dealt with admissibility of evidence and reviewed those issues accordingly. *Id.* at 96. It then determined that "the analytical gap test is the appropriate way to analyze the Camachos' expert testimony because such testimony in the instant case is based on the experience of the testifying experts." *Id.* The court held that the trial court did not abuse its discretion in admitting Clayton's testimony. *Id.* at 98-100. The appeals court then considered Whirlpool's contention that it conclusively disproved the validity of Clayton's opinions for legal sufficiency, but did not otherwise review Whirlpool's challenge to the design defect evidence for legal sufficiency. *Id.* at 100; *see City of Keller*, 168 S.W.3d at 827 (noting that a legal sufficiency issue will be sustained if the record reveals one of the following: (1) the complete absence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence established conclusively the opposite of the vital fact).

We disagree with the Camachos' assertion that the court of appeals effectively performed a proper legal sufficiency review by determining whether Whirlpool conclusively disproved that the fire occurred as Clayton testified it did. Evaluating whether expert testimony has been conclusively disproved by the opposing party is not the same as considering whether the proponent of the testimony satisfied its burden to prove the testimony is relevant and reliable. *See Mack Trucks*, 206 S.W.3d at 578; *Volkswagen*, 159 S.W.3d at 904; *Robinson*, 923 S.W.2d at 557. The proponent must satisfy its burden regardless of the quality or quantity of the opposing party's evidence on the issue and regardless of whether the opposing party attempts to conclusively prove the expert testimony is wrong.

Witnesses offered as experts in an area or subject will invariably have experience in that field. If courts merely accept "experience" as a substitute for proof that an expert's opinions are reliable and then only examine the testimony for analytical gaps in the expert's logic and opinions, an expert can effectively insulate his or her conclusions from meaningful review by filling gaps in the testimony with almost any type of data or subjective opinions. *See Gammill*, 972 S.W.2d at 722. We have recognized, and do recognize, that some subjects do not lend themselves to scientific testing and scientific methodology. *Id.* at 724; *see Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 39 (Tex. 2007) (recognizing that the *Robinson* factors do not readily lend themselves to a review of expert testimony in automobile accident cases). But given the facts in this case, the analytical gap test was not the only factor that should have been considered. For example, although Clayton had extensive experience in fire investigation and testified that he relied on that experience in reaching his opinions, much of the evidence offered by both parties centered on testing: lint ignition tests,

reports of dryer tests by the CPSC, and tests Whirlpool performed on clothes dryers. That evidence corresponds to the first reliability factor discussed in *Robinson*—the extent to which a theory and its parts have been or could be subject to testing. *See Robinson*, 923 S.W.2d at 557. Further, Clayton testified that some of his opinions were peer reviewed—another factor we listed in *Robinson*. *See id.* This is not one of the few cases in which appellate review of expert evidence should be limited to either an analysis focused solely on *Robinson*-like factors or solely on an analytical gap test. We agree with Whirlpool that proper appellate legal sufficiency review pursuant to Whirlpool's challenge requires evaluating Clayton's testimony by considering both *Robinson*-type factors and examining for analytical gaps in his testimony.

III. Application

The lint transport tube and blower assembly on the Camachos' dryer were destroyed in the fire, so there was no evidence of the condition of the transport tube. Clayton testified that according to general engineering knowledge, corrugated tubing could cause lint to hang up inside the tube. He examined the transport tube of an exemplar dryer that had a great deal of lint in it, but he did not contend the tube from the exemplar dryer reflected the condition of the tube on the Camachos' dryer. Rightfully so. The former owner of the exemplar dryer testified that the exemplar did not have its exhaust vent properly connected during the first of the four years she owned and used it. She also testified that she typically used the dryer two to three days each week, and when she used it, she usually dried eight to ten loads of clothes. In contrast, the Camachos used their dryer twice a week to dry a few of the boys' tee-shirts, and the exhaust air from their dryer was always properly vented to the outside of the trailer. There was no evidence that before the Camachos purchased the dryer

from their daughter, it was used in a manner similar to the exemplar. Further, there was evidence that the dryer had been serviced shortly before the Camachos purchased it and the cabinet had been vacuumed out.

Clayton had not seen or read of a test showing that a corrugated lint transport tube in a dryer properly vented, such as the Camachos' was, would become clogged with lint to the extent it backed lint up in the blower assembly. He did not personally test his theory. Nor did he test his theory that lint would be blown through the lint chute seal if the lint transport tube became clogged. Nevertheless, he offered the opinion that the corrugated lint tube in the Camachos' dryer became clogged and the clogging caused excessive lint to be blown into the dryer cabinet through the lint chute seal.

Building on his opinion that the corrugated lint transport tube caused excessive lint to be blown through the lint chute seal, Clayton asserted that some of the lint particles remained airborne and were drawn into the heater box where they ignited and were circulated to the dryer drum inlet grill. There the lint either passed through the approximately one-quarter inch openings in the grill and into the drum, or ignited more lint that was trapped on the grill, which in turn became "untrapped" and was circulated by airflow through the grill openings into the dryer drum. Clayton identified what he believed to be burnt lint on the heater element of the Camacho dryer, but he did not find any on the inlet grill or in the dryer drum.

Whirlpool challenges Clayton's assertion based, in part, on its contention that uncontested expert testimony and test results showed that even if lint particles had been ignited by the heating element or if lint trapped on the inlet grill was ignited by particles previously ignited by the heating

element, any particles small enough to pass through the small openings in the inlet grill would not have ignited clothing in the drum. Whirlpool relies on evidence and testimony that (1) the particles would not have generated enough heat to ignite the drying clothes, (2) the particles would not have remained smoldering but would have quickly self-extinguished, and (3) even if they had not self-extinguished, the tumbling, drying clothes and circulating air in the drum would have extinguished them.

Clayton based his opinion that the ignited lint survived to ignite the clothing in the dryer, in part, on lint-ignition tests described in a CPSC report entitled "Final Report on Electric Clothes Dryers and Lint Ignition Characteristics."[7] The CPSC report documented tests showing lint being ignited by a horizontally-mounted heating element, being carried "downstream" from the heating element by air flow, and then igniting other lint and cloth. The lint ignited by the heating element was carried by airflow in a straight line directly onto open, fixed pieces of lint and cloth that were secured in place. Unlike the manner in which the Easy Clean 100 was designed and operated, the target lint and cloth in the CPSC test were not separated from the heating element by an inlet grill nor were they tumbling with air circulating through them as clothes in the Camachos' dryer would have been.

In addition to the configuration and operation of the test equipment in the CPSC test differing significantly from the way the Easy Clean 100 dryer was configured and operated, the pieces of lint

[7] In his testimony, Clayton also discussed a test performed by Dr. Don Russell, another expert hired by the Camachos. In that test, tufts of lint ignited when they were dropped directly onto an energized heating element. Clayton did not assert that this test supported his conclusion that ignited lint would survive to ignite clothing in a dryer. He stated that this test showed what happened when lint came in contact with an energized heating element. He acknowledged that tufts of lint the size used in the test were too large to become airborne and be drawn into the heating element.

tested by the CPSC were larger and heavier than any pieces of lint that evidence showed (1) would have been in the dryer cabinet to begin with or (2) could have been airborne or pulled by the dryer's airflow from the cabinet base into the heater box. In the CPSC test, the lint pieces weighed .10, .20, and .30 grams. The Camachos presented no evidence that pieces of lint weighing that much were probably present in the cabinet of their dryer, while Whirlpool introduced evidence of tests and expert testimony to the effect that the largest piece of lint that could pass through the Easy Clean 100's inlet grill was .0051 grams—a much smaller piece of lint than those used by the CPSC testers. The CPSC did not report testing or calculation of whether lint pieces of the size they used for testing would in some manner either remain airborne and be drawn into the dryer's heater box, or whether they could be drawn into the heater box from a resting place on the floor of the cabinet beneath the heater box. Whirlpool's evidence, however, included tests showing that tufts of lint similar in size to the lint pieces used in the CPSC tests would not become airborne inside the dryer cabinet and would not be drawn up into the heater box even when positioned on the cabinet base directly underneath the heater box.

Whirlpool also introduced evidence that lint pieces small enough to pass through the dryer drum's inlet grill self-extinguish within one or two seconds and are not capable of generating sufficient heat energy to ignite clothing such as tee-shirts. And a Whirlpool expert testified that even if a smoldering piece of lint could find its way into the dryer drum and tumbling clothes, the ignited lint would not be "captured" by the clothing in the dryer and remain smoldering undetected until the dryer door was opened by someone such as Margarita. Instead, the tumbling clothing would have

a "stop drop and roll" effect on the smoldering lint and extinguish it, just as fire is extinguished when persons whose clothing has caught fire are rolled on the ground.

While we do not decide whether Whirlpool's evidence conclusively proved that Clayton's opinions were invalid, we note that the evidence, including the CPSC report relied on by Clayton, highlights the extent to which Clayton's theory was subject to testing and examining for reliability. Clayton did not explain what size particles of lint he believed could have remained airborne and then been drawn into the heater box. He did not test or otherwise calculate or determine the maximum size or weight of lint particles that could be drawn into the heater box by the Easy Clean 100's air circulation system. He did not determine and did not know the length of time it took for various sizes of ignited lint particles to self-extinguish or how much heat was generated by ignited lint particles. Clayton neither performed tests, had tests performed, did calculations to determine, or testified about (1) the size of lint particles that could be blown through the lint chute seal into and remain airborne in the dryer cabinet; (2) whether lint particles that were ignited and were small enough to pass through the inlet grill's approximately one-quarter inch openings into the dryer drum were capable of remaining lit for more than a few seconds or producing sufficient heat to ignite clothes in the dryer drum; or (3) how ignited lint particles small enough to pass through the inlet grill could survive and smolder inside a tumbling clothes load through at least part of a drying cycle. He denied having seen "any testing anywhere that found that a smoldering piece of lint can have a sufficient heat release, both in terms of temperature and longevity, to cause a tumbling drum load to itself reach smoldering temperatures."

While Clayton referenced the CPSC report, he did not explain how the testing data supported his ultimate conclusion as to lint particles reaching the clothes in the drum, smoldering there for some period of time, and then igniting the clothes. Nor was there an explanation of how the CPSC test supported his conclusion that much smaller airborne lint particles could pass through an inlet grill into tumbling clothes and remain smoldering for at least a few minutes before igniting the clothes. Thus, the only test on which he founded his theory about how the fire was started in the dryer drum by ignited lint particles did not support all the various and critical parts of his opinion. *See Volkswagen*, 159 S.W.3d at 906 (pointing out that while an expert conducted tests related to one aspect of his theory, he never explained how those tests supported another aspect of his opinion).

It is incumbent on an expert to connect the data relied on and his or her opinion and to show how that data is valid support for the opinion reached. *See Pollock*, 284 S.W.3d at 819-20; *Volkswagen*, 159 S.W.3d at 906; *Gammill*, 972 S.W.2d at 726. Clayton did not do so.

The Camachos assert that because there was legally sufficient evidence that the fire began in the dryer and there was testimony that other possible causes of the fire had been eliminated, testing was not *required* to prove that material in the drum could be ignited in the manner advanced by Clayton. Testing is not always required to support an expert's opinion, but lack of relevant testing to the extent it was possible, either by the expert or others, is one factor that points toward a determination that an expert opinion is unreliable. *See Volkswagen*, 159 S.W.3d at 906 ("[E]ven more concerning in light of our jurisprudence is that [the expert] performed no tests and cited no publications to support his opinion . . . ."); *see also Mack Trucks*, 206 S.W.3d at 580; *Cooper Tire*, 204 S.W.3d at 802. If testing of critical aspects of an expert's testimony has not taken place either

by the expert or others in the relevant scientific or expert community, then an explanation of why it has not is an important consideration in evaluating the expert opinions and determining whether they are substantively more than merely the expert's conclusory, subjective opinion.

Aside from the lack of testing as to most of Clayton's theory of how the fire was caused by a clogged lint transport tube, the other *Robinson* factors do not help establish the reliability of Clayton's opinion. Clayton's theory was developed for the litigation in this case. *See Robinson*, 923 S.W.2d at 559 ("[O]pinions formed solely for the purpose of testifying are more likely to be biased toward a particular result."). Also, his opinions and theory had not been published in any scientific journal, treatise, or publication so they could be subjected to peer review by someone other than an expert retained by the Camachos in regard to the lawsuit. The purpose of publication and peer review is to allow the relevant community to comment on the expert's theories, findings, and conclusions. *See Havner*, 953 S.W.2d at 727. That did not occur here. Further, Clayton did not indicate that his theory had been accepted as valid by any part of a relevant scientific or expert community at large.

The Camachos point to objective evidence they say supports Clayton's opinion that the fire was started by lint embers that reached, then survived among, and ignited the clothes in the dryer: partially charred tee-shirts inside the dryer, an investigator's report noting severe damage to the interior of the dryer drum, testimony that damage to the laundry room indicated the fire could not have started beneath the floor, and Margarita's testimony that she saw fire coming from the drum of the dryer. But these facts are consistent with and support a conclusion that fire was in and around the dryer, not that the fire originated as Clayton said it did. *See Mack Trucks*, 206 S.W.3d at 580

(noting that factors relied on by an expert consistent with the release of diesel fuel prior to a fire were not probative evidence that diesel fuel was released because of an asserted defect in the fuel system).

When all the evidence is considered, as it must be in a proper legal sufficiency review, we conclude that the data on which Clayton relied does not support his opinions. His opinions are subjective, conclusory, and are not entitled to probative weight. *Pollock*, 284 S.W.3d at 817. Because his testimony is the only evidence that the alleged design defect—a corrugated lint transport tube—caused the fire, there is no evidence to support the finding that a design defect in the dryer caused the trailer fire.

Because Whirlpool's challenge to the legal sufficiency of the evidence of design defect is dispositive, we do not reach the remainder of its issues.

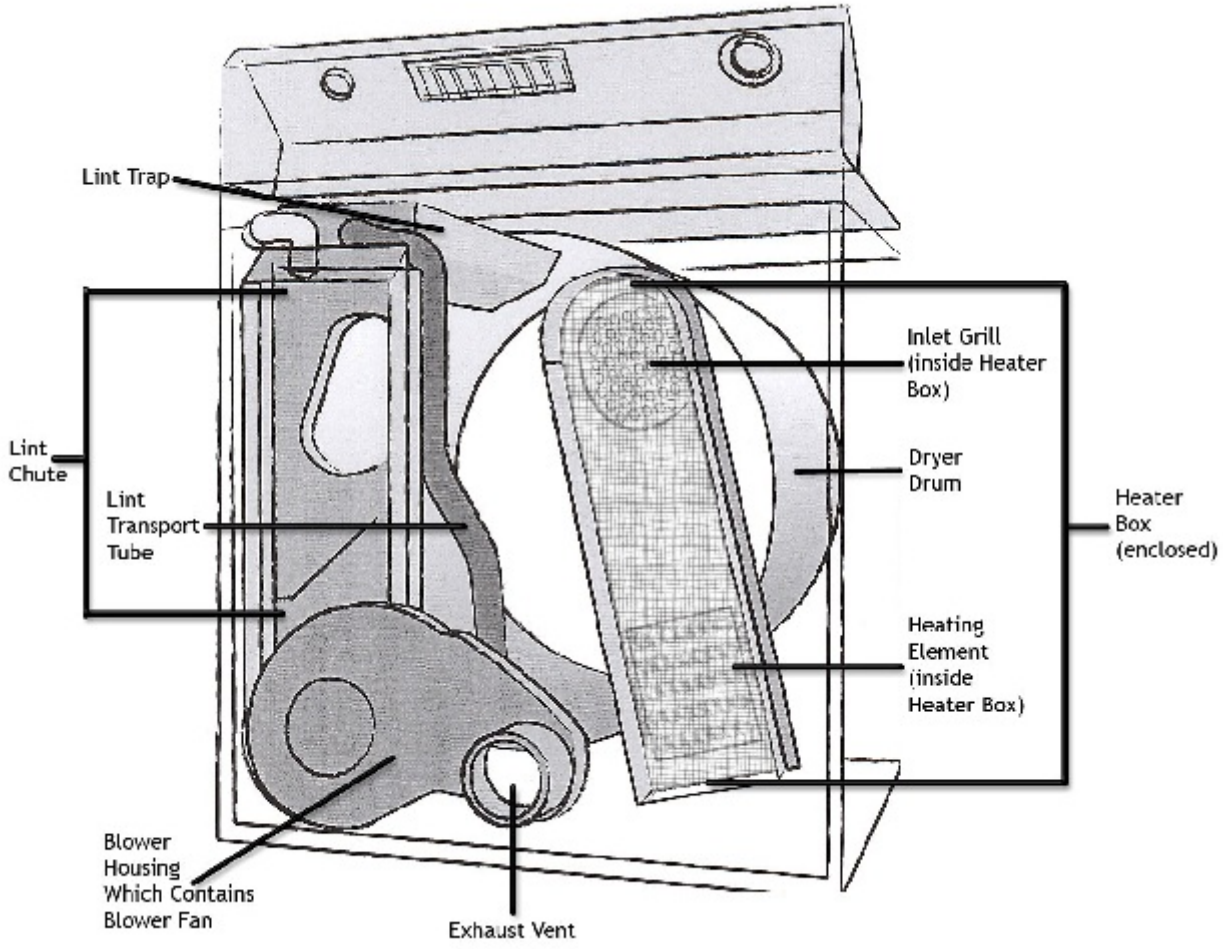
IV. Conclusion

The evidence is legally insufficient to support the jury's verdict. We reverse the court of appeals' judgment and render judgment that the Camachos take nothing.

Phil Johnson
Justice

OPINION DELIVERED: December 11, 2009

APPENDIX A


Lint Trap
Lint Chute
Lint Transport Tube
Inlet Grill (inside Heater Box)
Dryer Drum
Heater Box (enclosed)
Heating Element (inside Heater Box)
Blower Housing Which Contains Blower Fan
Exhaust Vent

IN THE SUPREME COURT OF TEXAS

NO. 08-0246

GILBERT TEXAS CONSTRUCTION, L.P., PETITIONER,

v.

UNDERWRITERS AT LLOYD'S LONDON, RESPONDENT

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

Argued October 6, 2009

JUSTICE JOHNSON delivered the opinion of the Court.

During a Dallas Area Rapid Transit Authority (DART) construction project, unusually heavy rains resulted in water damage to a building adjacent to the construction site. The owner of the building sued DART and its contractors, alleging that construction activities caused the water damage. The building owner sued the general contractor in tort and for breach of contract. In the breach of contract claim, the building owner alleged that the general contractor assumed liability for the damage under its contract with DART. Except for the breach of contract claim, the trial court granted summary judgment for the general contractor on the basis of governmental immunity. The general contractor later settled the breach of contract claim and sought indemnity from its insurers. The excess insurer denied coverage.

The primary issue is whether the contractual liability exclusion in a Commercial General Liability (CGL) policy excludes coverage for property damage when the only basis for liability is that the insured contractually agreed to be responsible for the damage, and if so, whether an exception to the exclusion operates to restore coverage. We hold that the exclusion applies, the exception does not, and there is no coverage.

I. BACKGROUND

A. The Underlying Suit

In 1993, DART contracted with Gilbert Texas Construction, L.P., as general contractor, to construct a light rail system. One part of the contract required Gilbert to protect the work site and surrounding property:

> 10. Protection of Existing Site Conditions
>
> a. The Contractor shall preserve and protect all structures . . . on or adjacent to the work site. . . .
>
> b. The Contractor shall protect from damage all existing improvements and utilities (1) at or near the work site and (2) on adjacent property of a third party . . . [and] repair any damage to those facilities, including those that are the property of a third party, resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work. If the Contractor fails or refuses to repair the damage promptly, [DART] may have the necessary work performed and charge the cost to the Contractor.

During construction, Dallas suffered an unusually heavy rain, and a building adjacent to the construction area was flooded. RT Realty (RTR), the building's owner,[1] sued DART, Gilbert, and other persons and entities involved in the construction. RTR alleged various theories of liability,

[1] Various interveners eventually joined the suit, including RTR's property insurers and persons who had offices in the flooded building.

including violations of the Texas Transportation Code and the Texas Water Code, nuisance, and trespass. RTR also claimed it was a third-party beneficiary of the contract between Gilbert and DART and that Gilbert was liable to RTR for breach of that contract.

Gilbert's primary insurance coverage was by a CGL policy with Argonaut Insurance Company. Gilbert also had several layered excess coverage policies[2] through Underwriters at Lloyd's London[3] (Underwriters). Argonaut assumed Gilbert's defense and provided a list of approved defense counsel to Gilbert, who selected attorney James Grau to defend it. The original answer Grau filed for Gilbert contained a pleading asserting that Gilbert had sovereign immunity.[4]

Through its coverage counsel, Underwriters sent a series of reservation of rights letters to Gilbert. The letters generally (1) reviewed the claims made by RTR in each successive petition, (2) noted that under its policy, Underwriters did not have a duty to defend Gilbert and its obligation to indemnify Gilbert did not depend on allegations made in RTR's pleadings but would be determined by the judgment rendered and facts found in the suit, (3) stated that a coverage determination was not possible because no judgment had yet been entered and no fact finding

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[2] Underwriters' policies generally followed form, meaning the policies tracked the essential terms of the primary policy. Underwriters' policies also had separate provisions and exclusions applicable to the excess policies. We will generally refer to Underwriters' policies collectively as "the policy" for ease of reference. Because our analysis focuses on provisions found in the primary policy, the policy language we reference, unless specifically noted otherwise, will be that of Argonaut's primary policy, which is incorporated by Underwriters' policy.

[3] The policies were underwritten and risks participated in by various Members of the Lloyd's market and individual insurance companies. The underwriters and participating insurers will be referred to collectively as "Underwriters."

[4] The State has sovereign immunity and subdivisions have what is called governmental immunity. The parties refer to DART's immunity and that of Gilbert, as DART's contractor, as sovereign immunity. However, we will use the term "governmental immunity" throughout this opinion as that is the proper terminology.

accomplished, and (4) referenced various policy provisions that might preclude coverage for the damages being sought from Gilbert. In addition, the letters reserved Underwriters' rights to deny coverage under the policies and noted the potential conflict of interest between Gilbert and Underwriters because of Underwriters' position that damages claimed by RTR might not be covered. Underwriters' policy included a provision allowing Underwriters to associate with Gilbert in defense of claims.

Other defendants also responded to RTR's suit, in part, by claiming they had governmental immunity. The parties moved for summary judgment. The trial court granted Gilbert's motion on immunity grounds for all of RTR's claims except breach of contract.

A few weeks after the trial court granted partial summary judgment to Gilbert, Underwriters sent another reservation of rights letter. In that letter, Underwriters, for the first time, took the specific position that RTR's breach of contract claim was not covered because Underwriters' policy excluded coverage for contractual liability. Gilbert settled RTR's breach of contract claim for $6.175 million. Underwriters denied coverage.

B. The Coverage Suit

Gilbert sued Underwriters for breach of contract and Insurance Code violations, also urging that Underwriters waived its right to deny coverage and was estopped to deny coverage. Both parties moved for summary judgment on all issues. The trial court granted Gilbert's motion as to coverage and granted Underwriters' motion as to Gilbert's statutory, waiver, and estoppel claims.

Underwriters and Gilbert both appealed. The court of appeals reversed and rendered judgment for Underwriters, holding that the breach of contract claim (1) fell within the policy's

contractual liability exclusion and (2) was not excepted from the exclusion. 245 S.W.3d 29, 34-35 (Tex. App.—Dallas 2007, pet. granted). It additionally held that Underwriters had not waived its policy defenses and was not estopped from raising the defense of non-coverage because Underwriters had not assumed Gilbert's defense. *Id.* at 37.

In this Court, Gilbert asserts that (1) the contractual liability exclusion does not apply because Gilbert's liability arises from its own breach of contract and not from another's liability that Gilbert assumed; (2) even if the exclusion applies, an exception to the exclusion brings the breach of contract claim back into coverage because Gilbert would have been liable to RTR in the absence of its contract with DART; and (3) in the alternative, Underwriters asserted control over Gilbert's defense and prejudiced Gilbert, so under an estoppel theory Gilbert should be awarded damages for the amount it paid to settle RTR's lawsuit.

We agree with the court of appeals: the contractual exclusion applies to the breach of contract claim and the exception for liability the insured would have absent its contract is inapplicable. Further, we determine that Underwriters did not assume control of Gilbert's defense, Gilbert was not prejudiced by Underwriters' actions, and Underwriters is not required to pay damages to Gilbert under an estoppel theory.[5]

[5] Underwriters also asserted issues the court of appeals did not reach: (1) an exclusion in the excess policy bars coverage for breach of contract; (2) RTR's claim did not involve a covered occurrence resulting in liability for which Gilbert was obligated to pay damages; and (3) Gilbert lacked a reasonable basis for settling RTR's claim when there was no potential liability or basis for a judgment against Gilbert. In this Court, Underwriters argues those issues warrant remand to the court of appeals in the event we reverse. Because we affirm the court of appeals' judgment, we do not reach the remand issues.

II. DISCUSSION

A. Standard of Review

The parties do not dispute the applicable burdens of proof. Initially, the insured has the burden of establishing coverage under the terms of the policy. *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 782 (Tex. 2008). If the insured proves coverage, then to avoid liability the insurer must prove the loss is within an exclusion. *Id.* If the insurer proves that an exclusion applies, the burden shifts back to the insured to show that an exception to the exclusion brings the claim back within coverage. *Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 193 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *see also Century Sur. Co. v. Hardscape Constr. Specialties, Inc.*, 578 F.3d 262, 265 (5th Cir. 2009).

When both sides move for summary judgment, as they did here, and the trial court grants one motion and denies the other, reviewing courts consider both sides' summary-judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered. *Embrey v. Royal Ins. Co. of Am.*, 22 S.W.3d 414, 415-16 (Tex. 2000).

B. Jurisdiction

As a preliminary matter, Underwriters argues that we lack jurisdiction. Gilbert contends, in part, that we have jurisdiction because the court of appeals' opinion conflicts with opinions of other courts of appeals on a question of law material to the decision of the case. *See* TEX. GOV'T CODE § 22.001(a)(2). We agree with Gilbert. The court of appeals' decision is contrary to a decision of the Fourteenth Court of Appeals that held the contractual liability exclusion is limited to liability assumed for conduct of a third party, such as in an indemnity or hold-harmless agreement. *See*

Lennar Corp. v. Great Am. Ins. Co., 200 S.W.3d 651, 693 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Here, the court of appeals held that the exclusion applies because Gilbert assumed liability in its contract with DART. 245 S.W.3d at 34. We have jurisdiction pursuant to Section 22.001(a)(2) of the Government Code.

C. Contractual Liability Exclusion

Coverage A of the policy, which is entitled "Bodily Injury and Property Damage Liability," provides that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. . . . The 'bodily injury' or 'property damage' must be caused by an occurrence." Exclusion 2(b)provides that the insurance does not apply to

> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) Assumed in a contract or agreement that is an "insured contract;" or
>
> (2) That the insured would have in the absence of the contract or agreement.

The policy's definitions section provides a definition of "insured contract." The term is defined as seven types of agreements, the last of which is an agreement to assume another's tort liability:

> "Insured contract" means:
>
> a. A lease of premises;
>
> b. A sidetrack agreement;
>
> . . .
>
> g. That part of any other contract or agreement pertaining to your business under which you assume the tort liability of another to pay damages because of "bodily injury" or "property damage" to a third person or organization, if the contract or agreement is made prior to the "bodily injury" or

> "property damage." Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Underwriters does not argue that RTR's claim is not within the general terms of the policy; rather, it asserts that exclusion 2(b)—the contractual liability exclusion—precludes coverage because at the time Gilbert settled, the trial court had already granted summary judgment on all RTR's statutory and tort claims, and the only basis for liability remaining was for breach of contractual obligations Gilbert assumed in its contract with DART. Gilbert contends the contractual liability exclusion applies more narrowly. It contends the exclusion applies only in the limited situation in which the insured has assumed the liability *of another* such as in hold-harmless or indemnity agreements. Gilbert argues that to hold otherwise runs afoul of our decision in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), in which we stated that a breach of contract claim can involve an occurrence and coverage does not turn on the label of the cause of action. Finally, Gilbert contends that, at the very least, the exclusion is ambiguous and must be interpreted in favor of coverage.

1. Preservation on Appeal

Underwriters argues at the outset that Gilbert waived its argument regarding the inapplicability of the exclusion because Gilbert did not timely assert and brief the issue in the court of appeals. *See* TEX. R. APP. P. 53.2(f). As Underwriters observes, the court of appeals did not consider, in depth, the applicability of the exclusion because Gilbert did not dispute its applicability in its initial appeal. 245 S.W.3d at 34. Gilbert argues that it prevailed on the exclusion issue in the trial court and did not need to initially raise the issue in the court of appeals. We agree with Gilbert.

After the court of appeals reversed the trial court's judgment on this issue, Gilbert challenged the court of appeals' judgment both in a motion for rehearing in the court of appeals and in its petition for review. While ordinarily a party waives a complaint not raised in the court of appeals, a complaint arising from the court of appeals' judgment may be raised either in a motion for rehearing in that court or in a petition for review in this Court. *See* TEX. R. APP. P. 53.2(f); *Bunton v. Bentley*, 153 S.W.3d 50, 53 (Tex. 2004). Gilbert did not waive the issue.

2. Scope of the Exclusion

The policy at issue is a standard CGL policy developed by the Insurance Services Office, Inc. (ISO).[6] *See Lamar Homes*, 242 S.W.3d at 5; 2 JEFFREY W. STEMPEL, STEMPEL ON INSURANCE CONTRACTS § 14.01 (3d ed. 2007). The meaning of the terms and exclusions within a standard policy should theoretically be the same in Texas as in other states. *See Lamar Homes*, 242 S.W.3d at 5. However, a lack of consensus on the meaning of terms in a CGL policy is not unusual. As noted above, Texas courts of appeals have reached different conclusions about the exclusion's effect, as have other state and federal courts.

The principles Texas courts use when interpreting an insurance policy are well established. Those principles include construing the policy according to general rules of contract construction to ascertain the parties' intent. *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008); *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998). First, we look at the language of the policy because we presume parties intend what the words of their

[6] The ISO is an insurance industry organization which drafts standard forms used by insurers. *See Lamar Homes*, 242 S.W.3d at 5 n.1.

contract say. *See Don's Bldg. Supply*, 267 S.W.3d at 23. We examine the entire agreement and seek to harmonize and give effect to all provisions so that none will be meaningless. *See MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 652 (Tex. 1999). The policy's terms are given their ordinary and generally-accepted meaning unless the policy shows the words were meant in a technical or different sense. *Don's Bldg. Supply*, 267 S.W.3d at 23; *see also Sec. Mut. Cas. Co. v. Johnson*, 584 S.W.2d 703, 704 (Tex. 1979). Courts strive to honor the parties' agreement and not remake their contract by reading additional provisions into it. *See Nat'l Union Fire Ins. Co. of Pittsburg, PA v. Crocker*, 246 S.W.3d 603, 606 (Tex. 2008). With these principles in mind, we turn to the language of the exclusion.

Considered as a whole, the contractual liability exclusion and its two exceptions provide that the policy does not apply to bodily injury or property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement, except for enumerated, specific types of contracts called "insured contracts" and except for instances in which the insured would have liability apart from the contract. In this case, Gilbert agreed under its contract with DART to "repair any damage to . . . facilities, including those that are the property of a third party, resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work." RTR originally sued on tort and statutory theories of liability, then added a breach of contract claim. But Gilbert prevailed on its summary-judgment motion, leaving only RTR's breach of contract claim. Thus, the only liability theory remaining at the time Gilbert settled arose from Gilbert's undertaking in the contract with DART—an obligation Gilbert assumed by contract. And Gilbert does not claim there are facts that could result in its being

liable under some other theory besides breach of contract. Underwriters argues that the exclusion unambiguously applies to the breach of contract claim.

Gilbert, however, argues that the policy's plain language is not as plain as it might seem. Citing several authorities, Gilbert contends that in order to give meaning to the word "assumption" in the exclusion, the liability assumed must be that of another. *E.g., Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 80-81 (Wis. 2004) ("The term 'assumption' must be interpreted to add something to the phrase 'assumption of liability in a contract or agreement.' Reading the phrase to apply to all liabilities sounding in contract renders the term 'assumption' superfluous."). In other words, Gilbert would have us read the exclusion to say "'property damage' for which the insured is obligated to pay damages by reason of the assumption of *another's* liability in a contract or agreement." Underwriters counters that we should not judicially rewrite the exclusion by inserting the word "another's" into it. We agree with Underwriters.

The exclusion bars coverage for liability of a third party that is assumed, such as that assumed by an indemnity agreement. But had it been intended to be so narrow as to apply *only* to an agreement in which the insured assumes liability of another party by an indemnity or hold-harmless agreement, it would have been simple to have said so. The parties' intent is governed by what they said in the insurance contract, not by what one side or the other alleges they intended to say but did not. *See Fortis Benefits v. Cantu*, 234 S.W.3d 642, 647, 649 (Tex. 2007) (noting that contract rights arise from the parties' agreement and declining to "judicially rewrite the parties' contract by engrafting extra-contractual standards"); *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 753 (Tex. 2006) ("[W]here 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.").

The exclusion applies when the insured is obligated to pay damages "by reason of the assumption of liability in a contract or agreement." Those terms are not defined, so we give them their "generally accepted or commonly understood meaning." *Lamar Homes*, 242 S.W.3d at 8 (citing *W. Reserve Life Ins. Co. v. Meadows*, 261 S.W.2d 554, 557 (Tex. 1953)). To "assume" means to "undertake." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 133 (2002). "Liability" is "[t]he quality or state of being legally obligated or accountable." BLACK'S LAW DICTIONARY 997 (9th ed. 2009). Independent of its contractual obligations, Gilbert owed RTR the duty to comply with law and to conduct its operations with ordinary care so as not to damage RTR's property, and absent its immunity it could be liable for damages it caused by breaching its duty. In its contract with DART, however, Gilbert undertook a legal obligation to protect improvements and utilities on property adjacent to the construction site, and to repair or pay for damage to any such property "resulting from a failure to comply with the requirements of this contract *or* failure to exercise reasonable care in performing the work." (emphasis added). The latter obligation—to exercise reasonable care in performing its work—mirrors Gilbert's duty to RTR under general law principles. The obligation to repair or pay for damage to RTR's property "resulting from a failure to comply with the requirements of this contract" extends beyond Gilbert's obligations under general law and incorporates contractual standards to which Gilbert obligated itself. The trial court granted summary judgment on all RTR's theories of liability other than breach of contract, so Gilbert's only potential liability remaining in the lawsuit was liability in excess of what it had under general law

principles. Thus RTR's breach of contract claim was founded on an obligation or liability contractually assumed by Gilbert within the meaning of the policy exclusion.

Further, considering the exclusion and its exceptions as a whole reinforces our conclusion. *See MCI Telecomms.*, 995 S.W.2d at 652 ("When interpreting a contract, we examine the entire agreement in an effort to harmonize and give effect to all provisions of the contract so that none will be meaningless."); *Kelley-Coppedge, Inc.*, 980 S.W.2d at 464 (observing that we must "attempt to give effect to all contract provisions so that none will be rendered meaningless"). The first exception—the insured-contract exception—lists six specific types of contracts to which the exclusion does not apply. The seventh and final item in the list addresses assumption of another's tort liability: "That part of any other contract or agreement pertaining to your business under which you assume the tort liability *of another* to pay damages because of 'bodily injury' or 'property damage' to a third person or organization . . . ." (emphasis added). The fact that the definition explicitly references assumption of the tort liability *of another* demonstrates that the parties are capable of using such narrow, specific language when that is their intent.

Gilbert argues that the exclusion should be read as applying to all situations in which the insured assumes another's liability while the insured-contract exception to the exclusion should be read as applying only to agreements in which the insured assumes another's tort liability. We agree that the insured-contract exception brings back into coverage contracts in which the insured assumes the tort liability of another—it says it does. But the exclusion does not say it is limited to the narrow set of contracts by which the insured assumes the liability of another person; the exclusion's language applies without qualification to liability assumed by contract except for two situations:

(1) specified types of contracts referred to as "insured contracts," including indemnity agreements by which the insured assumes another's tort liability, and (2) situations in which the insured's liability for damages would exist absent the contract—in other words, situations in which the insured's liability for damages does not depend solely on obligations assumed in the contract.

Gilbert further argues that if the exclusion were meant to apply to a breach of contract claim like the one at issue in this case, it could easily have said just that. To illustrate its argument, Gilbert points to language in another section of the policy—"Coverage B. Personal and Advertising Injury Liability." As we understand it, Gilbert's argument is that Coverage B has an exclusion for both personal injury and advertising injury that is substantively the same as Coverage A's contractual liability exclusion, except Coverage B's exclusion does not provide coverage for "insured contracts" as does the Coverage A exclusion:

> This insurance does not apply to:
>
> a. "Personal injury" or "advertising injury:"
>
> . . .
>
> (4) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

Gilbert argues that if the foregoing exclusion applied to all contractual obligations, then a separate exclusion in Coverage B specific to advertising injury would be unnecessary. That particular exclusion provides as follows:

> b. "Advertising injury" arising out of:
>
> (1) Breach of contract, other than misappropriation of advertising ideas under an implied contract.

According to Gilbert, if Coverage B's contractual liability exclusion excluded all breach of contract claims, then the express breach of contract claim exclusion for advertising injury would be unnecessary. We are not persuaded. We do not hold that the exclusion in Coverage A precludes liability for all breach of contract claims. We hold that it means what it says: it excludes claims when the insured assumes liability for damages in a contract or agreement, except when the contract is an insured contract or when the insured would be liable absent the contract or agreement. The express breach of contract exclusion in Coverage B, on the other hand, excludes all claims "arising out of" a breach of contract—a potentially larger category of claims than is excluded under the contractual liability exclusion.[7]

3. Holdings from Other Jurisdictions

Other jurisdictions have interpreted the exclusion differently than the way we do today. Gilbert points out that some jurisdictions, including the federal Fifth Circuit, have suggested, and held, that the exclusion applies to a limited category of cases in which the insured assumes the liability of another, such as in an indemnity or hold-harmless agreement.[8] Underwriters, on the other

[7] In its post-submission brief, Gilbert notes that some insurance policies include an express breach of contract exclusion in Coverage A of the policy. This, according to Gilbert, is further evidence that the contractual liability exclusion is not intended to exclude general breach of contract claims. We are not persuaded by the argument because the policy we are interpreting does not include such language in Coverage A, and each policy must be interpreted according to its own specific provisions and coverages.

[8] *See, e.g.*, *Ferrell v. W. Bend Mut. Ins. Co.*, 393 F.3d 786, 795 (8th Cir. 2005) (suggesting exclusion applies only where insured assumes liability of a third party); *Federated Mut. Ins. Co. v. Grapevine Excavation Inc.*, 197 F.3d 720, 726 (5th Cir. 2000) (the insured was not sued as the contractual indemnitor of a third party's conduct but rather for its own conduct, so the contractual liability exclusion was inapplicable); *Olympic, Inc. v. Providence Wash. Ins. Co.*, 648 P.2d 1008, 1011 (Alaska 1982) ("'Liability assumed by the insured under any contract' refers to liability incurred when one promises to indemnify or hold harmless another, and does not refer to the liability that results from breach of contract."); *ACUITY v. Burd & Smith Constr., Inc.*, 721 N.W.2d 33, 40 (N.D. 2006) (liability assumed by the insured in a CGL policy is "generally understood and interpreted by the courts to mean the liability *of another* which one 'assumes' in the sense that one agrees to indemnify or hold the other person harmless"); *Gibbs M. Smith, Inc. v. U.S. Fid.*

hand, cites cases interpreting the exclusion as we do—not limiting the exclusion's scope to only those situations in which the insured has assumed the liability of another.[9] While we believe our

& Guar. Co., 949 P.2d 337, 341 (Utah 1997) ("Courts have over and over again interpreted the phrase 'liability assumed by the insured under any contract' to apply only to indemnification and hold-harmless agreements, whereby the insured agrees to 'assume' the tort liability of another."); *Am. Family Mut. Ins. Co.*, 673 N.W.2d at 70 (Wis. 2004) (contractually-assumed liability clause excludes coverage for liability "where the insured has contractually assumed the liability of another, as in an indemnification or hold-harmless agreement"); 4 PHILLIP L. BRUNER & PATRICK J. O'CONNOR, BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 11:109 (2010) (criticizing the court of appeals' judgment in this case and observing that the exclusion addresses "situations where the insured assumes the liability of another and, as a consequence, the insurer is placed in the position of extending coverage to a third party's liabilities for which the insurer performed no underwriting. In other words, the exclusion applies to the 'assumed' liability of another, not one's own liability due to a contractual undertaking."); C.T. Drechsler, Annotation, *Scope and Effect of Clause in Liability Policy Excluding from Coverage Liability Assumed by Insured Under Contract Not Defined In Policy, Such as One of Indemnity*, 63 A.L.R.2d 1122 (2009) ("[T]he contractual liability exclusion clause is not effective primarily in the two following situations: (1) where the insured is the one who is solely responsible for the injury, and (2) where the insured is the actively negligent wrongdoer."); 21 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE § 132.3, 36-40 (2d ed. 1996) (noting that the contractual liability exclusion clause refers to the assumption of another's liability as in an indemnity agreement); 2 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 10.05[2], 10-61 (1st ed. 2006) ("Although it could be argued that one assumes liability (*i.e.*, a duty of performance, the breach of which will give rise to liability) whenever one enters into a binding contract, in the CGL policy and other liability policies an 'assumed' liability is generally understood and interpreted by the courts to mean the liability *of another* which one 'assumes' in the sense that one agrees to indemnify or hold the other person harmless therefor."); 1 BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 7.05, 546 (14th ed. 2008) ("[C]ourts have consistently interpreted the phrase 'liability assumed by the insured under any contract' to apply only to indemnification and hold-harmless agreements, whereby the insured agrees to 'assume' the tort liability of another. This phrase does not refer to the insured's breaches of its own contracts."); 2 JEFFREY W. STEMPEL, STEMPEL ON INSURANCE CONTRACTS § 14.14 (3d ed. 2006 & Supp. 2009) ("The CGL coverage for a policyholder's liability assumed by contract 'refers to liability incurred when one promises to indemnify or hold harmless another, and does not refer to liability that results from breach of contract.'") (quoting *Olympic*, 648 P.2d at 1011).

[9] *See, e.g.*, *Nationwide Mut. Ins. Co. v. CPB Int'l Inc.*, No. 3:06-CV-0363, 2007 WL 4198173, at *8 (M.D.Pa. Nov. 26, 2007) ("Exclusion (b) is simply further clarification in the policy that contract-based claims are not covered."); *CIM Ins. Corp. v. Midpac Auto Ctr., Inc.*, 108 F.Supp.2d 1092, 1099-1100 (D.Haw. 2000) (clause in policy stating that policy does not apply to liability assumed under any contract or agreement means that any claim that is dependent on the existence of an underlying contract is not covered); *Monticello Ins. Co. v. Dismas Charities, Inc.*, No. 3:96CV-550-S, 1998 WL 1969611, at *2 (W.D.Ky. Apr. 3, 1998) (exclusion for liability assumed by the insured under any contract or agreement does not arise only when a party assumes the liability for another party; rather, the plain meaning of the policy excludes a breach of contract claim from coverage); *Silk v. Flat Top Constr., Inc.*, 453 S.E.2d 356, 359 (W.Va. 1994) (exclusion removed coverage for breach of contract); *TGA Dev., Inc. v. N. Ins. Co. of N.Y.*, 62 F.3d 1089, 1091-92 (8th Cir. 1995) (exclusion for which the insured has assumed liability in a contract or agreement plainly excluded coverage for contractual claims and not just hold-harmless or indemnity agreements); *but see Ferrell*, 393 F.3d at 795 (without overruling or mentioning *TGA Development*, holding that the contractual liability exclusion applies only to situations where the insured has contractually assumed a third party's liability, such as in an indemnification or hold-harmless agreement).

interpretation of the policy accords with longstanding principles of Texas insurance contract interpretation, we consider it worthwhile to examine the rationale of courts reaching contrary conclusions.

Most courts that have held the exclusion to be limited in nature and to apply only when indemnity or hold-harmless agreements are involved have relied on a case from the Alaska Supreme Court, *Olympic, Inc. v. Providence Washington Insurance Co. of Alaska*, 648 P.2d 1008 (Alaska 1982), which interpreted an earlier version of the standard CGL form.[10] When *Olympic* was decided in 1982, the CGL policy contained an exclusion for contractual liability that was similar to the exclusion in the CGL policy before us, but which included an exception for "incidental contracts" rather than "insured contracts." *See id.*, at 1010; 21 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE § 132.3[B][1] (2d ed. 1996) (explaining the 1973 CGL contractual liability exclusion). The definition of "incidental contract" was narrower than the definition of "insured contract"; it did not include an explicit exception for certain indemnity or hold-harmless agreements as does the current CGL policy. *See* 21 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE § 132.3[B][1]. Instead, coverage for specific indemnity or hold-harmless agreements was generally provided through a broad-form endorsement to the CGL policy. *See* 2 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 10.05[2] (2006).

In 1986, the ISO revised the CGL form to generally provide coverage for indemnity and hold-harmless agreements through the insured-contract exception within the general CGL policy, as

[10] Prior to 1986, the CGL policy was called the Comprehensive General Liability Insurance Policy.

opposed to through a broad-form endorsement. *See* 21 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE § 132.3[B] (explaining that the purpose of the 1986 revision was to "combine the essence of the former 1973 [contractual liability exclusion] with the expanded liability coverage formerly provided under the broad-form endorsement"); *See Am. Family Mut. Ins. Co.*, 673 N.W.2d at 81.

With this history in mind, we examine *Olympic*. In that case, a lessee agreed to obtain insurance indemnifying its lessor, but obtained insurance indemnifying only itself in case of breach of the lease between the parties. *Olympic*, 648 P.2d at 1009-10. When a firefighter was killed in a fire on the leased premises, the firefighter's estate sued both lessee and lessor. *Id.* at 1010. The lessor's insurer settled with the firefighter's estate, then sued the lessee's liability insurer to recover part of the settlement. *Id.* The lessor's insurer claimed the lessee's insurer was liable because the lessee breached the lease agreement. *Id.* The lessor's insurer asserted that the lessee's insurer's incidental contract exception to the contractual liability exclusion for "any written . . . lease of premises" implied that the policy insured against liability pursuant to any contract that was an incidental contract, i.e. the lease agreement. *Id.* The Alaska Supreme Court disagreed, holding that "'[l]iability assumed by the insured under any contract' refers to liability incurred when one promises to indemnify or hold harmless another, and does not refer to the liability that results from breach of contract." *Id.* at 1011. According to the court, because the exclusion was limited to indemnity and hold-harmless agreements and did not apply, the exception to the exclusion for leases could not bring the claim into coverage because the contract was not an indemnity or hold-harmless agreement. *Id.*

Accordingly, the court held that the lessee's policy did not cover its failure to procure proper insurance coverage. *Id.* at 1013-14.

The *Olympic* court was interpreting the pre-1986 contractual liability exclusion, thus the court did not have a specific exception for indemnity or hold-harmless agreements before it as part of the contract. The court was not faced with a circular reading of the exclusion and insured-contract exception as we are in the instant dispute. However, the rationale behind the *Olympic* decision lends support to our interpretation of the exclusion. In reaching its holding, the *Olympic* court relied, at least in part, on its perception that breach of contract claims generally are not covered absent tort liability. The court noted in its opinion that the general terms of the policy applied only to liability imposed by law for torts, and not to damages for breach of contract. *Id.* at 1012. Thus, "[t]he contractual liability exclusion functions to relieve the insurer of responsibility for any 'extra' liability that the insured undertakes by contract beyond the liability imposed by law for negligence." *Id.* at 1011 n.6. Moreover, the lessee in *Olympic* had a separate contractual liability policy listing specific contracts that were included in coverage, but the separate policy did not apply to the lease covenant because it did not list the covenant. A similar situation exists here: the policy did not have an endorsement adding Gilbert's contract with DART as an insured contract.

We disagree, by and large, with courts' and treatises' conclusions that the language of the contractual liability exclusion before us applies only to indemnity or hold-harmless agreements for the reasons mentioned above. Texas insurance policy interpretation principles emphasize a policy's plain language in determining its intended coverage. *See, e.g.*, *Lamar Homes*, 242 S.W.3d at 14 (stating in regard to a CGL policy that coverage for a particular risk "depends, as it always has, on

the policy's language, and thus is subject to change when the terms of the policy change"); *Fortis Benefits*, 234 S.W.3d at 647 (noting that insurance contract rights arise from the insurance contract language); *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 (Tex. 1894)); *but see Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938-39 (Tex. 1984) (holding that an aviation insurance policy's failure to include a causal connection requirement between the breach of the policy and the accident violated Texas public policy). We hold that the exclusion means what it says. It applies when the insured assumes liability for bodily injury or property damages by means of contract unless an exception to the exclusion brings a claim back into coverage.

4. *Lamar Homes*

Gilbert argues that to adopt Underwriters' interpretation of the exclusion "effectively eviscerates" our decision in *Lamar Homes*. In *Lamar Homes*, we said a breach of contract can constitute an occurrence that causes property damage, thus bringing some breach of contract claims within the general grant of coverage for purposes of determining a duty to defend. *Lamar Homes*, 242 S.W.3d at 13. We explained that "the label attached to the cause of action—whether it be tort, contract, or warranty—does not determine the duty to defend" and that "any preconceived notion that a CGL policy is only for tort liability must yield to the policy's actual language." *Id.* Gilbert contends that if the exclusion in Underwriters' policy can operate to exclude general breach of

contract claims, then our opinion in *Lamar Homes* would not have been necessary. Underwriters counters that our *Lamar Homes* decision did not interpret the exclusion but instead dealt with whether unintended construction defects could constitute an accident that would fall within the definition of an occurrence in the CGL policy's general grant of coverage.

We disagree that our interpretation of the exclusion in the policy runs afoul of our decision in *Lamar Homes*. The contractual liability exclusion was not at issue in *Lamar Homes*. There we considered whether property damage to a house that resulted from construction defects could nevertheless come within the general terms of liability coverage because the damage resulted from an occurrence as defined by the CGL policy. *See id.* at 10 ("The CGL's insuring agreement grants the insured broad coverage for property damage and bodily injury liability, which is then narrowed by exclusions that 'restrict and shape the coverage otherwise afforded.'") (quoting *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 790 (N.J. 1979)). Whether a claim triggers an insurer's duty to defend and whether a claim eventually is covered or excluded for purposes of indemnity are different questions. *See D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009) (observing that "the duty to defend and the duty to indemnify 'are distinct and separate duties'") (quoting *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004)). In *Lamar Homes*, we did not address the duty to indemnify, but rather the separate duty to defend. An insurer's duty to defend is determined under the eight-corners doctrine, while the duty to indemnify is determined by the facts as they are established in the underlying suit. *Id.* at 744 (quoting *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 656 (Tex. 2009)). Here, the facts demonstrate that Gilbert settled RTR's breach of contract claim after the trial court granted judgment

in Gilbert's favor on all theories of liability besides the contractual one, and Gilbert does not contend the trial court erred in granting summary judgment on these other theories. Thus, Gilbert's liability to RTR falls within the policy's contractual exclusion for purposes of determining Underwriters' duty to indemnify.

5. Ambiguity

Gilbert argues that even if we hold the exclusion applies to the facts of this case, the exclusion is ambiguous and we must interpret it in favor of coverage. According to Gilbert, the exclusion could apply to general breach of contract claims *or* it could only apply to contracts for indemnity, depending on one's interpretation. Underwriters counters that the exclusion is unambiguous.

Terms in insurance policies that are subject to more than one reasonable construction are interpreted in favor of coverage. *Comsys*, 130 S.W.3d at 194; *Evergreen Nat'l Indem. Co. v. Tan It All, Inc.*, 111 S.W.3d 669, 676 (Tex. App.—Austin 2003, no pet.). "Where an ambiguity involves an exclusionary provision of an insurance policy, we 'must adopt the construction . . . urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent.'" *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998) (quoting *Nat'l Union Fire Ins. Co. of Pittsburg, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991)). But an ambiguity does not exist simply because the parties interpret a policy differently. *See Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). If a contract as written can be given a clear and definite legal meaning, then it is not ambiguous as a matter of law. *Progressive County Mut. Ins. Co. v. Sink*,

107 S.W.3d 547, 551 (Tex. 2003); *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997).

We agree with Underwriters that the exclusion is not ambiguous. The exclusion is straightforward and not reasonably subject to two interpretations. It applies to liabilities the insured assumes by contract or agreement and not just to a particular subset of liabilities such as indemnity contracts. As discussed above, interpreting the exclusion as narrowly as Gilbert urges would yield a circular reading when the exclusion is considered in context with the insured-contract exception to the exclusion. In order to interpret the policy in a manner that harmonizes and gives effect to all provisions so that none are meaningless, Underwriters' interpretation is the only reasonable interpretation. *See MCI Telecomms. Corp.*, 995 S.W.2d at 652.

D. Second Exception to the Exclusion

Gilbert next argues that the second exception to the exclusion brings RTR's claim back into coverage. The second exception provides that the exclusion "does not apply to liability for damages . . . [t]hat the insured would have in the absence of the contract or agreement." Gilbert urges that (1) in the absence of its contract with DART, Gilbert would have been liable to RTR in tort because without the contract Gilbert would not have enjoyed governmental immunity status; (2) to hold otherwise would defeat the purpose of CGL coverage because there would not be coverage when there are multiple causes of action and the tort claim is dismissed for some reason; and (3) the exception must be construed broadly in favor of coverage. Underwriters counters that the duty to indemnify is based on the actual facts proven and adjudicated liability, and the only liability theory

remaining when Gilbert settled with RTR was the breach of contract claim. We agree with Underwriters.

As the court of appeals observed, it is well settled that "a claim based on a contract that provides indemnification from liability does not accrue until the indemnitee's liability becomes fixed and certain." 245 S.W.3d at 35 (quoting *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 205 (Tex. 1999)); *Hartrick v. Great Am. Lloyds Ins. Co.*, 62 S.W.3d 270, 275 (Tex. App.—Houston [1st Dist.] 2001, no pet.) ("[T]he duty to indemnify arises from proven, adjudicated facts."); *S. County Mut. Ins. Co. v. Ochoa*, 19 S.W.3d 452, 460 (Tex. App.—Corpus Christi 2000, no pet.) ("An insurer is not obligated to pay a liability claim until its insured has been adjudicated to be legally responsible."); *Tex. Prop. & Cas. Ins. Guar. Ass'n v. Boy Scouts of Am.*, 947 S.W.2d 682, 691 (Tex. App.—Austin 1997, no writ) (stating that the insurer becomes legally obligated to pay claims once the obligation is fixed by judgment or settlement contract).

While this case involves a policy exception, not an indemnity provision as in the cases referenced above, the contract language similarly guides our analysis. *See Ingersoll-Rand*, 997 S.W.2d at 207. As modified by the second exception, the exclusion precludes the insurer's liability for indemnity if the insured is obligated to pay only because of its contractually assumed liability. If the insured's liability is because of an otherwise covered basis in addition to its contractually-assumed liability, the second exception brings the claim back into coverage. *See Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex. 1991) (recognizing that tort obligations are imposed by law independent of contractual obligations, but the acts of a party may simultaneously breach duties in tort and contract); *Cagle v. Commercial Standard Ins. Co.*, 427 S.W.2d 939, 943-44 (Tex.

Civ. App.—Austin 1968, no writ) ("[W]here the express contract actually adds nothing to the insured's liability, the contractual liability exclusion clause is not applicable, but where insured's liability would not exist except for the express contract, the contractual liability clause relieves the insurer of liability."). Therefore, to determine whether the exception applies, we must decide whether Gilbert proved it would have had liability for RTR's damages absent its contractual undertaking. *See Comsys*, 130 S.W.3d at 193.

Gilbert asserts that if no contract existed in the first place, it would not have had immunity and RTR's negligence claim against Gilbert would not have been subject to an immunity defense. Assuming, without deciding, that Gilbert is correct, the argument misses the mark. The determination of an indemnity obligation is based on the actual facts of the case as proven and the language of the indemnity agreement. Here, the existence of the contract between Gilbert and DART was merely an underlying fact that was to be considered in determining Underwriters' indemnity obligation. *See Ingersoll-Rand*, 997 S.W.2d at 208 (noting that an indemnification cause of action accrues when the indemnitee's liability becomes fixed and certain). Because RTR's tort claims were properly dismissed, the only viable claim underlying Gilbert's settlement was for breach of contract. Gilbert asserts no other basis for its settlement than the breach of contract claim; thus, Gilbert's settlement payment for which it seeks indemnity simply was not a liability for damages it had apart from its contract with DART, as it must have been in order for the second exception to apply.

Gilbert correctly argues that our decisions require us to interpret an exception to an exclusion broadly in favor of coverage. *See Evanston Ins. Co. v. ATOFINA Petrochems., Inc.*, 256 S.W.3d 660, 668 (Tex. 2008). But that principle does not mean we should distort the exception in order to

find coverage where none exists. Gilbert would have us disregard the actual facts underlying its settlement and hold that the exception applies even to potential liability that Gilbert *might* have had if it had not entered into a contract with DART. We decline to do so. Indemnity under a liability policy depends on actual facts and adjudicated liability, not possible scenarios that did not occur.

Gilbert also argues that interpreting the exception to apply only to actual proven facts and adjudicated liability will bar coverage anytime a tort claim is dismissed during litigation and a contractual claim remains—for example, where a tort claim is dismissed based on a statute of limitations defense but a breach of contract claim remains. We understand Gilbert's concerns, but speculation about coverage of insurance policies based on surmised factual scenarios is a risky business because small alterations in the facts can warrant completely different conclusions as to coverage. It is proper that we await a fully developed, actual case to decide an issue not presented here. We note, however, as did the court of appeals, that it is common for insurance coverage determinations to depend on the final basis for the insured's liability. 245 S.W.3d at 35. For example, when a claim alleges that an insured caused damages by both negligent and intentional conduct, "a judgment based upon [negligent] conduct often triggers the duty to indemnify, while a judgment based on [intentional conduct] usually establishes the lack of a duty." *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997).

Finally, contrary to Gilbert's assertions, to hold that the second exception does not apply here does not run afoul of our decision in *Lamar Homes*, in which we said that a cause of action's label does not determine whether an insurer has a duty to defend. *See Lamar Homes*, 242 S.W.3d at 13. The second exception contemplates a situation in which an insured's liability for damages results

from matters that are within the policy's coverage in addition to or in lieu of the insured's contractually-assumed liability, but it does not prescribe whether the covered liability must be based in contract or tort. Moreover, *Lamar Homes* concerned a duty to defend rather than a duty to indemnify. These are separate duties and are determined differently. *D.R. Horton-Tex., Ltd.*, 300 S.W.3d at 744 n.2 ("In contrast [to the duty to defend], the duty to indemnify arises only once liability has been conclusively determined.") (quoting 14 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 200:3 (3d ed. 2009)).

The exception for liability for damages Gilbert would have in the absence of the DART contract is inapplicable where, as here, the insured has governmental immunity and liability is based on its contractual undertaking. If particular relationships of the parties, their contracts, and applicable legal principles create unusual circumstances, as they do here, it is incumbent on the parties to take those relationships, circumstances, and applicable legal principles into account when entering into contracts and insurance agreements. If we held as Gilbert proposes, we would be remaking the parties' insurance agreement. We decline to do so.[11]

[11] Underwriters raises additional arguments which we need not address. First, Underwriters asserts that Gilbert was not cloaked with governmental immunity based on the DART contract per se, but based on Gilbert's status as a governmental contractor and its performance of specific governmental functions. *See* TEX. TRANSP. CODE § 452.056(d) ("A private operator who contracts with an authority under this chapter is not a public entity for purposes of any law of this state except that an independent contractor of the authority that . . . performs a function of the authority or an entity . . . that is created to provide transportation services is liable for damages only to the extent that the authority or entity would be liable if the authority or entity were performing the function . . . ."). Our holding precludes the need to determine whether Gilbert would have had immunity under the statute even in the absence of a contract, and we express no opinion on the question. Second, Underwriters argues that although its policy is a following-form policy generally, a separate exclusion in the excess policy bars coverage for "the failure of the Insured to complete a contract on time or to comply with any contractual obligations." Because we hold that the contractual liability exclusion in the underlying primary policy bars coverage for RTR's claim and exceptions to the exclusion do not bring the claim back into coverage, we do not reach the issue of the separate contractual exclusion in the excess policy.

E. Estoppel

Finally, Gilbert argues that if we determine no coverage exists under the policy, Gilbert is entitled to recover under an estoppel theory because Underwriters assumed control of Gilbert's defense and prejudiced Gilbert as a result. Underwriters responds that (1) Gilbert waived the issue because it did not raise it in the court of appeals, and (2) Underwriters did not assume Gilbert's defense, and Gilbert was not prejudiced by Underwriters' actions in regard to defense of the claim. We first address the procedural question.

In the court of appeals, Gilbert argued that coverage existed by virtue of waiver and estoppel. After the court of appeals released its decision, we overruled cases on which Gilbert relied and held that the doctrine of estoppel may not be used to create insurance coverage where none exists under the policy. *Ulico*, 262 S.W.3d at 780. Following our decision in *Ulico*, Gilbert reframed its argument to argue that it is entitled to damages by virtue of estoppel. Our rules provide that a case may be remanded for further proceedings in light of changes in the law. TEX. R. APP. P. 60.2(f). However, an analysis pursuant to our *Ulico* opinion is substantively the same as that undertaken by the court of appeals in addressing Gilbert's estoppel issue: a determination must be made as to whether Underwriters assumed control of Gilbert's defense and is estopped to refuse to pay damages Gilbert suffered because of Underwriters' actions. We see no need to remand the case to allow the court of appeals to consider an argument it has effectively already considered. In light of the unusual circumstances, we conclude that Gilbert is entitled to make its estoppel argument, so we will consider its merits. *See Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 (Tex. 1992).

In *Ulico*, we explained the estoppel doctrine as it relates to coverage when an insurer assumes an insured's defense:

> [I]f an insurer defends its insured when no coverage for the risk exists, the insurer's policy is not expanded to cover the risk simply because the insurer assumes control of the lawsuit defense. But, if the insurer's actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer's actions.

Ulico, 262 S.W.3d at 787.

Gilbert argues that several facts in the record demonstrate Underwriters assumed control of its defense and Gilbert was prejudiced by Underwriters' actions. Gilbert alleges that Underwriters failed to reserve its rights on the contractual liability exclusion and yet urged Gilbert's counsel in RTR's suit, James Grau, to move for summary judgment on the basis of governmental immunity even though Underwriters intended to deny coverage on the basis of the exclusion if the governmental immunity defense was successful. Gilbert contends Underwriters informed Gilbert that (1) Underwriters intended to become more actively involved in the case and independently evaluate the governmental immunity issue and (2) Underwriters did not believe the case should be mediated until the trial court ruled on the summary-judgment motions. Gilbert alleges both positions demonstrate Underwriters' control of Gilbert's defense. Grau testified that he was pressured by Underwriters' counsel to move for summary judgment on the governmental immunity issue and he believed that if he did not move forward with the motion, Underwriters would invoke the cooperation clause to deny coverage. Gilbert additionally points to Underwriters' internal communications dated more than seventeen months before it denied coverage. It says those comments imply there should be no coverage under the policy for breach of contract. Gilbert

contends it was prejudiced because Underwriters informed Gilbert that if Gilbert decided not to present the summary-judgment motion, Underwriters would deny coverage under the cooperation clause, yet secretly knew if Gilbert successfully presented the summary-judgment motion, Underwriters would deny coverage. We agree with the court of appeals that Underwriters did not assume Gilbert's defense and, even if it had, Gilbert was not prejudiced by Underwriters' actions.

First, the fact Underwriters allegedly threatened Gilbert by stating that Gilbert's failure to assert governmental immunity would be a breach of the policy's cooperation clause does not rise to the level of actually assuming control of Gilbert's defense. Although Underwriters did not have a duty to defend Gilbert under the excess policies, it had the right "to associate with the Insured or the Insured's Underlying Insurers, or both, in the defense and control of any claim, suit or proceedings relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve Underwriters in which event the Insured and Underwriters shall co-operate in all things in the defense of such claim, suit or proceeding." Thus, Underwriters had the contractual right to associate with Gilbert and Argonaut in defending RTR's claim. Underwriters also had the right to stand on the cooperation clause in its policy. Gilbert was represented by counsel independent from Underwriters and had the right to refuse to assert governmental immunity and litigate or else settle RTR's claim. Either way it could afterward seek recovery for the excess judgment or settlement from Underwriters. Underwriters' disclosure of its intent to stand on contractual rights in its policy does not equate with asserting actual control over Gilbert's defense.

Second, even though Underwriters did not expressly mention the contractual liability exclusion in its initial reservation of rights letters, it disclosed its belief that a claim for breach of

contract was potentially not covered and that a potential conflict of interest existed between it and Gilbert. Thus, Gilbert was on notice early in the case that Underwriters questioned whether a breach of contract claim was covered. There is nothing in Underwriters' internal communications that was not in substance communicated to Gilbert in the reservation of rights letters.

Third, Gilbert's defense counsel, Grau, testified that he raised the issue of governmental immunity in Gilbert's original answer to RTR's claim, and the answer was filed before Grau had contact with Underwriters or its coverage counsel. Grau asserted the defense of governmental immunity on Gilbert's behalf because he "believe[d] that it applied." Thus, Grau independently raised this issue without any prompting from Underwriters.

Further, even if Underwriters had assumed control of Gilbert's defense, Gilbert has not shown it was prejudiced by Underwriters' actions. Gilbert relies on our decision in *Employers Cas. Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973), to support its claims of prejudice. In *Tilley*, the insurer retained and assigned an attorney to defend the insured in the underlying suit. *Id.* at 554. The insurer did not reserve its rights to deny coverage for the claim or advise its insured that the insurer had a conflict of interest with the insured as to coverage. *Id.* Nor did the attorney advise the insured that he had a conflict of interest because he was simultaneously defending the insured and gathering coverage information favorable to the insurer. *Id*. The insurer later denied coverage, largely on the basis of evidence developed by the attorney while the attorney was defending the insured on the claim. *Id.* This Court held the insurer was estopped from denying coverage. *Id.* at 561.

The facts of this case are not similar to those present in *Tilley*. First, Underwriters did not have a duty to defend Gilbert and did not retain and assign Gilbert's defense attorney, and Gilbert

does not claim that its defense attorney simultaneously defended Gilbert and represented Underwriters in regard to coverage. Next, the other contractors involved in RTR's suit, as well as Gilbert, moved for summary judgment on governmental immunity grounds. An attorney for Gilbert's parent company acknowledged it likely would not have mattered whether Gilbert raised the issue of governmental immunity because the trial court ruled that governmental immunity extended to all the contractors in the case, but in any event Gilbert's attorney raised governmental immunity without consultation with Underwriters. Third, these facts do not show that Underwriters improperly coerced Gilbert into pursuing summary judgment on governmental immunity grounds. Underwriters acted within its contractual rights by associating in Gilbert's defense and alerting Gilbert to the issue Underwriters believed would be presented under the policy's cooperation clause if a legally valid defense existed but was not urged by Gilbert. Finally, unlike the insurer in *Tilley*, Underwriters provided Gilbert with reservation of rights letters putting Gilbert on notice of a potential conflict of interest between Gilbert and Underwriters.

In sum, the court of appeals did not err in determining there was not a fact issue as to Gilbert's estoppel claim.

III. CONCLUSION

We agree with the court of appeals that the trial court (1) erred in granting Gilbert's motion for summary judgment on the issue of coverage and (2) correctly granted Underwriters' motion for summary judgment on the issue of estoppel. We affirm the court of appeals' judgment.

Phil Johnson
Justice

OPINION DELIVERED: June 4, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0280

AQUAPLEX, INC. AND JAMES EDWARD JONES, JR., PETITIONERS,

v.

RANCHO LA VALENCIA, INC. AND CHARLES R. "RANDY" TURNER, RESPONDENTS

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

PER CURIAM

In this case, we decide whether the evidence presented at trial was legally sufficient to support the award of damages. The trial court believed so and entered judgment on the jury verdict, but the court of appeals reversed, holding that no evidence supported the amount of damages awarded. "[B]ecause there is no legally sufficient evidence to support the entire amount of damages, but there is some evidence of the correct measure of damages," *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 51 (Tex. 1998), we reverse the damages portion of the court of appeals' judgment and remand the case to the court of appeals.

Randy Turner established Rancho La Valencia, Inc. to acquire a piece of land called the Tumbleweed Property located in Austin. Rancho took out a $2.4 million loan from Omnibank to develop the property, with Turner as the guarantor. Problems arose during the development, so Omnibank required Rancho to bring in a new partner before it would continue financing. A Rancho

employee put Turner in touch with Eddie Jones who agreed to a joint venture. For purposes of the joint venture, Jones established Aquaplex, Inc. Rancho and Aquaplex (through their representatives Turner and Jones) then signed the Tumbleweed Investment Joint Venture Agreement (JVA), which included the following provisions:

- Contributions: Rancho would contribute the property and existing project; Aquaplex would contribute $400,000.

- Loans: Only Rancho and the property remained responsible for the existing $2.4 million OmniBank loan—Aquaplex had no liability. Aquaplex also made a $644,000 loan to the joint venture, with repayment priority second only to the OmniBank loan.

- Ownership Interest: Aquaplex–60%; Rancho–40%.

- Management: Aquaplex would be managing partner and would be paid up to a $6,000 monthly management fee. Aquaplex could make all but "major decisions" without Rancho's approval. One "major decision" was selling any of the development's properties for less than $60,000 per unit. Even in a major decision, however, a partner could not unreasonably withhold its approval.

- Cash Calls: Aquaplex, as managing partner, could issue a cash call when needed and both partners would be responsible for their pro-rata share. If a partner failed to comply with the cash call, then the other partner could either contribute the amount, loan the joint venture the amount, or could seek to dissolve the joint venture.

- Third-party Offers: On an offer of purchase by a third-party of the property, either party that dissented to the sale could make a matching offer to buy the property. If no offer was made, the sale would go through.

Disputes between Aquaplex and Rancho arose soon after the JVA was signed. Aquaplex terminated the project manager and took over the day-to-day management. Aquaplex also demolished the clubhouse, which Rancho had already completed. Aquaplex then issued a cash call

under the terms of the JVA, but Rancho refused to contribute. Rancho sued Aquaplex, alleging fraud, breach of duties under the JVA, and conversion and destruction of partnership assets. Rancho claimed that Aquaplex overstated the budgetary needs that led to the cash call and was needlessly destroying property. Aquaplex counter-claimed, alleging frivolous suit, negligent misrepresentation, fraud, breach of the JVA, and breach of warranty. Aquaplex claimed that, prior to the JVA, Rancho misrepresented the status of the project and Rancho's own financial ability to meet continuing financial obligations. In the meantime, Rancho's loan with Omnibank went into default, causing concerns about a potential foreclosure.

The parties proceeded to mediation. They entered into a Rule 11 memorandum of settlement agreement (MSA), which envisioned selling the property or ending the joint venture within six months. The terms of the MSA provided that:

- OmniBank would roll all existing interest into the note and extend it for six months.
- Rancho would deposit $100,000 into an OmniBank account to pay all interest, taxes, and expenses on the property for those six months.
- The property would be listed for six months at $5 million, but that the property could be sold at any price exceeding $4 million. Rancho retained a right of first refusal on any offer.
- Rancho could acquire Aquaplex's interest in the joint venture for $1,645,425 (the approximate amount of Aquaplex's capital contribution, loan, interest, and management fees) at any time in the next six months.
- If the property was not sold or acquired in six months, Rancho's interest passed to Aquaplex.

OmniBank also agreed under a forbearance agreement not to post the property for foreclosure and if the property was not sold, to extend the maturity of the note with interest at the then-existing federal funds rate. The MSA contemplated the later execution of a formal settlement agreement. However, Rancho never established the $100,000 account and a formal settlement agreement was never executed, causing Omnibank's forbearance agreement to lapse.

After the collapse of the settlement, the case proceeded to trial. A few days before trial, Rancho's trial counsel filed a motion to withdraw, claiming that his services were being used to perpetuate a fraud. Rancho then filed for bankruptcy, which temporarily stayed the trial court proceedings. During the bankruptcy, an individual named Jeff Greenberg offered to purchase the Tumbleweed Property (the "Greenberg Offer") for $4.05 million. Rancho refused to consent to the sale and filed a *lis pendens* on the property to prevent a sale of the property until the dispute was adjudicated. The bankruptcy court later dismissed Rancho's bankruptcy suit as a bad-faith filing. The trial then resumed. Aquaplex amended its petition to include allegations of breach and fraud related to the MSA. At the close of Rancho's case in chief, the court directed a verdict against Rancho on all of its claims, ruling that Rancho breached the MSA as a matter of law for failing to fund the $100,000 account. This left Aquaplex's claims as the subject of the remainder of the trial. In a video deposition shown at trial, Rancho's former attorney testified under the crime-fraud exception about his dealings with Turner. *See* TEX. R. EVID. 503(d)(1) ("There is no [attorney-client privilege] . . . [i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."). The former attorney testified that he discovered that Rancho did not intend to put up the

$100,000 deposit required under the MSA and that Rancho was negotiating with bankruptcy attorneys on the side during the settlement process. The jury found that Rancho had breached both the JVA and the MSA and also committed fraud in connection with both. The jury also found that Rancho had assigned its interest in the joint venture to OmniBank in an earlier document.

Aquaplex elected to recover damages for fraud under the MSA and pursued declaratory and injunctive relief for the breach of the JVA. The trial court entered judgment on the jury verdict, which awarded Aquaplex:

- actual damages for fraudulent inducement under the MSA, itemized as:
  - $597,183.70 for the loss of the Greenberg Offer;
  - $100,000 for the OmniBank deposit that Rancho failed to set up;
  - $279,000 for the loss of the forbearance agreement with OmniBank;[1]
  - $35,000 for the amount Aquaplex spent on legal representation during the bankruptcy proceedings.
- punitive damages of $1.5 million under the MSA
- declaratory relief that Rancho had no rights under the JVA because they were divested by either: (1) the MSA; (2) an assignment of the JVA to OmniBank; (3) paragraph 5.2(j) of the JVA;(4) paragraph 5.9 of the JVA
- injunctive relief that Rancho has no rights in the property and cannot interfere with the sale of the property
- $283,624 in attorney's fees
- an avoidance of the *lis pendens* on the property.

Rancho appealed. In its initial opinion, the court of appeals reversed the trial court's judgment, holding that: (1) the single injury doctrine precluded recovery under both the JVA and the

[1] The jury actually awarded $279,010 for the loss of the forbearance agreement, but based on the judgment's actual damages award of $1,011,183.70, it appears the trial court rounded this number down to $279,000.

MSA;[2] (2) there was no evidence that fraud relating to the MSA caused damages to Aquaplex; and (3) Aquaplex was barred from punitive damages because it did not prove actual damages. 253 S.W.3d 728, 732–36 (Tex. App.—Amarillo 2007). On rehearing, the court of appeals acknowledged that its initial opinion failed to address the declaratory and injunctive relief awarded for Rancho's breach of the JVA. ___ S.W.3d ___, ___. The court held that there was no evidence supporting this relief and rendered judgment that Aquaplex take nothing. *Id*. at ___.

The trial court's judgment declared that Rancho no longer had any interest in the joint venture because the interest was divested by one or more of: (1) the MSA; (2) an assignment of Rancho's interest in the joint venture to OmniBank; (3) paragraph 5.2(j) of the JVA;[3] or (4) paragraph 5.9 of the JVA.[4] We agree with the court of appeals that none of these is a proper basis for this relief. First, Aquaplex's counter-claim for declaratory and injunctive relief was premised on breach of the JVA, not the MSA. Second, the unambiguous language of the "assignment" makes clear it was a security interest. It states that Rancho "assigns, transfers and conveys unto OMNIBANK . . . all of Assignor's right, title and interest in and to Assignor's 40% ownership in [the joint venture] . . . including, but not limited to all rights to cash and other distributions from the Venture." It states that "[t]his assignment is given in consideration of and as security for the

[2] We do not reach the single injury issue or consider whether Aquaplex suffered more than one injury. An application of the single injury rule does not arise unless there is more than one recovery for a single injury. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 303 (Tex. 2006). Under our holding, Aquaplex has only one recovery.

[3] This provision in the JVA listed Aquaplex's authority as "managing venturer." It provided that Aquaplex is authorized to "[sell] all or a portion of the Land or the Project for $60,000.00 per condominium unit or more."

[4] This provision in the JVA discussed third-party offers. It provided that if an offer was made, a dissenting partner may buy out the other partner for the amount that partner would have made if the sale went through and the joint venture was immediately liquidated. Otherwise, the third-party offer shall be accepted.

payment of all the indebtedness . . . owing by Assignor . . . to Lender." It further provides that "[s]o long as there shall exist no default . . . Assignor shall have the right to collect . . . property and other distribution rights . . . pursuant to the terms of the [JVA]." In addition, OmniBank would not be obligated to perform any duties or be obligated for any liabilities under the JVA and, upon default, OmniBank could notify the joint venture that all further distributions under the JVA shall be made to OmniBank. Lastly, it provided that, upon payment in full, the assignment was void. An "assignment" such as this, where the creditor does not assume any obligations and the effectiveness of the instrument is terminated on final payment, is a security interest. *See Amco Trust, Inc. v. Naylor*, 317 S.W.2d 47, 51 (Tex. 1958). Nevertheless, we agree with the court of appeals that nothing in the record indicates OmniBank ever elected to exercise any rights it had under the "assignment" upon Rancho's default. Finally, relief cannot be premised on Paragraphs 5.2(j) and 5.9 of the JVA. Under 5.2(j), Aquaplex, as managing venturer, had a right to sell the property as long as the amount of the sale equaled $60,000 or more per condo. The Greenberg sale would have fit that description. Under 5.9, Rancho could have offered to buy out Aquaplex, but did not. There is some evidence that Rancho's actions prevented the Greenberg sale. But none of the contractual provisions cited by Aquaplex in the JVA or MSA explicitly supports a forfeiture of interest in the event of a breach. Forfeitures are not favored in Texas, and contracts are construed to avoid them. *See Sirtex Oil Indus., Inc. v. Erigan*, 403 S.W.2d 784, 787 (Tex. 1966). Generally, the proper remedy for breach is damages. *See Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991).

As held by the court of appeals, the injunctive relief can no longer stand because there was no evidence to support the trial court's declaratory relief under the JVA. Thus, the denial of

injunctive relief is proper as there was no threat of imminent harm. *See Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 285 (Tex. 2004).

While we agree with the court of appeals with regard to relief under the JVA, we do not agree with regard to the fraud claim under the MSA. The elements of fraud are:

> (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

In re FirstMerit Bank, N.A., 52 S.W.3d 749, 758 (Tex. 2001) (citing *Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998)). The court of appeals focused on the injury (or damages) element, holding that no evidence supported the damages awarded by the trial court. But first we consider whether, as Rancho argues, the intent element is not supported by legally sufficient evidence.[5] In reviewing a verdict for legal sufficiency, we "must view the evidence in the light favorable to the verdict, 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, 807 (Tex. 2005).

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[5] Rancho did not raise this alternative ground for affirmance as a cross-point in its response to the petition for review. It raised it for the first time in its brief on the merits. Aquaplex argues Rancho has waived this point. *See* TEX. R. APP. P. 53.3(c)(2) (providing that the issues presented section in the response to the petition for review must include any "independent grounds for affirmance of the court of appeals' judgment"). Rancho's "Issues Presented" section did not assert that the court of appeals could have found no evidence supporting the intent element. But Rule 53.4 of the Rules of Appellate Procedure provides: "[T]o request that the Supreme Court consider [points briefed in the court of appeals but not decided by that court], a party may raise those issues or points in the petition, the response, the reply, any brief, or a motion for rehearing." TEX. R. APP. P. 53.4. The court of appeals did not consider the intent element, but Rancho raised that issue before the court of appeals and its brief on the merits before this Court. Therefore, the point is not waived.

"A promise of future performance constitutes an actionable misrepresentation if the promise was made with no intention of performing at the time it was made." *Formosa Plastics*, 960 S.W.2d at 48. "Proving that a party had no intention of performing at the time a contract was made is not easy, as intent to defraud is not usually susceptible to direct proof." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006) (citing *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986)). While breach of the contract alone is not evidence that a party did not intend to perform, "breach combined with 'slight circumstantial evidence' of fraud" is some evidence of fraudulent intent, enough to support a verdict. *Id*. "[A] party's intent is determined at the time the party made the representation, [but] it may be inferred from the party's subsequent acts after the representation is made." *Spoljaric*, 708 S.W.2d at 434 (citing *Chicago, T. & M.C. Ry. Co. v. Titterington*, 19 S.W. 472, 474 (1892)).

Here, Rancho's attorney withdrew and then testified that he believed his client was perpetrating a fraud. The timing of the bankruptcy, filed just after the execution of the MSA, constitutes further circumstantial evidence of Rancho's lack of intent to perform. These examples satisfy the "slight circumstantial evidence" standard enunciated in *Tony Gullo Motors I* and *Spoljaric*, and when combined with Rancho's breach, establish the fraudulent intent requirement. *See, e.g.*, *Tony Gullo Motors I*, 212 S.W.3d at 305–06 (breach plus spoliation of evidence and forged signatures met standard); *Spoljaric*, 708 S.W.2d at 435–36 (breach plus evidence that employer refused to commit bonus plan to writing and remained silent when asked if plan would be approved after it had already been approved met standard). Contrary to the court of appeals' conclusion, there is legally sufficient evidence to support a finding of fraudulent intent.

The court of appeals held that no evidence supported the award of damages. 253 S.W.3d at 736. We disagree. "Texas recognizes two measures of direct damages for common-law fraud: the out-of-pocket measure and the benefit-of-the-bargain measure. The out-of-pocket measure computes the difference between the value paid and the value received, while the benefit-of-the-bargain measure computes the difference between the value as represented and the value received." *Formosa Plastics*, 960 S.W.2d at 49 (citations omitted); *see also Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007) (per curiam) (observing that out-of-pocket damages "derive from a restitutionary theory," while benefit-of-the-bargain damages "derive from an expectancy theory").

The trial court entered judgment on the jury verdict, which awarded the following monetary damages: (1) $35,000 in attorney's fees and expenses incurred by Aquaplex as a result of Rancho's bankruptcy proceedings; (2) $597,183.70 as the amount Aquaplex lost due to Rancho's failure to permit a sale of the property after the execution of the MSA; (3) $100,000 as the amount Rancho was obligated to provide under the MSA; and (4) $279,000 as the amount that Aquaplex lost due to the loss of the OmniBank forbearance agreement. Under the benefit-of-the-bargain measure, Aquaplex suffered some damages under each of these categories.

Rancho argues that there is no evidence supporting a causal relationship between the alleged fraud and the $35,000 attorney's fees awarded in relation to the bankruptcy filing. But the bankruptcy delay was in direct contradiction to the purpose of the MSA—to end the litigation. The attorney's testimony that Rancho was consulting with bankruptcy counsel and that it did not intend to fund the $100,000 as it agreed in the MSA, along with the evidence of the bad faith bankruptcy filing is legally sufficient evidence to support these damages.

Some evidence also supports Aquaplex's claim that it lost the benefit of the sale of the property due to Rancho's fraud. "Under the benefit-of-the bargain measure, lost profits on the bargain may be recovered if such damages are proved with reasonable certainty." *Formosa Plastics*, 960 S.W.2d at 50. But the damages cannot be based upon an "entirely hypothetical, speculative bargain that was never struck and would not have been consummated." *Id*. "[D]etermining whether lost profits have been proved with reasonable certainty is a fact-intensive determination dependent upon the circumstances of a particular case," but "[w]hen a review of the surrounding circumstances establishes that the profits are not reasonably certain, there is no evidence to support the lost profits award." *Id*. at 50 n.3. Here, there is some evidence that Aquaplex lost profits due to the fraud—specifically the loss of a sale to Greenberg. Greenberg offered $4.05 million for the property, which under the terms of the MSA, satisfied the minimum offer amount of $4 million. Rancho refused to consent to the sale and filed a *lis pendens*, effectively blocking the sale. The court of appeals held, and Rancho argues, that there is no evidence as to why the Greenberg Offer failed, and it is thus speculative to claim the alleged fraud caused its failure. But both parties testified that they knew of the Greenberg Offer, and Rancho testified that it filed the *lis pendens* to prevent the sale. This is sufficient evidence that the sale fell through due to Rancho's actions. Therefore, damages were proper.

The damages were calculated incorrectly, however. The jury and trial court awarded $597,183.70 for the loss of the sale. It appears from the record that this figure was reached by subtracting Aquaplex's original investment of $1,044,000 ($400,000 in contribution and $644,000 loan) from $1,641,183.70, which is the amount Aquaplex argued it was due (including interest)

under the JVA had the property been sold to Greenberg. But this figure does not take into account that Aquaplex still received an interest in the property by way of its interest in the joint venture, which survived the failed sale under the Greenberg Offer. The damages figure must reflect this offset. *See Formosa Plastics*, 960 S.W.2d at 49–50. Therefore, the trial court's award was not proper and must be recalculated.

The trial court also awarded $100,000 for the OmniBank account Rancho failed to fund. The court of appeals held that there was no evidence that the money was to be paid to Aquaplex or that Aquaplex had to make the payments in lieu of Rancho. 253 S.W.3d at 736. Aquaplex argues that the $100,000 was a benefit-of-the-bargain, and that it was damaged by Rancho's failure to fund the $100,000 because the property remained encumbered with this amount. The court of appeals is partially correct: Rancho's failure to fund the $100,000 damaged the joint venture because its asset is encumbered by additional interest. Because of its ownership interest in the joint venture, Aquaplex was injured and may recover to the extent of that injury. This amount, though, would not necessarily be $100,000, and must be recalculated.

The court of appeals also held that the evidence did not support $279,000 in damages for the loss of the forbearance agreement because Aquaplex put on evidence of damages over a two-year period when the agreement at issue was only a one-year period. 253 S.W.3d at 735. The court of appeals is correct here. Aquaplex outlined the value of a two-year forbearance agreement in a chart at trial, but the agreement introduced into evidence was only for one year. Thus, while there may have been damages, it was only for one year and Aquaplex failed to put on any evidence of the appropriate amount of damages for a one-year period.

We hold that some evidence supported an award of damages for fraud under the MSA, just not at the level awarded by the trial court. This Court may not order a remittitur, but the courts of appeals may. TEX. R. APP. P. 46.3; *Tony Gullo Motors I*, 212 S.W.3d at 310. Therefore, we affirm the portion of the court of appeals' judgment rejecting Aquaplex's declaratory and injunctive relief, and reverse the portion of the court of appeals' judgment related to the monetary damages. We remand the case to the court of appeals so that it may determine whether to remand for a new trial on damages, *see Formosa Plastics*, 960 S.W.2d at 51, or whether to suggest a remittitur, *see* TEX. R. APP. P. 46.3; *Tony Gullo Motors I*, 212 S.W.3d at 310. Furthermore, because we hold that actual damages were proper, the court of appeals must reconsider whether punitive damages are appropriate. *See Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 665 (Tex. 1995) ("[A]ctual damages sustained from a tort must be proven before punitive damages are available."). The court of appeals must also consider the factual sufficiency issues raised by Rancho, but not yet addressed by the court of appeals. *See* TEX. R. APP. P. 53.4.

OPINION DELIVERED: October 30, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0316

METHODIST HEALTHCARE SYSTEM OF SAN ANTONIO, LTD., L.L.P., W.C. SCHORLEMER, M.D., AND ROBERT SCHORLEMER, M.D., PETITIONERS,

v.

EMMALENE RANKIN, RESPONDENT

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

Argued September 9, 2009

JUSTICE WILLETT delivered the opinion of the Court.

This case pits the ten-year statute of repose for healthcare-liability claims[1] against the Texas Constitution's Open Courts provision.[2] We examine for the first time whether the latter saves a malpractice claim if the former has expired. The answer is no.

The Open Courts provision does not confer an open-ended and perpetual right to sue; it "merely gives litigants a reasonable time to discover their injuries and file suit."[3] The Legislature may

[1] TEX. CIV. PRAC. & REM. CODE § 74.251(b).

[2] TEX. CONST. art. I, § 13.

[3] *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 784 (Tex. 2007).

set an absolute cut-off point for healthcare suits, as it has for other suits,[4] so long as the repose period is a reasonable exercise of the Legislature's police power to act in the interest of the general welfare. The ten-year statute of repose at issue adopts a constitutionally permissible policymaking judgment of the Legislature. Accordingly, we reverse the judgment of the court of appeals and render judgment for the petitioners.

I. Background

After experiencing abdominal pain, Emmalene Rankin consulted a physician in July 2006 and learned that a surgical sponge had been left inside her during a November 1995 hysterectomy. Rankin sued the hospital where the operation was performed, Southwest Texas Methodist Hospital, and two physicians, Robert and Wendell Schorlemer.

Rankin filed her suit, however, in October 2006, almost eleven years after the alleged negligence. The defendants moved for summary judgment, arguing that Rankin's claim was barred by section 74.251(b) of the Civil Practice and Remedies Code, the ten-year statute of repose for healthcare-liability claims. Rankin submitted evidence that she did not know of the sponge and could not have discovered it in the exercise of reasonable care prior to expiration of the ten-year repose period.

Section 74.251(b) provides:

> A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a

[4] *See* TEX. CIV. PRAC. & REM. CODE §§ 16.008 (repose for actions against architects, engineers, interior designers, and landscape architects), 16.009 (repose for actions against a person who constructs or repairs an improvement to real property), and 16.011 (repose for actions against a registered public surveyor or a licensed state land surveyor).

> statute of repose so that all claims must be brought within 10 years or they are time barred.[5]

The trial court granted summary judgment, but the court of appeals reversed, holding the statute unconstitutional under the Open Courts provision.[6] This appeal followed.

II. Analysis

When reviewing the constitutionality of a statute, we presume "that the Legislature has not acted unreasonably or arbitrarily; and a mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable."[7] "The burden is on him who attacks a law for unconstitutionality and courts need not exert their ingenuity to find reasons for holding the law invalid."[8]

Under the Open Courts provision, "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[9] In *Lebohm v. City of Galveston*,[10] the Court undertook its first in-depth analysis of the Open Courts provision. Justice Calvert, writing for a unanimous Court, formulated the test that we follow today:

> [L]egislative action withdrawing common-law remedies for well established common-law causes of action for injuries to one's "lands, goods, person or reputation" is sustained only when it is reasonable in substituting other remedies, or when it is a

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[5] TEX. CIV. PRAC. & REM. CODE § 74.251(b).

[6] 261 S.W.3d 93, 103.

[7] *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968).

[8] *Tex. Nat'l Guard Armory Bd. v. McCraw*, 126 S.W.2d 627, 634 (Tex. 1939).

[9] TEX. CONST. art. I, § 13.

[10] 275 S.W.2d 951 (Tex. 1955).

> reasonable exercise of the police power in the interest of the general welfare. Legislative action of this type is not sustained when it is arbitrary or unreasonable.[11]

We have quoted this language with approval in later decisions.[12]

The statute at issue is a statute of repose, not a statute of limitations, and our analysis must appreciate that the two are not synonymous. We recently recognized that "there are significant differences between the two."[13] The Legislature stated explicitly that section 74.251(b) "is intended as a statute of repose" applicable to "all claims."

The term "statute of repose" may not submit to a simple, universal definition. Generally, a statute of repose specifies a longer period than that found in the statute of limitations applicable to the same cause of action.[14] Statutes of repose begin to run on a readily ascertainable date, and unlike statutes of limitations, a statute of repose is not subject to judicially crafted rules of tolling or deferral.[15]

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[11] *Id.* at 955 (on rehearing).

[12] *Trinity River Auth. v. URS Consultants,* Inc.-*Tex.*, 889 S.W.2d 259, 262 (Tex. 1994)*; Sax v. Votteler*, 648 S.W.2d 661, 665 (Tex. 1983); *Waites v. Sondock*, 561 S.W.2d 772, 774 (Tex. 1977).

[13] *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 866 (Tex. 2009).

[14] *See* TEX. CIV. PRAC. & REM. CODE §§ 16.008 (ten-year repose statute for actions against architects, engineers, interior designers, and landscape architects), 16.009 (ten-year repose statue for actions against a person who constructs or repairs an improvement to real property), and 16.011 (ten-year repose statute for actions against a registered public surveyor or a licensed state land surveyor).

[15] *E.g.*, TEX. CIV. PRAC. & REM. CODE § 16.011(a)(ten-year repose statute for actions against a registered public surveyor or a licensed state land surveyor begins to run on "the date the survey is completed" for surveys completed on or after September 1, 1989); *see also* 51 AM. JUR. 2D *Limitation of Actions* § 12 (2000) ("[A] statute of repose extinguishes a cause of action after a fixed period of time (usually measured from the delivery of the product, the completion of the work, or some other action of the defendant), regardless of when the cause of action accrued."); *Trinity River Auth.*, 889 S.W.2d at 261 ("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.").

Indeed, the key purpose of a repose statute is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions,[16] except perhaps those clear exceptions in the statute itself.[17] Without a statute of repose, professionals, contractors, and other actors would face never-ending uncertainty as to liability for their work. Insurance coverage and retirement planning would always remain problematic, as would the unending anxiety facing potential defendants.[18] In recognizing the absolute nature of a statute of repose, we have explained that "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."[19] The Legislature could reasonably conclude that the general welfare of society, and various trades and professions that serve society, are best served with statutes of repose that do not submit to exceptions even if a small number of claims[20] are barred through no fault of the plaintiff, since "the purpose of a statute of repose is to provide 'absolute protection to certain parties

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[16] *See* 51 AM. JUR. 2D *Limitation of Actions* §§ 12, 18 (2000) (explaining that unlike statutes of limitations, repose statutes "reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct").

[17] *E.g.*, TEX. CIV. PRAC. & REM. CODE § 16.011(b) (providing that if the claimant presents a written claim during the 10-year repose period, the period is extended for two years from the date the claim is presented).

[18] *See Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987) ("In contrast to statutes of limitation, statutes of repose serve primarily to relieve potential defendants from anxiety over liability for acts committed long ago.").

[19] *Galbraith Eng'g*, 290 S.W.3d at 866.

[20] Rankin offered no evidence that a significant number of claims are barred by the operation of the repose statute in issue. One study has determined that ninety-nine percent of claims brought against OB-GYNs are reported within nine years. Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH. L. REV. 169, 188 (2005). In upholding a ten-year statute of repose applicable to architects and engineers as striking "a fair balance between the legislative purpose of protecting against stale claims and the rights of litigants to obtain redress for injuries," we cited a study finding that 99.6 percent of claims against architects were brought within ten years. *Trinity River Auth. v. URS Consultants, Inc.-Tex.*, 889 S.W.2d 259, 264 & n.6 (Tex. 1994).

from the burden of indefinite potential liability.'"[21] The whole point of layering a statute of repose over the statute of limitations is to "fix an outer limit beyond which no action can be maintained."[22] One practical upside of curbing open-ended exposure is to prevent defendants from answering claims where evidence may prove elusive due to unavailable witnesses (perhaps deceased), faded memories, lost or destroyed records, and institutions that no longer exist.

Rankin argues that the statute is unreasonable, and thus unconstitutional, because it cut off her right to sue before she had an opportunity to discover her injury. But Open Courts analysis is not quite this myopic; focusing solely on Rankin's lost right to sue ignores the broader societal concerns that spurred the Legislature to act.

Section 74.251(b) was enacted in 2003 as part of House Bill 4, a top-to-bottom overhaul of Texas malpractice law to "make affordable medical and health care more accessible and available to the citizens of Texas,"[23] and to "do so in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis."[24] The omnibus bill makes explicit findings describing the Legislature's concern that a spike in healthcare-liability claims had fueled an insurance crisis that was harming healthcare delivery in Texas.[25] The Legislature specifically found that the crisis had

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[21] *Galbraith Eng'g*, 290 S.W.3d at 866 (quoting *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003)).

[22] *Holubec*, 111 S.W.3d at 37.

[23] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(5), 2003 Tex. Gen. Laws 847, 884–85.

[24] *Id*. § 10.11(b)(3).

[25] *Id.* § 10.11(a).

often made insurance unavailable at any price.[26] The Legislature made these findings after conducting hearings and amassing evidence of the problems facing healthcare providers as a result of enduring liability claims for indeterminate periods of time. We have recognized "that the length of time that insureds are exposed to potential liability has a bearing on the rates that insurers must charge."[27]

In enacting the repose piece of House Bill 4, lawmakers made a fundamental policy choice: the collective benefits of a definitive cut-off are more important than a particular plaintiff's right to sue more than a decade after the alleged malpractice. A few plaintiffs such as Rankin will encounter the Legislature's statutory roadblock, unable to bring claims through no fault of their own, but some defendants would likewise suffer unfortunate consequences were potential liability left indeterminate. The constitutional inquiry is whether the Legislature acted unreasonably or arbitrarily. We cannot brand as arbitrary lawmakers' policy rationales for granting healthcare providers a substantive right to be free from liability after ten years, even if a plaintiff could have discovered her injury no sooner.

Surveying legislation around the nation, repose statutes for medical-negligence cases are commonplace. Many jurisdictions have enacted such statutes for malpractice claims,[28] and Texas' ten-year period is the longest of them all. Fourteen of these repose statutes are expressly inapplicable

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[26] *Id.* § 10.11(a)(10).

[27] *Sax v. Votteler*, 648 S.W.2d 661, 667 (Tex. 1983).

[28] *See infra* notes 29–30.

to foreign-object claims[29] — not true of section 74.251(b) — and of twenty other statutes that apply equally to "sponge cases," no statute gives plaintiffs more time to sue than the Texas statute.[30]

Other jurisdictions have rejected constitutional challenges to repose statutes in medical-malpractice cases premised on open courts provisions or similar provisions guaranteeing the right to a remedy,[31] with two inapposite exceptions.[32] And most of the failed challenges were to statutes with

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[29] CAL. CIV. PROC. CODE § 340.5 (West 2010); COLO. REV. STAT. § 13-80-102.5(3)(b) (2009); GA. CODE ANN. § 9-3-72 (2009); IOWA CODE ANN. § 614.1(9)(a) (West 2010); MASS. GEN. LAWS ANN. ch. 260, § 4 (West 2010); MISS. CODE ANN. § 15-1-36(2)(a) (2009); OHIO REV. CODE ANN. § 2305.113(D)(2) (LexisNexis 2010); 40 PA. CONS. STAT. ANN. § 1303.513(b) (West 2009); S.C. CODE ANN. § 15-3-545(B) (2009); TENN. CODE ANN. § 29-26-116(a)(4) (2009); UTAH CODE ANN. § 78B-3-404(2)(a) (2009); VT. STAT. ANN. tit. 12, § 521 (2009); WASH. REV. CODE ANN. § 4.16.350 (West 2010); WIS. STAT. ANN. § 893.55(1m)(3) (West 2009).

[30] Three states and one territory have a three-year statute of repose. CONN. GEN. STAT. ANN. § 52-584 (West 2005); LA. REV. STAT. ANN. § 9:5628(a) (2010); NEV. REV. STAT. ANN. § 41A.097(2) (LexisNexis 2009); GUAM CODE ANN. tit. 7, § 11308 (2009). Four states have a four-year statute of repose. ALA. CODE § 6-5-482 (2009); FLA. STAT. ANN. § 95.11(4)(b) (West 2009); 735 ILL. COMP. STAT. ANN. 5/13-212(a) (West 2010); KAN. STAT. ANN. § 60-513(c) (2010). Four states have a five-year statute of repose. KY. REV. STAT. ANN. § 413.140(2) (LexisNexis 2010); MD. CODE ANN., CTS. & JUD. PROC. § 5-109(a)(1) (LexisNexis 2010); MONT. CODE ANN. § 27-2-205(1) (2009); OR. REV. STAT. § 12.110(4) (2007). Three states have a six-year statute of repose. HAW REV. STAT. ANN. § 657-7.3 (LexisNexis 2009); MICH. COMP. LAWS ANN. § 600.5838a(2) (West 2000); N.D. CENT. CODE § 28-01-18(3) (2009). Five states other than Texas have a ten-year statute of repose. MO. ANN. STAT. § 516.105(3) (West 2009); N.C. GEN. STAT. § 1-15(c) (2009); NEB. REV. STAT. ANN. § 44-2828 (LexisNexis 2009); VA. CODE ANN. § 8.01-243(C) (2009); W. VA. CODE ANN. § 55-7B-4(a) (LexisNexis 2009).

[31] *See Aicher v. Wis. Patients Comp. Fund*, 613 N.W.2d 849 (Wis. 2000); *Schendt v. Dewey*, 520 N.W.2d 541, 547 (Neb. 1994); *Choroszy v. Tso*, 647 A.2d 803 (Me. 1994); *Kush v. Lloyd*, 616 So.2d 415, 419-22 (Fla. 1992); *Hawley v. Green*, 788 P.2d 1321, 1323-24 (Idaho 1990); *Mega v. Holy Cross Hosp.*, 490 N.E.2d 665, 668-71 (Ill. 1986); *Barlow v. Humana, Inc.*, 495 So.2d 1048 (Ala. 1986); *Crier v. Whitecloud*, 496 So.2d 305, 309-10 (La. 1986); *Hill v. Fitzgerald*, 501 A.2d 27, 33-35 (Md. 1985); *Dunn v. St. Francis Hosp., Inc.*, 401 A.2d 77, 80-81 (Del. 1979); *Harrison v. Schrader*, 569 S.W.2d 822, 827-28 (Tenn. 1978); *Barke v. Maeyens*, 31 P.3d 1133, 1136-39 (Or. Ct. App. 2001); *Golden v. Johnson Mem'l Hosp., Inc.*, 785 A.2d 234, 243-46 (Conn. App. Ct. 2001); *Plummer v. Gillieson*, 692 N.E.2d 528, 532 (Mass. App. Ct. 1998). *See also* Robin D. Miller, Annotation, *Validity of Medical Malpractice Statutes of Repose*, 5 A.L.R. 6th 133, 161-63 (2005).

We note that in some states, the statute of repose provides minors a longer period to bring claims; they may sometimes bring claims even after the period of repose has elapsed. *See, e.g.*, HAW REV. STAT. ANN. § 657-7.3 (LexisNexis 2009) (providing that minors may bring claims up until six years after their tenth birthday, regardless of the normal six-year repose period).

[32] *McCollum v. Sisters of Charity of Nazareth Health Corp.*, 799 S.W.2d 15, 18–19 (Ky. 1990) (examining only whether a common-law right of action existed prior to the passage of adoption of the Kentucky Constitution, but not examining whether the statute was reasonable, as Texas does); *Hardy v. VerMeulen*, 512 N.E.2d 626, 627–28 (Ohio

much shorter repose periods than in Texas.[33] Rankin acknowledges there is no statutory exception in section 74.251(b) for foreign-object cases, but argues "the Legislature appropriately deferred to this Court to make an exception under the open courts provision on a case-by-case basis." The Texas Legislature, unlike legislatures in other states,[34] has not enacted an exception to its repose statute for foreign-body cases, nor is there any indication that it intended to give this Court authority to adopt such an exception on a case-by-case basis. On the contrary, the Legislature expressly characterized the ten-year statute as a statute of repose, and as explained above a statute of repose by its nature and purpose admits to no implied exceptions. This construction is particularly prudent given that the Texas repose statute for defective-product cases explicitly makes an exception for latent diseases that may stay hidden until after the repose period expires.[35] By contrast, lawmakers made clear in section 74.251(b) that the ten-year period for medical-negligence claims applies to "all claims."[36]

1987) (examining solely whether the plaintiff had a remedy at the time he discovered his injury without an inquiry into the reasonableness of the statute).

[33] *See, e.g.*, *Aicher v. Wis. Patients Comp. Fund*, 613 N.W.2d 849 (Wis. 2000) (five-year statute); *Schendt v. Dewey*, 520 N.W.2d 541, 547 (Neb. 1994) (ten-year statute); *Choroszy v. Tso*, 647 A.2d 803 (Me. 1994) (three-year statute); *Kush v. Lloyd*, 616 So.2d 415, 419-22 (Fla. 1992) (four-year statute); *Hawley v. Green*, 788 P.2d 1321, 1323-24 (Idaho 1990) (two-year statute); *Mega v. Holy Cross Hosp.*, 490 N.E.2d 665, 668-71 (Ill. 1986) (four-year statute); *Barlow v. Humana, Inc.*, 495 So.2d 1048 (Ala. 1986) (four-year statute); *Crier v. Whitecloud*, 496 So.2d 305, 309-10 (La. 1986) (three-year statute); *Hill v. Fitzgerald*, 401 A.2d 27, 33-35 (Md. 1985) (five-year statute); *Dunn v. St. Francis Hosp., Inc.*, 401 A.2d 77, 80-81 (Del. 1979) (three-year statute); *Harrison v. Schrader*, 569 S.W.2d 822, 827-28 (Tenn. 1978) (three-year statute); *Barke v. Maeyens*, 31 P.3d 1133, 1136-39 (Or. Ct. App. 2001) (five-year statute); *Golden v. Johnson Mem'l Hosp., Inc.*, 785 A.2d 234, 243-46 (Conn. App. Ct. 2001) (three-year statute); *Plummer v. Gillieson*, 692 N.E.2d 528, 532 (Mass. App. Ct. 1998) (seven-year statute).

[34] *See supra* note 29.

[35] TEX. CIV. PRAC. & REM. CODE § 16.012(d)(3).

[36] TEX. CIV. PRAC. & REM. CODE § 74.251(b) ("This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.").

And of course, there is our own precedent, which rejected an Open Courts challenge to the ten-year statute of repose covering claims against architects and engineers, an area of law where injuries may also be difficult to discover.[37] Before today's case, numerous courts of appeals' decisions have addressed the constitutionality of various Texas statutes of repose, and have upheld them every time.[38]

Section 74.251(b) is a reasonable exercise of the Legislature's police power to provide a certain cutoff to claims after an ample period of ten years, five times longer than the general limitations period for bringing a negligence action,[39] and five times longer than the general limitations period for bringing a healthcare-liability claim.[40] As one court of appeals has noted in a decision where we found no reversible error, and as is apparent, "the ten-year limit is substantially more protective of individual rights than the two-year limit" found in the corresponding statute of

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[37] *Trinity River Auth. v. URS Consultants, Inc.-Tex.*, 889 S.W.2d 259, 261–63 (Tex. 1994). However, *Trinity River Authority* held that the statute of repose did not violate the Open Courts provision because it did not abrogate a well-established common-law cause of action, an issue we do not reach. *Id.* at 262–63.

[38] *See Zaragosa v. Chemetron Invs., Inc.*, 122 S.W.3d 341 (Tex. App.—Fort Worth 2003, no pet.); *Gordon v. W. Steel Co.*, 950 S.W.2d 743 (Tex. App.—Corpus Christi 1997, writ denied); *Dallas Mkt. Ctr. Dev. Co. v. Beran & Shelmire*, 824 S.W.2d 218 (Tex. App.—Dallas 1991, writ denied); *Barnes v. J.W. Bateson Co.*, 755 S.W.2d 518 (Tex. App.—Fort Worth 1988, no writ); *Dubin v. Carrier Corp.*, 731 S.W.2d 651 (Tex. App.—Houston [1st Dist.] 1987, no writ); *Suburban Homes v. Austin-Nw. Dev. Co.*, 734 S.W.2d 89 (Tex. App.—Houston [1st Dist.] 1987, no writ); *Nelson v. Metallic-Braden Bldg. Co.*, 695 S.W.2d 213 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *Sowders v. M.W. Kellogg Co.*, 663 S.W.2d 644 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.); *Hill v. Forrest & Cotton, Inc.*, 555 S.W.2d 145 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e). In addition, the United States Court of Appeals for the Fifth Circuit has at least twice upheld other Texas statutes of repose against Open Courts challenges. *See Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 361 (5th Cir. 2005) (holding fifteen-year statute of repose for certain defective-products claims does not violate Open Courts provision); *Brown v. M.W. Kellogg Co.*, 743 F.2d 265, 268 (5th Cir.1984) (holding that the ten-year statute of repose for architects, engineers, and builders does not violate the Open Courts provision).

[39] TEX. CIV. PRAC. & REM. CODE § 16.003.

[40] *Id.* § 74.251(a).

limitations.[41] We presume that the Legislature's judgment was not an arbitrary or unreasonable exercise of its police power, and Rankin has offered no compelling argument or proof to the contrary.

The court of appeals held section 74.251(b) unconstitutional because it restricted Rankin's right to sue "before she had a reasonable opportunity to discover the wrong and bring suit,"[42] but the essential function of all statutes of repose is to abrogate the discovery rule and similar exceptions to the statute of limitations. The court of appeals saw little to distinguish statutes of limitations and statutes of repose.

A statute of repose, by design, creates a right to repose precisely where the applicable statute of limitations would be tolled or deferred. More to the point, a statute of repose serves no purpose *unless* it has this effect. To hold that a statute of repose must yield to the plaintiff's inability to discover her injury would treat a statute of repose like a statute of limitations, and would effectively repeal this and all other statutes of repose. To quote our recent discussion in *Galbraith Engineering Consultants, Inc. v. Pochucha*:

> Such a construction would defeat the recognized purpose for statutes of repose, . . . unaffected by rules of discovery or accrual. As already observed, statutes of repose create a substantive right to be free from liability after a legislatively determined period. In contrast, statutes of limitations are procedural devices operating as a defense to limit the remedy available from an existing cause of action. 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.[43]

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[41] *McCulloch*, 696 S.W.2d at 925.

[42] 261 S.W.3d at 96.

[43] 290 S.W.3d 863, 868 (Tex. 2009) (citations omitted).

Under the court of appeals' decision, all plaintiffs have a "reasonable time" to discover their injuries,[44] a holding that means never-ending exposure to liability, which in turn injects actuarial uncertainty into the insurance market. This indefiniteness wholly undermines the purpose of House Bill 4 and of statutes of repose generally: to declare a no-exceptions cut-off point and grant a substantive right to be free of liability. Repose statutes are not exempt from Open Courts challenges, but the reviewing court cannot ignore the Legislature's broader reasons for limiting a litigant's rights and its considered judgment in exercising its police power in the interest of the general welfare.

The court of appeals also relied on language from *Trinity River Authority v. URS Consultants, Inc.–Texas*,[45] where we upheld a statute of repose, but noted:

> [T]his Court's decision in [*Robinson v. Weaver*, 550 S.W.2d 18 (Tex. 1977)], illustrates the important public purpose underlying statutes of repose. We held in that case that the discovery rule does not apply to cases of medical misdiagnosis. Unlike malpractice based on leaving a foreign object in the patient's body, or negligently performing a vasectomy, there is often no physical evidence establishing a misdiagnosis, thus increasing the risk of stale or even fraudulent claims.[46]

This language does not compel us to rule that foreign-object cases cannot constitutionally be subjected to a statute of repose in light of the Open Courts provision. First, while we referred generically to "statutes of repose" in the quotation, *Robinson* did not in fact concern a statute of repose at all, but a two-year statute of limitations. Second, *Robinson* did not involve a constitutional challenge; it did not decide whether the statute of limitations in issue could survive a challenge under

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[44] 261 S.W.3d at 103.

[45] 889 S.W.2d 259 (Tex. 1994).

[46] 261 S.W.3d at 100 (emphasis omitted) (quoting *Trinity River Auth.*, 889 S.W.2d at 263–64) (citations omitted)).

the Open Courts provision or any other constitutional provision. *Robinson* held that the discovery rule applicable to sponge cases was not applicable to a medical misdiagnosis case. Third, our discussion of *Robinson* was in a section of *Trinity River Authority* discussing the constitutionality of the statute of repose under federal and state substantive due process requirements. The Court had already finished its analysis under the Open Courts provision and ultimately rejected all constitutional challenges to the statute. In short, the quotation, read in context, does not hold or fairly imply that the Court would view a ten-year statute of repose in foreign-object cases as necessarily vulnerable to an Open Courts challenge.

The Legislature could have excepted foreign-body cases from the statute of repose, as some states have done.[47] But such an exception would introduce its own form of arbitrariness, since it would apply even to those foreign-body cases, such as needle cases, where the surgeon's error is not particularly likely to go undetected for long periods. Regardless, the fact that the Legislature could have excepted foreign-body cases does not render the statute that was enacted unconstitutional. Our constitutional review asks only if the statute represents "a reasonable exercise of the police power in the interest of the general welfare,"[48] a review that focuses on whether the legislation is "arbitrary or unreasonable."[49] As detailed above, the statute survives this test.

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[47] *See supra* note 29.

[48] *Lebohm v. City of Galveston*, 275 S.W.2d 951, 955 (Tex. 1955) (on rehearing).

[49] *Id.*

III. Conclusion

We have never declared a statute of repose unconstitutional and decline to do so today. Section 74.251(b)'s grant of absolute protection against indefinite potential liability does not violate the Texas Constitution. The Open Courts provision confers a constitutional right of access but not an everlasting one. Texas' ten-year repose period will weigh heavily on a small number of plaintiffs like Rankin, who belatedly discover a *res-ipsa*-like injury. A statute of repose, by design, will always bar some otherwise-valid claims, but that result is the whole point of a statute of repose, and "is the price of repose."[50]

The Legislature considered competing public and private interests and determined that ten years, the most generous repose period in the nation, is a reasonable final deadline regardless of accrual or discovery issues. Giving wide berth to the Legislature's policy judgments, as we must, we cannot say lawmakers offended the Constitution by cutting off malpractice claims after giving claimants a decade to bring suit. We thus reverse the court of appeals' judgment and render a take-nothing judgment in favor of the petitioners.

Don R. Willett
Justice

OPINION DELIVERED: March 12, 2010

[50] *S.V. v. R.V.*, 933 S.W.2d 1, 23 (Tex. 1996).

IN THE SUPREME COURT OF TEXAS

NO. 08-0345

INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE AND MIGUEL MARTINEZ, PETITIONERS

v.

ARTHUR POWELL, RESPONDENT

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

PER CURIAM

JUSTICE LEHRMANN did not participate in the decision.

Arthur Powell sued the Institutional Division of the Texas Department of Criminal Justice (the Department) and one of its officers, complaining that they deprived him of certain constitutional rights. The trial court dismissed Powell's claims, and a divided court of appeals reversed. 251 S.W.3d 783, 792. Because Powell has failed to state a claim, we reverse the court of appeals' judgment and render judgment dismissing the case.

This case arises out of a disciplinary proceeding brought against Powell, an inmate at the Department's McConnell Unit in Beeville, Texas. Officer Miguel L. Martinez, a guard at the prison, instructed Powell to walk along the right side of a yellow line in an orderly manner. Powell alleges that he did so, but thirty minutes later, he was approached in his cell and handcuffed by another

officer for failing to follow the instruction. Powell was charged with "creating a disturbance"—an institutional disciplinary infraction—allegedly in retaliation for complaints his family had made about his mistreatment at the facility.

The Department held a disciplinary proceeding and determined that the disturbance charge was supported by evidence. Following the hearing, Powell filed step one and step two grievances pursuant to Department rules for appealing these decisions. He argued that the hearing officer's refusal to allow him to call certain witnesses (including Officer Hagar, the officer who Powell alleged handcuffed him) denied him due process. The Department determined that the hearing officer's denial was proper, as Hagar had not been present at the time of the incident. The Department also concluded that the hearing officer's findings were supported by a preponderance of the evidence.

Powell then sued the Department, Officer Martinez, and Officer Gilbert Herrera. As to the Department, Powell argued that the administrative decision was not based on sufficient evidence and that his due process rights were violated by the hearing officer's refusal to allow him to call Hagar as a witness. As to Martinez, Powell argued that the infraction was brought against him in retaliation for his family's complaints about his alleged mistreatment at the facility. He did not allege any facts against Herrera (who was later dismissed from the suit).

The Department, Martinez, and Herrera denied the allegations and sought attorney's fees and costs. The two officers specially excepted to Powell's pleadings, and the Department filed a plea to the jurisdiction. After a hearing, the trial court rejected Powell's claims, granted the officers' special exceptions and the Department's plea to the jurisdiction, and dismissed the suit. Powell

made three arguments on appeal: (1) because his claim against the Department was for declaratory relief, it did not implicate sovereign immunity; (2) the Department waived sovereign immunity by seeking affirmative relief in the form of attorney's fees and costs; and (3) the trial court erred in sustaining Martinez's special exceptions. 251 S.W.3d at 787. A divided court of appeals agreed and reversed the trial court's judgment. *Id.* at 792.

As for his claims against the Department, Powell has abandoned his sufficiency of the evidence complaint here, and asserts instead that he seeks only a declaration of his constitutional rights. But Powell has also dropped his constitutional complaint that his inability to present testimony from certain witnesses violated his right to due process. Although he argued in the court of appeals that his witness exclusion claim was not subject to immunity, he no longer makes such a claim.[1] Instead, he now asserts that his constitutional claim against the Department is based on retaliation for his family members' complaints about Powell's alleged mistreatment.

In the trial court, however, the only constitutional claim he made against the Department related to his inability to present witnesses on his behalf, and the only relief sought was that the decision be vacated and remanded. The trial court gave Powell the opportunity to replead, but he chose not to do so. Nor would repleading remedy the problem. Although plaintiffs should be given an opportunity to replead "[i]f the pleadings are insufficient to establish jurisdiction but do not affirmatively demonstrate an incurable defect," *Westbrook v. Penley*, 231 S.W.3d 389, 395 (Tex.

[1] The court of appeals held that Powell had not challenged the trial court's granting of Martinez's special exceptions relating to Powell's allegation that he was not allowed to present Hagar as a witness and "affirm[ed] the trial court's dismissal of Powell's claim against Martinez relating to the failure to allow testimony at the hearing." 251 S.W.3d 783, 789 n.2.

2007), even if Powell repleaded his constitutional claim as a retaliation claim under 42 U.S.C. § 1983, that claim would fail for the reasons explained below. Because Powell has abandoned his sufficiency of the evidence and witness exclusion arguments on appeal, because his petition stated no other constitutional claims against the Department, and because Powell cannot recast his claim as a retaliation claim, the trial court correctly granted the Department's plea to the jurisdiction.

As to Officer Martinez, Powell alleged that Martinez retaliated against Powell based on his family members' complaints about Powell's treatment by prison officials. Powell sought a declaration and damages from Martinez under 42 U.S.C. § 1983. Even assuming that Powell may assert a § 1983 claim based on deprivation of his family members' constitutional rights—a point the Department contests—we hold that Powell has failed to state a valid claim against Martinez.

Prisoners have a First Amendment right to be free from retaliation for complaining about a prison official's misconduct, and a violation of this right is actionable under 42 U.S.C. § 1983. *Woods v. Smith*, 60 F.3d 1161, 1164 (5th Cir. 1995). "'To prevail on a claim of retaliation, a prisoner must establish (1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation.'" *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006) (quoting *McDonald v. Steward*, 132 F.3d 225, 231 (5th Cir. 1998)), *cert. denied*, 549 U.S. 1038 (2006).

Under the third prong of this test, acts of retaliation that are *de minimis* do not satisfy the "retaliatory adverse act" requirement. *Id*. at 684-85. "To establish a constitutional violation, an inmate must show that he suffered a qualifying adverse retaliatory act," and "[i]f the retaliation alleged . . . does not pass this bar, he has suffered no constitutional injury." *Id*. at 684.

In making this determination, the Fifth Circuit has adopted the standard first set forth in *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996): an inmate's retaliation claim must allege adverse acts "that 'would chill or silence a person of ordinary firmness from future First Amendment activities.'" *See Morris*, 449 F.3d at 685-86 (quoting *Britton*, 93 F.3d at 826); *see also Thaddeus-X v. Blatter*, 175 F.3d 378, 397 (6th Cir. 1999) (adopting the same standard). Thus, an inmate's job transfer from the commissary to the kitchen was *de minimis*, while his transfer to a more dangerous prison was not. *Morris*, 449 F.3d at 687; *see also Bibbs v. Early*, 541 F.3d 267, 271-72 (5th Cir. 2008) (subjecting inmate to below-freezing temperatures for more than four hours during each of four consecutive nights was more than *de minimis*); *Leggett v. Comer*, 280 Fed. Appx. 333, 336 (5th Cir. 2008) (purported confiscation of more than $11,000 of inmate's personal property was not *de minimis*).

We agree that this is the appropriate standard for judging whether an inmate's retaliation claim is *de minimis*. Here, Powell has not shown that Martinez's actions "would chill or silence a person of ordinary firmness from future First Amendment activities." *Morris*, 449 F.3d at 685 (quotations omitted). While Powell was charged with a disciplinary infraction, the record contains no allegation or evidence of *any* punishment threatened or imposed for the alleged infraction, and evidence of such sanctions would necessarily present a different question than the one we face here. Instead, Powell asserts only that disciplinary proceedings were instituted. *Cf. Starr v. Dube*, 334 Fed. Appx. 341, 342-43 (1st Cir. 2009) (per curiam) (holding that the mere institution of disciplinary proceedings, which were later dismissed, would not deter an inmate of ordinary firmness from continuing to exercise his constitutional rights); *Bridges v. Gilbert*, 557 F.3d 541, 555 (7th Cir.

2009) (concluding that "[a] single [allegedly unjustified] retaliatory disciplinary charge that is later dismissed is insufficient to serve as the basis of a § 1983 action"). *But see Zarska v. Higgins*, 171 Fed. Appx. 255, 259-60 (10th Cir. 2006) (filing retaliatory disciplinary proceedings "'would chill a person of ordinary firmness'" from future exercise of his or her rights (quoting *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001))); *Brown v. Crowley*, 312 F.3d 782, 789 (6th Cir. 2002) (a reasonable jury could find that filing a retaliatory charge exposing an inmate to a "risk of significant sanctions" could deter persons of "ordinary firmness" from exercising their rights), *cert. denied*, 540 U.S. 823 (2003). Without more, we are unable to conclude that Powell has alleged an adverse act that was more than *de minimis*. Accordingly, his § 1983 claim fails.

Without hearing oral argument, we reverse the court of appeals' judgment and render judgment dismissing Powell's claims.[2] TEX. R. APP. P. 59.1, 60.2(c).

OPINION DELIVERED: July 2, 2010

[2] In light of our disposition, we do not reach the Department's claim that the court of appeals erred in holding that the Department's defensive request for attorney's fees waived immunity under our holding in *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371, 384 (Tex. 2006). We note, however, that we recently held that such a request does not waive immunity. *See Tex. Dep't of Criminal Justice v. McBride*, 53 Tex. Sup. Ct. J. 832, 833 (June 11, 2010 Tex. 2010).

IN THE SUPREME COURT OF TEXAS

NO. 08-0413

CITY OF HOUSTON, PETITIONER,

v.

TRAIL ENTERPRISES, INC. D/B/A WILSON OIL COMPANY, ET AL., RESPONDENTS

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

PER CURIAM

In this inverse condemnation case, we consider whether the court of appeals erred by rendering a money judgment against the City of Houston on mineral interest owners' regulatory takings claims. We hold that it did. Because the trial court never entered a final judgment on the jury verdict, the court of appeals' rendition of judgment prevents the City from properly challenging the judgment. We, therefore, reverse the court of appeals' judgment and remand the case to the trial court so that it may reach final judgment and the parties may then have an opportunity to challenge that judgment.

A Houston ordinance prohibited drilling for minerals in a "Control Area" in the City's extraterritorial jurisdiction, including near Lake Houston where the owners' interests lie. The owners were unsuccessful in obtaining a variance in 1994, and brought regulatory takings claims in 1995, seeking damages for inverse condemnation. That suit was dismissed as barred by the statute of limitations. Then, in December 1996, the City annexed the area at issue. Because their land was

no longer subject to the ordinance, the owners wrote the City regarding the possibility of drilling. In 1997, however, the City amended its Control Area ordinance to include land within city limits. The owners did not seek a variance, but instead filed new regulatory takings claims. The trial court held a bifurcated trial, finding that a taking occurred, and the jury awarded damages nearing $17 million.[1] Before it entered final judgment, though, the trial court granted the City's motion for summary judgment on ripeness grounds, for want of a permit or variance request, and ordered the case dismissed without prejudice for lack of jurisdiction. That order is the subject of this appeal.

The court of appeals reversed, concluding that the action was ripe.[2] 255 S.W.3d 105, 109 (Tex. App.—Waco 2007). We agree that the action was ripe, and on this issue we affirm. *See Mahew v. City of Sunnyvale*, 964 S.W.2d 922, 929 (Tex. 1998) (holding that "futile variance requests or re-applications are not required" for a regulatory takings claim to be ripe); *Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 60 (Tex. 2006) (concluding that owners' takings claims were ripe upon enactment of an ordinance absolutely prohibiting precisely the use owners intended to make, without including potential exceptions).[3] Rather than remanding, though, the court of appeals rendered judgment on the jury verdict for the owners based on the trial court's finding of liability. 255 S.W.3d at 115. However, because the trial court relied only on the jurisdictional ripeness issue

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[1] The jury found that the fair market value of the property was reduced by $19,046,700.00 as a result of any inverse condemnation, and the plaintiffs stipulated that together they own a total of 88.46204% of the mineral estate in the property, for a damages award to plaintiffs of $16,849,099.37 before interest.

[2] The court of appeals issued an opinion on rehearing that let its liability determination stand (including ripeness) without revisiting it. *See* 255 S.W.3d 111, 112 (Tex. App.—Waco 2008). Accordingly, we cite to both opinions as appropriate.

[3] We note that the trial court entered judgment before we issued our opinion in *Hallco*.

in disposing of the case, it was improper for the court of appeals to render judgment on the jury verdict. Our rules provide procedures through which parties may challenge a verdict's or judgment's propriety. *E.g.*, TEX. R. CIV. P. 301 (motion for judgment notwithstanding the verdict); TEX. R. CIV. P. 320 (motion for new trial). Remand was necessary at least to enable these further proceedings. *See* TEX. R. APP. P. 43.3. The court of appeals circumvented these procedures by treating a motion for summary judgment on a jurisdictional issue as if it were a motion for judgment notwithstanding the verdict, 255 S.W.3d at 113, and doing so was error.

We note that at one point the trial court decided to reconsider its liability finding.[4] Certainly the trial court should determine if additional exploration is warranted into whether the owners have met their burden of demonstrating a taking under the balancing test articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See also Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 670–71 (Tex. 2004); *Hallco*, 221 S.W.3d at 56. Likewise, the trial court may consider other appropriate issues before entering its final judgment.[5] However, we do not reach any such issues with our ruling today.

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[4] In an order on June 16, 2005, the trial court stated upon motion for reconsideration that it would hear further evidence on liability. But in its August 29, 2005 final order, granting summary judgment for the City on ripeness, the court described its earlier determination that an inverse condemnation occurred and the jury verdict on damages together as a "final judgment." *See* 255 S.W.3d at 109. The order also incorrectly stated that the City filed a "motion for new trial." *See id*. (One could surmise from this language that the trial court was ready to enter final judgment on the jury verdict but for the ripeness issue.) Regardless of the trial court's posture, it remains for the trial court to determine whether it will consider liability further before entering its final judgment.

[5] The dissent noted that unresolved issues include whether any taking was a total taking or, if not, substantially interfered with the owners' rights of use and enjoyment, as well as whether the accommodation doctrine would require an evaluation of alternatives to direct drilling. *See* 255 S.W.3d at 111 n.1 (Gray, C.J., dissenting). In reversing the court of appeals' rendition of judgment, we provide no opinion as to whether these or any other issues remain in this case, or as to their potential resolution.

Therefore, without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the court of appeals' rendition of judgment and order the case remanded to the trial court for further proceedings consistent with this opinion.

OPINION DELIVERED: October 30, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0444

MYRAD PROPERTIES, INC., PETITIONER,

v.

LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED HOLDERS OF GMAC COMMERCIAL MORTGAGE SECURITIES, INC., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 1997-C1, ROBIN GREEN, AND MELISSA COBB, RESPONDENTS

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

Argued March 31, 2009

JUSTICE GREEN delivered the opinion of the Court.

In this foreclosure dispute, we must decide whether a correction deed may convey two properties when an unambiguous deed mistakenly conveyed only one. Because the particular correction deed at issue exceeds the narrow permissible scope of a correction deed, we hold that the correction deed was void and only one property was conveyed. We therefore reverse the judgment of the court of appeals. We then decide whether to rescind the mistaken deed because under the unique circumstances of this case, where the issue of rescission reaches us on cross-motions for

summary judgment without factual dispute, we need not remand for further proceedings. Instead, we render judgment and order rescission of the mistaken deed.

I

The undisputed facts show that Myrad Properties, Inc. financed two separate properties in Killeen for $1.05 million. An apartment complex stood on each, the La Casa Apartments on one, the Casa Grande Apartments on the other. Myrad executed a promissory note, which was secured by a deed of trust that covered both properties. LaSalle Bank National Association's predecessor in interest, which held the note as trustee for its investors, recorded the deed of trust. The deed of trust provided that, upon default, LaSalle's predecessor would have the right to sell the property through non-judicial foreclosure. After Myrad defaulted, LaSalle proceeded to foreclose.

A group of substitute trustees was appointed.[1] LaSalle directed them "to foreclose the lien of the Deed of Trust in accordance with its terms and the laws of the State of Texas," and cited to the recorded deed of trust. The substitute trustees posted notice of sale. In various parts, the notice referred both to the note and the recorded deed of trust, including a statement that "Notice is hereby given of Holder's election to proceed against and sell both the real property and any personal property described in the Deed of Trust." However, the notice's property description referred to Exhibit A, the only exhibit, which in turn described only the Casa Grande property.

At the auction, the substitute trustees read only the legal description of the Casa Grande property, while at the same time referring unspecifically to the property described in the deed of

[1] Although certain individual trustees performed the actions discussed here, we refer to the substitute trustees collectively throughout this opinion for ease of reference.

trust. LaSalle made the sole bid at the auction, bidding $978,000.00.[2] After the foreclosure sale, the substitute trustees issued a deed to LaSalle, which LaSalle immediately recorded. The deed, in relevant part, states as follows:

> The undersigned Substitute Trustee, in consideration of the foregoing and of the payment of the Purchase Price, by the authority conferred on the undersigned Substitute Trustee by the Deed of Trust, GRANTS, SELLS, and CONVEYS to Grantee, its legal representatives, successors and assigns, the Property, together with, all and singular, the rights, privileges and appurtenances thereto, subject, subordinate and inferior to any senior encumbrances and other exceptions to conveyance and warranty in the Deed of Trust (the 'Permitted Exceptions').

"Property" is defined in the substitute trustees' deed as "The real property described in Exhibit A attached hereto and made a part hereof for all purposes, together with all improvements and personal property described in the Deed of Trust" (emphasis in original). Again, Exhibit A described only the Casa Grande property.[3]

Two days later Myrad filed this action seeking a temporary restraining order to prohibit LaSalle from filing a corrected deed covering the La Casa property. The district court entered the order, but dissolved it after a hearing, whereupon LaSalle recorded a correction deed including a description of both properties. Myrad then brought an action to quiet title and for a declaration that LaSalle owns only the Casa Grande property, while Myrad owns La Casa free from encumbrance and is entitled to any surplus from the sale. Myrad also sought damages for breach of duty, alleging

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[2] The parties dispute whether other potential bidders were present at the auction. Myrad contends that inadequate notice chilled potential bidding, which LaSalle contests. The parties also dispute whether the terms of the note were satisfied by this transaction, with LaSalle seeking a declaration that La Casa remains subject to the note, while Myrad seeks a declaration of entitlement to surplus. As discussed below, we need not address these disputes.

[3] While the parties disagree about whether the notice was ambiguous, neither asserts that the deed is ambiguous.

that the substitute trustees "breach[ed their] duties to Myrad by taking acts to file the [correction deed] . . . [which] was the proximate cause of damages," and similarly alleging that acts taken to file the correction deed amounted to conspiracy to breach such duties. LaSalle in turn sought a declaration that it now holds title to both properties, or in the alternative, LaSalle and the substitute trustees sought rescission of the conveyance from the substitute trustees to LaSalle. The parties then filed cross-motions for summary judgment on their declaratory claims and LaSalle's claim for rescission. LaSalle's motion also sought summary judgment on Myrad's claims for breach of duty and conspiracy. The trial court granted LaSalle's motion and entered final judgment that Myrad take nothing, declaring that the sale had conveyed title to both properties to LaSalle, and that the correction deed vested title in both properties. The court of appeals affirmed the judgment that LaSalle held title to both properties, affirmed that Myrad's breach of duty and conspiracy claims failed, and remanded on the fact question of whether Myrad is entitled to any surplus from the sale.[4] 252 S.W.3d 605, 622 (Tex. App.—Austin 2008).

II

Rather than requiring that erroneous deeds be reformed or rescinded by judicial proceedings, we have long allowed agreeable parties to use correction deeds in limited circumstances.[5] *See Doty v. Barnard*, 47 S.W. 712, 713 (Tex. 1898) (stating that use of a correction deed was proper "to correct the defects and imperfections of the deed above referred to, and had the same effect upon the

[4] Myrad alleges in its final brief to this Court that LaSalle sold both properties while this petition was pending. This fact, if true, does not affect our analysis of any of the issues properly before us at this time.

[5] LaSalle raised only a claim for rescission to this Court, not reformation. We thus reach no conclusion as to whether reformation would have been possible under the circumstances.

rights of the parties that a judgment of court would have had"). But the proper use of a correction deed is narrow in scope. *See, e.g.*, *Adams v. First Nat'l Bank of Bells/Savoy*, 154 S.W.3d 859, 871 (Tex. App.—Dallas 2005, no pet.) ("A correction deed is filed for the sole purpose of correcting some facial imperfection in the title."). For instance, a correction deed may be used to correct a defective description of a single property when a deed recites inaccurate metes and bounds. *E.g.*, *Doty*, 47 S.W. at 712 (enforcing a deed correcting an improper acreage description). Similarly, a correction deed may be used to correct a defective description of a grantor's capacity. *E.g.*, *Humble Oil & Refining Co. v. Mullican*, 192 S.W.2d 770, 771–72 (Tex. 1946) (enforcing a correction deed stating that a grantor was "community administrator" of an estate under the probate code, not "independent executor" as stated in the original deed). However, using a correction deed to convey an additional, separate parcel of land is beyond the appropriate scope of a correction deed. *See Smith v. Liddell*, 367 S.W.2d 662, 666 (Tex. 1963) (refusing to enforce a correction deed purporting to convey a mineral interest in an additional 71.446-acre tract from a separate survey where the first deed mistakenly conveyed only an interest in a 152.11-acre tract); *cf. Sanborn v. Crowdus Bros. & Co.*, 102 S.W. 719, 720 (Tex. 1907) (refusing to render judgment enforcing a corrected quitclaim deed where the mistaken quitclaim deed purported to release and convey additional lots not covered by a vendor's lien); *Halbert v. Green*, 293 S.W.2d 848, 852–53 (Tex. 1956) (rejecting use of a correction deed to change the fractional interest of a mineral estate, or change a mineral interest to a royalty interest).

Preserving the narrow circumstances for acceptable use of a correction deed is important because a proper correction deed may relate back to the date of the deed it corrects. *See Doty*, 47

S.W. at 714 ("All persons claiming [an interest] . . . by conveyance subsequent to the [first, mistaken] deed . . . are bound by the recitals contained in the latter [correction] deed, and could acquire no right under the [first, mistaken] deed . . . to land not embraced in the [correction] deed. . . ."); *Humble Oil*, 192 S.W.2d at 772–73 (stating that a delay rental deadline related back to the original deed); *see also Wilson v. Dearing, Inc.*, 415 S.W.2d 475, 479 (Tex. App.—Eastland 1967, no writ) ("The correction instrument related back to and became effective as of the time of the instrument it purported to correct."); *Adams*, 154 S.W.3d at 871 ("Ordinarily, a correction deed relates back to the date of the document that it purports to express more accurately."). To allow correction deeds to convey additional, separate properties not described in the original deed would introduce unwarranted and unnecessary confusion, distrust, and expense into the Texas real property records system. For example, it could require those who must rely on such records to look beyond the deed and research the circumstances of ownership to make sure that no conveyance mistake such as that before us in this case was made, undermining the entire purpose of record notice. We hold that LaSalle's correction deed purporting to convey both properties was void as a matter of law.

III

Myrad premised its claims for breach of duty and conspiracy on the filing of the correction deed. It pled these claims with conclusory allegations that the substitute trustees breached their duties to Myrad by filing the correction deed and that acts taken to file the correction deed amounted to conspiracy to breach such duties. Having held that the correction deed was void as a matter of law, we conclude that these claims are not sustainable. *Cf. Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 859 (Tex. 2000) (disposing of a breach of fiduciary duty claim that was

premised entirely on a contract breach, upon holding that the breach of contract claim failed). Any duty imposed on the substitute trustees to conduct a fair foreclosure sale ran both to Myrad and LaSalle. *See Hammonds v. Holmes*, 559 S.W.2d 345, 347 (Tex. 1977) ("[A deed of trust trustee] must act with absolute impartiality and fairness to the grantor in performing the powers vested in him by the deed of trust."); *Tarrant Savings Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 476 (Tex. 1965) (reviewing evidence of unfair or wrongful conduct in sale by substitute trustee to mortgagee). Even assuming that the substitute trustees owed a cognizable duty to Myrad that was breached by the act of filing the correction deed, Myrad has never explained what harm it allegedly suffered apart from the enforcement of the correction deed itself, which we have set aside as Myrad urged. Myrad also has not explained how filing this correction deed, while void, was an unlawful act, which is an element of a civil conspiracy claim. *See Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005). For these reasons, we hold that Myrad's claims for breach of duty and conspiracy fail.

IV

LaSalle seeks to rescind the conveyance from the substitute trustees because of mistake in the original deed. When mistake is alleged, we may consider extrinsic evidence of intent in determining whether to enforce a deed. *See Cherokee Water Co. v. Forderhouse*, 641 S.W.2d 522, 524 (Tex. 1982). Rescission is an available equitable remedy if mutual mistake is shown. *See A.L.G. Enters., Inc. v. Huffman*, 672 S.W.2d 230, 231 (Tex. 1984) (per curiam) (remanding for trial on whether mutual mistake occurred). "Pursuant to the doctrine of mutual mistake, when parties to an agreement have contracted under a misconception or ignorance of a material fact, the agreement will be avoided." *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990). "The question of mutual

mistake is determined not by self-serving subjective statements of the parties' intent, which would necessitate trial to a jury in all such cases, but rather solely by objective circumstances surrounding execution of the [contract]." *Id.* Courts have awarded rescission to avoid unjust enrichment based on mistake. *E.g.*, *Humphrey v. Camelot Ret. Cmty.*, 893 S.W.2d 55, 59 (Tex. App.—Corpus Christi 1994, no writ).

LaSalle and the substitute trustees, as co-defendants, jointly counterclaimed to rescind the conveyance from the substitute trustees to LaSalle on the basis of their mutual mistake concerning the properties at issue. Myrad opposed this claim, although it was not a party to the conveyance, and moved for summary judgment. Soon after, LaSalle and the substitute trustees also jointly moved for summary judgment on this claim.

The lower courts did not reach the rescission claim. However, on cross-motions for summary judgment, the trial court granted, and the court of appeals affirmed, LaSalle's "declaratory claim that the correction deed vested title to both parcels in LaSalle." 252 S.W.3d at 619. The use of a correction deed to reform a mistaken deed necessarily implies a mutual mistake in the underlying instrument running contrary to the grantor's and grantee's intent. *Cf. Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987) ("The underlying objective of reformation is to correct a mutual mistake made in *preparing* a written instrument so that the instrument truly reflects the *original* agreement of the parties.") (emphasis in original). Thus, a fact-finding supporting a decision to enforce a correction deed would be identical to the finding required for equitable rescission.

The correction deed at issue made a single change: the description of two properties instead of one. Thus, in entering and affirming judgment enforcing the correction deed, the trial court and court of appeals necessarily found that a mistake existed in the substitute trustees' deed, the intent of LaSalle and the substitute trustees being to convey both properties covered by the deed of trust. *Cf. In re Weekley Homes, L.P.*, 295 S.W.3d 309, 316 (Tex. 2009) (concluding that the trial court's decision to order forensic examination implied a finding that evidence was not reasonably available and required extraordinary steps for retrieval and production); *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). The substitute trustees and LaSalle presented evidence of their mutual mistake, such as the instrument directing the substitute trustees to foreclose on the deed of trust covering both properties and the amount of LaSalle's bid, in addition to the plain fact that the substitute trustees delivered and LaSalle accepted the correction deed. Myrad, as a third party to the conveyance, has presented no contrary evidence that might raise a fact question on intent or mistake to support its summary judgment motion on rescission, or defend against LaSalle's. Indeed, in its summary judgment motion, Myrad did not argue against mistake, asserting instead that LaSalle showed "affirmation or ratification of the contract."[6] It follows that because of the trial court's implied finding of mutual mistake, supported by all of the evidence, equitable rescission is an available remedy.

[6] We note that LaSalle, by attempting to use a correction deed, can hardly be said to have affirmed or ratified the mistaken deed.

We are not blind to the equities of this dispute. LaSalle was entitled to be made whole as holder of the note from Myrad, and in trying to acquire two properties LaSalle received only one by mistake. Although we cannot enforce the correction deed, we recognize that enforcement of the original substitute trustees' deed would result in one of two things happening. Should LaSalle remain able to foreclose on the La Casa property under the note after accounting for its payment, requiring someone to pay a second time for that property will entitle Myrad to a windfall from any surplus beyond what Myrad owes on the note. Likewise, if the terms of the note are satisfied, Myrad will stand as owner of the La Casa property free from encumbrance despite its default. Myrad has never disputed this, and indeed argues for just such a result. We conclude that Myrad will be unjustly enriched if the mistaken deed to LaSalle is enforced.

Where cross-motions for summary judgment exist on an issue absent factual dispute, we may render the judgment the lower courts should have rendered. *See Comm'rs Court of Titus County v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997); *see also* TEX. R. APP. P. 60.2(c) (providing that this Court may "render the judgment that the lower court should have rendered"). Each party's motion for summary judgment expressly argued LaSalle's alternative equitable rescission claim. Accordingly, we need not remand on this issue under the circumstances of this case. Rescission is available based on the trial court's necessary finding that a mutual mistake existed in the conveyance to LaSalle from the substitute trustees, supported by all the evidence. To avoid an unjust enrichment, we rule in favor of LaSalle and render judgment on its claim for rescission.

We need not reach the question of whether notice was adequate, then, or chilled potential bidding, because rescission of the deed is proper regardless. Still, we are confident that a fresh

foreclosure sale would address Myrad's concerns about adequate notice to the public. The dispute over any surplus owed to Myrad from the mistaken sale is also thus resolved.

V

In conclusion, we hold that a correction deed may not be used to correct a mistake of omitting an entire second property. The correction deed in this case was therefore void. We reverse the court of appeals' judgment that LaSalle holds title to both properties. We agree, however, that all the evidence indicates a mutual mistake in the substitute trustees' deed, contrary to the clear intent of the grantor and grantee. Enforcing this mistaken deed would unjustly enrich Myrad. Accordingly, we render judgment for LaSalle on its claim for rescission of the substitute trustees' deed.

_____
Paul W. Green
Justice

OPINION DELIVERED: December 18, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0453

GEFFREY KLEIN, M.D. AND BAYLOR COLLEGE OF MEDICINE, PETITIONERS,

v.

CYNTHIA HERNANDEZ, AS THE PARENT AND NEXT FRIEND OF N.H., A MINOR, RESPONDENT

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

Argued October 7, 2009

JUSTICE MEDINA delivered the opinion of the Court.

JUSTICE WILLETT filed a concurring opinion.

By statute, a state employee may appeal an interlocutory order denying a motion for summary judgment based on an assertion of immunity. TEX. CIV. PRAC. & REM. CODE § 51.014(5). The issue here is whether a resident physician, working at a public hospital under an agreement with his private medical school, may take an interlocutory appeal under this statute. The court of appeals decided he could not, dismissing the interlocutory appeal because the resident physician was not a state employee. 260 S.W.3d 1, 10-11. We conclude, however, that by statute a resident physician at a private medical school is to be treated like a state employee for purposes of section 5l.014(5) when the underlying litigation arises from a residency program coordinated through a supported medical

school at a public hospital. Accordingly, we reverse the court of appeals' judgment, reinstate the physician's interlocutory appeal, and remand the case to the court of appeals for its review.

I

Cynthia Hernandez sued Dr. Geffrey Klein and Baylor College of Medicine, alleging malpractice during the delivery of her daughter at Ben Taub General Hospital. Ben Taub is a part of the Harris County Hospital District, a political subdivision of the State. *See* TEX. HEALTH & SAFETY CODE § 281.002(a); *see also* TEX. CONST. art. IX, § 4. Baylor is a private, non-profit medical school, but is also a "supported medical school," which means that it has contracts with the Texas Higher Education Coordinating Board and receives state funding specifically allocated for training physicians who provide medical care at public hospitals such as Ben Taub. TEX. HEALTH & SAFETY CODE § 312.002(6). Dr. Klein was a Baylor obstetrics and gynecology resident at Ben Taub under this arrangement when he delivered Hernandez's daughter in 1994.

Responding to Hernandez's claims, Baylor and Klein jointly filed a motion to dismiss for lack of jurisdiction and a motion for summary judgment, asserting they were entitled to immunity under sections 312.006 and 312.007 of the Texas Health and Safety Code. Hernandez responded to the motions, but also non-suited her claim against Baylor. Despite the non-suit, the trial court denied the motions as to both defendants, and Baylor joined Klein in appealing the trial court's interlocutory order.

The court of appeals dismissed both appeals. 260 S.W.3d 1. The court held it lacked jurisdiction to consider the interlocutory appeals under either section 51.014(a)(5) or (a)(8) of the Civil Practice and Remedies Code. *Id.* at 7-11. Section 51.014(a)(5) allows an interlocutory appeal from the denial of "a motion for summary judgment that is based on an assertion of immunity by an

individual who is an officer or employee of the state," while section 51.014(a)(8) authorizes an interlocutory appeal from the grant or denial of "a plea to the jurisdiction by a governmental unit." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5), (8). The court reasoned that it lacked jurisdiction under (a)(5) because Klein was not an "officer or employee of the state," and under (a)(8) because Baylor was not a "governmental unit." 260 S.W.3d at 7-11. The court also concluded that Chapter 312 of the Texas Health and Safety Code did not confer immunity upon either Baylor or Klein. *Id.* at 8, 10.

II

Because this is an interlocutory appeal, we first consider the matter of our own jurisdiction. Interlocutory appeals are generally final in the courts of appeals, TEX. GOV'T CODE § 22.225(b)(3), although exceptions to this general rule exist. *See* TEX. GOV'T CODE § 22.001(a)(1)-(2), (c), (d); *see also Univ. of Tex. Sw. Med. Ctr. of Dallas v. Margulis*, 11 S.W.3d 186, 187 (Tex. 2000) (per curiam). One exception is when a court of appeals' decision conflicts with another court of appeals's prior decision. TEX. GOV'T CODE § 22.001(a)(2). That exception applies here as the court acknowledged that its decision regarding Klein conflicted with the Fourteenth Court of Appeals's decision in *Young v. Villegas*, 231 S.W.3d 1 (Tex. App.–Houston [14th Dist.] 2007, pet. denied). *See* 260 S.W.3d at 9-11 (disagreeing with the conclusion in *Young* that "a Baylor doctor, who was similarly situated to Dr. Klein in the instant case," was authorized by section 51.014(5) "to appeal the denial of his summary judgment motion, in which he asserted immunity from individual liability").

We also have jurisdiction over this appeal because the court of appeals declined to exercise its interlocutory-appellate jurisdiction. *See Lewis v. Funderburk*, 253 S.W.3d 204, 206 (Tex. 2008).

Even though we may lack jurisdiction over the substance of an appeal, we always have jurisdiction to determine whether the court of appeals correctly applied its jurisdiction. *Badiga v. Lopez*, 274 S.W.3d 681, 682 n.1 (Tex. 2009); *Del Valle Indep. Sch. Dist. v. Lopez,* 845 S.W.2d 808, 809 (Tex. 1992) (citing *Long v. Humble Oil & Ref. Co.*, 380 S.W.2d 554, 555 (Tex. 1964) (per curiam)).

III

As another preliminary matter, we note the parties' agreement here that Hernandez's non-suit left no case or controversy as to Baylor. As a general rule, a plaintiff may voluntarily dismiss a case — take a non-suit — at any time before all of the plaintiff's evidence other than rebuttal evidence has been introduced. TEX. R. CIV. P. 162. When this occurs, the non-suit typically moots the case or controversy from the moment of its filing or pronouncement in open court. *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 100 (Tex. 2006) (per curiam). Exceptions exist, such as when the defendant has asserted a claim for affirmative relief, *see Gen. Land Office of State of Tex. v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 570 (Tex. 1990), but Baylor submits it had no such claim in the trial court.

Appellate courts are prohibited from deciding moot controversies because the separation-of-powers article prohibits advisory opinions on abstract questions of law. TEX. CONST. art II, § 1; *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 164 (Tex. 2004). Assuming the non-suit in the trial court ended the case against Baylor, as the parties apparently agree, there was no live controversy for the court of appeals to decide. But the court of appeals did not dismiss Baylor's appeal because the case was moot, but rather reasoned that Baylor was not entitled to an interlocutory appeal because it was not a "governmental unit." *See* 260 S.W.3d at 7-8 (holding that the Health and Safety Code does not make Baylor a "governmental unit" entitled to interlocutory appeal). Baylor therefore

asks us to declare the part of the court of appeals's opinion pertaining to it void as an advisory opinion. Hernandez, on the other hand, argues that the court of appeals's judgment is correct whether based on Baylor's failure to meet the requirements for an interlocutory appeal or due to the absence of a live controversy between the parties. Under either circumstance, the correct action is to dismiss Baylor's appeal, which is what the court of appeals has done.

When a plaintiff is entitled to a non-suit, the trial court's dismissal order is ministerial. *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 59 (Tex. 1991). Before the motions hearing in this case, the trial court acknowledged its understanding of this, observing that the non-suit had taken Baylor out of the case. Its subsequent order, however, purported to deny both Klein's and Baylor's motions. This may have been inadvertent, but even if the trial court changed its mind about Baylor's status in the case, the determination is no basis for an interlocutory appeal. That is, even if we assume the trial court's action here to be a refusal to comply with its ministerial duty to dismiss, no statute provides Baylor the right to an interlocutory appeal under these circumstances. Mandamus, we have said, is the appropriate remedy when a trial court refuses to comply with its ministerial duty to dismiss after a non-suit. *Id.*

While we do not necessarily agree with the court of appeals's reasons for dismissing Baylor's appeal, we agree with its judgment. The court did not err in dismissing Baylor's appeal and that part of its judgment is accordingly affirmed. The viability of Klein's interlocutory appeal, however, remains in dispute because Hernandez has not similarly dismissed her claim against him.

IV

Klein asserts a right to an interlocutory appeal under section 51.014(a)(5) of the Civil Practice and Remedies Code. That section provides for the appeal of an order that "denies a motion

for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5). The order here unquestionably meets some of the statutory requirements: (1) the summary judgment motion is based on an individual's assertion of immunity, and (2) the trial court's order denies the motion. The requirement in dispute concerns the status of the movant; that is, whether this individual, who is a resident physician at a supported medical school, is also a state employee for purposes of the statute.

Klein contends that section 312.007(a) of the Texas Health and Safety Code classifies him as a state employee for purposes of his work at Ben Taub. The section, entitled "Individual Liability," provides:

> **A** medical and dental unit, **supported medical** or dental **school**, or coordinating entity **is a state agency**, **and a** director, trustee, officer, intern, **resident**, fellow, faculty member, or other associated health care professional or employee **of a** medical and dental unit, **supported medical** or dental **school**, or coordinating entity **is an employee of a state agency for purposes of Chapter 104, Civil Practice and Remedies Code, and for purposes of determining the liability, if any, of the person for the person's acts or omissions while engaged in the coordinated or cooperative activities of the** unit, **school**, or entity.

TEX. HEALTH & SAFETY CODE § 312.007(a) (emphasis added). Under this section, a supported medical school, like Baylor, "is a state agency," and a resident of a supported medical school, like Dr. Klein, "is an employee of a state agency" for two purposes: (1) obtaining indemnity under Chapter 104, Civil Practice and Remedies Code, which requires the state to indemnify employees in certain circumstances based on acts or omissions in the course and scope of employment, and (2) determining liability, if any, for acts or omissions while engaged in the coordinated or cooperative activities of a supported medical school. Because Klein "is an employee of a state agency" for

purposes of determining his liability in the underlying suit, he submits that he is a state employee for purposes of this litigation, which includes the right to an interlocutory appeal under section 51.014(a)(5).

The court of appeals, however, disagreed. It concluded Klein was not entitled to the same rights as an "actual" employee of a state agency. 260 S.W.3d at 9-11. More particularly, the court reasoned that the Legislature did not intend to extend sovereign or official immunity, or any attendant rights and benefits associated with such immunity, to a resident of a supported medical school by merely casting the resident as "an employee of a state agency" for purposes of determining liability. *Id.* at 10-11 (discussing TEX. HEALTH & SAFETY CODE § 312.007(a)). The court's analysis of the preceding provision, section 312.006(a), informed its understanding of section 312.007(a).

Section 312.006(a), entitled "Limitation on Liability," states that a supported medical school engaged in coordinated or cooperative medical education, including patient care at a public hospital,

> is not liable for its acts and omissions in connection with those activities except to the extent and up to the maximum amount of liability of state government under Section 101.023(a), Civil Practice and Remedies Code, for the acts and omissions of a governmental unit of state government under Chapter 101, Civil Practice and Remedies Code.

Id. § 312.006(a). By its specific reference to section 101.023(a), the court inferred that the Legislature intended only to limit a supported medical school's liability to the damages caps in the Texas Tort Claims Act. 260 S.W.3d at 5-6 (quoting TEX. CIV. PRAC. & REM. CODE § 101.023(a) which limits liability under the Tort Claims Act). Extending that inference to section 312.007(a) as well, the court reasoned that the Legislature intended to make Baylor a state agency and its residents state employees only to the extent of the Tort Claims Act's damages cap provision, specifically

mentioned in 312.006(a), and Chapter 104's indemnity provisions, specifically mentioned in 312.007(a). *Id.* at 6-8.

Klein asserts that the court misinterprets these provisions. He submits there are three parts to section 312.006(a): (1) a grant of immunity ("is not liable"), (2) a limited waiver for certain acts ("except to the extent ... of a governmental unit of state government [under the Tort Claims Act]"), and (3) a limitation on damages for those acts ("except ... up to the maximum amount of liability of state government [under the Tort Claims Act]"). He complains that the court of appeals's analysis only accounts for the last part, ignoring the rest. We agree that the court of appeals reads these provisions too narrowly.

The cardinal rule of statutory construction is to ascertain and give effect to the Legislature's intent. *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008). When determining that intent, the Code Construction Act further guides our analysis, listing a number of relevant factors including the object sought to be obtained by the legislation, the circumstances under which its was enacted, legislative history, and former statutory provisions on the same or similar subjects, among others. TEX. GOV'T CODE § 311.023.

The provisions at issue were first enacted in 1987. That year, the Seventieth Legislature amended Title 71 of the Revised Civil Statutes, which pertained to public health, by adding article 4494t, which related to coordinated medical and dental clinical education. Act of May 28, 1987, 70th Leg., R.S., ch. 219, 1987 Tex. Gen. Laws 1508-10. The Legislature concluded that the clinical education and patient care at public hospitals would benefit from coordination and cooperation rather than competition and that cooperation would enhance educational opportunities while conserving public resources. *Id.* at 1508. As further background, the senate bill analysis noted that Baylor

College of Medicine and the University of Texas Health Science Center at Houston had preliminarily agreed to staff the Harris County Hospital District's expanding health care facilities and coordinate their education and research efforts, but that "residents, interns, faculty and other health care professionals at the Baylor College of Medicine, a private institution, [did] not have the same level of liability as UTHSCH, a state agency-owned school." Senate Comm. on Health and Human Services, Bill Analysis, S.B. 1062, 70th Leg., R.S. (1987). The analysis recited the intent to overcome this impediment by equalizing liability, noting that, among other purposes, the bill "establishes that liability of units, schools, and entities engaged in cooperative or coordinated activities and services is the same as state government liability for a governmental unit of state government." *Id.*

Two years later, the Legislature repealed article 4494t and recodified it as Chapter 312 of the Health and Safety Code. Act of June 14, 1989, 71st Leg., R.S., ch. 678, § 1, 1989 Tex. Gen. Laws 2230, 3165. The codification reorganized the original statute and retitled some of its provisions. For example, before codification, article 4494t contained a single liability section, providing:

> Sec. 6. LIABILITY. No coordinating entity, medical and dental unit, or supported medical or dental school engaged in coordinated or cooperative medical or dental clinical education, including patient care and the provision or performance of health or dental services or research at a public hospital, pursuant to Section 4 of this article, shall be liable to any person for its acts and omissions in connection therewith except to the extent and up to but not in excess of the maximum amount of the liability of the state government as specified in Subsection (a) of Section 101.023 of the Texas Tort Claims Act (Chapter 101, Civil Practice and Remedies Code), for the acts and omissions of a governmental unit of the state government as provided in the Texas Tort Claims Act (Chapter 101, Civil Practice and Remedies Code), whether or not such a unit, school, or entity is a "governmental unit" as therein defined. A judgment in an action or a settlement of a claim against any such unit, school, or entity thus permitted under the provisions of the Texas Tort Claims Act shall ban any action involving the same subject matter by the claimant against any director, trustee, officer, intern, resident, fellow, faculty member, or other associated health care

> professional or employee of such unit, school, or entity whose act or omission gave rise to the claim, as if the person were an employee of a governmental unit against which such claim was asserted as provided in Section 101.106 of the Texas Tort Claims Act. All directors, trustees, officers, interns, residents, fellows, faculty, and other associated health care professionals and employees of the medical and dental unit, the supported medical or dental school, or the coordinating entity so engaged shall be deemed to be employees of a state agency, and said unit, school, or entity shall be deemed to be a "state agency" for purposes of Chapter 104, Civil Practice and Remedies Code, and for purposes of determining the liability, if any, of such persons for their acts and omissions while engaged in such coordinated or cooperative activities of the units, schools, or entities.

Act of May 28, 1987, 70th Leg., R.S., ch. 219, § 6, 1987 Tex. Gen. Laws 1509-10, *repealed by* Act of June 14, 1989, 71st Leg., R.S., ch. 678, § 1, 1989 Tex. Gen. Laws 2230, 3165. After codification, this liability section became sections 312.006 and 312.007 of the Texas Health and Safety Code and was retitled, "Limitation on Liability" and "Individual Liability," respectively. TEX. HEALTH & SAFETY CODE §§ 312.006 – .007. This reorganization, however, did not effect any substantive changes. Act of June 14, 1989, 71st Leg., R.S., ch. 678, § 1.001(a), 1989 Tex. Gen. Laws 2230, 2236.

As before, Baylor remained a supported medical school. *See* TEX. HEALTH & SAFETY CODE § 312.002(6) (defining "supported medical or dental school"). As such, the Legislature has authorized Baylor to coordinate and cooperate with other medical or dental schools and contract to provide medical, dental, or other patient services to public hospitals, the rationale being that such relationships will "(1) enhance the education of students, interns, residents and fellows attending [the schools]; (2) enhance patient care; and (3) avoid any waste of public money." *Id*. § 312.001(b); *see also id.* §§ 312.003 – .004; § 312.002(5) (defining "public hospital"). Under this authorization, Baylor has contracted with the Texas Higher Education Coordinating Board and receives state funding for training physicians who provide medical care at public hospitals.

Ben Taub is one such public hospital, being a part of the Harris County Hospital District. This District, like all such countywide districts, is a political subdivision of the State authorized by the Legislature to "provide for the establishment of a hospital or hospital system to furnish medical aid and hospital care to indigent and needy persons residing in the district." *Id.* § 281.002(a). These districts and their hospitals are "governmental units" for purposes of the Tort Claims Act. TEX. CIV. PRAC. & REM. CODE § 101.001(3).

Here, Baylor and the University of Texas Medical School at Houston, through a coordinating entity called Affiliated Medical Services ("AMS"), have agreed to provide medical care and services, and medical education, training and research activities at Ben Taub and other public hospital facilities and clinics owned and operated by the Harris County Hospital District. The Commissioner of Health has approved this agreement between Baylor and UT regarding AMS, and the State Board of Medical Examiners has certified AMS as a non-profit corporation organized to benefit the public. Under the agreement, Baylor provides all obstetrical and gynecological medical care services at Ben Taub. That was the arrangement in 1994, when Hernandez's daughter was delivered, and it remains the arrangement today.

Had Klein been directly employed by Ben Taub, he would be a governmental employee under the Tort Claims Act. Similarly, had the University of Texas Medical Branch or a similar public university provided Klein to the hospital, he would be a governmental employee under the Act. Instead, Baylor provided Klein's services to Ben Taub. This distinction, however, makes no difference under Chapter 312, which classifies Baylor as a "governmental unit of state government" and a "state agency" for certain purposes, including its services at Ben Taub. TEX. HEALTH & SAFETY CODE §§ 312.006(a) – .007(a).

In addition to making Baylor a "state agency" for certain purposes, including its services at Ben Taub, Chapter 312 also makes Klein a state employee for these same purposes. TEX. HEALTH & SAFETY CODE § 312.007(a). The chapter provides that a supported medical school like Baylor "is not liable for its acts or omissions" in connection with the provision or performance of these services:

> except to the extent and up to the maximum amount of liability of state government under Section 101.023(a), Civil Practice and Remedies Code, for the acts and omissions of a governmental unit of state government under Chapter 101, Civil Practice and Remedies Code.

Id. § 312.006(a).

Contrary to the court of appeals's reading, we construe "the extent" and "the maximum amount" of liability as referencing separate subjects. Thus, a supported medical school is not liable, except (1) to the extent of liability of state government for the acts and omissions of a governmental unit of state government under the Tort Claims Act, and (2) up to the maximum amount of liability of state government under Section 101.023(a) of the Act. Section 312.006(b) confirms this reading, stating that "[t]he limitation on liability provided by this section applies regardless of whether" the supported medical school "is a 'governmental unit' as defined by section 101.001, Civil Practice and Remedies Code." *Id.* § 312.006(b). Thus, a supported medical school does not need to be a governmental unit — like UT Medical Branch — to be entitled to immunity; the Health and Safety Code bestows such status by its own terms.

We conclude that the Legislature intended through Chapter 312 to treat Baylor like other governmental entities providing services at public hospitals, extending the same protection and benefits to Baylor and its residents who work at these hospitals. In the words of the chapter, a

supported medical school "is a state agency" and a resident of a supported medical school "is an employee of a state agency . . . for purposes of determining liability, if any." TEX. HEALTH & SAFETY CODE § 312.007(a). As an employee of a state agency, complaining about the denial of his motion for summary judgment based on an assertion of immunity, Klein was entitled to bring this interlocutory appeal like any other state employee, and the court of appeals erred in holding otherwise.

* * *

The judgment of the court of appeals is reversed, in part, and Klein's interlocutory appeal is remanded to the court for consideration of the merits.

_____
David M. Medina
Justice

OPINION DELIVERED: May 7, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0453

GEFFREY KLEIN, M.D. AND BAYLOR COLLEGE OF MEDICINE, PETITIONERS,

v.

CYNTHIA HERNANDEZ, AS THE PARENT AND NEXT FRIEND OF N.H., A MINOR, RESPONDENT

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

Argued October 7, 2009

JUSTICE WILLETT, concurring.

The Court is right that Chapter 312 extends to Baylor College of Medicine resident-physicians the same protection and benefits enjoyed by state agency employees providing services at public hospitals. The Court is also right that Chapter 312 compels this answer "by its own terms."[1] Because "the words of the chapter" decide this case,[2] it is imprudent to look outside those words, specifically by peeking into legislative minutiae surrounding the passage of Chapter 312's predecessor. As today's case can be decided without consulting legislative history, it should be decided without consulting legislative history.

[1] __ S.W.3d at __.

[2] *Id.* at __.

The Court says the Code Construction Act "guides our analysis"[3] and permits consideration of several extra-textual factors beyond the Legislature's chosen language, including legislative history. The Act, phrased in permissive language ("a court *may* consider"),[4] indeed invites judges to consult factors like legislative history "whether or not the statute is considered ambiguous on its face."[5] Several of our cases, both before and after enactment of the Code Construction Act, posit a simpler and less-manipulable principle: unambiguous text equals dispositive text.

- "Where text is clear, text is determinative of [legislative] intent."[6]
- "If a statute is clear and unambiguous, we apply its words according to their common meaning without resort to rules of construction or extrinsic aids."[7]
- "[O]ver-reliance on secondary materials should be avoided, particularly where a statute's language is clear. If the text is unambiguous, we must take the Legislature at its word and not rummage around in legislative minutiae."[8]
- "Unless a statute is ambiguous, we must follow the clear language of the statute. This principle has been set forth in a number of Texas cases. . . . [and] adopted and utilized by this court many times."[9]
- "If the disputed statute is clear and unambiguous extrinsic aids and rules of statutory construction are inappropriate . . . ."[10]

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[3] *Id.* at __.

[4] TEX. GOV'T CODE § 311.023 (emphasis added).

[5] *Id.*

[6] *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

[7] *In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex. 2007).

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

[9] *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985).

[10] *Cail v. Serv. Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983).

- "If the statute being construed is plain and unambiguous, there is no need to resort to rules of construction, and it would be inappropriate to do so."[11]

Faced with unequivocal language, "the judge's inquiry is at an end."[12] Today's holding is firmly rooted in the statutory text—"[i]n the words of the chapter,"[13] declares the Court—and our analysis should end there; definitive ought to be determinative. Mining legislative minutiae to divine legislative intent may be commonplace, but as we have held, relying on such materials is verboten where the statute itself is absolutely clear.[14]

I suppose it is fortunate that the senate bill analysis in today's case is consonant with Chapter 312's text. But what about tomorrow's case, where a shrewd snippet from a bill analysis (perhaps unread), committee hearing (perhaps unattended), or floor debate (perhaps unheard) calls into

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[11] *Ex parte Roloff*, 510 S.W.2d 913, 915 (Tex. 1974).

[12] *Sheshunoff*, 209 S.W.3d at 652.

[13] __ S.W.3d at __.

[14] *Sheshunoff*, 209 S.W.3d at 651–52. *See also, e.g.*, *Entergy*, 282 S.W.3d at 437 ("*Only when those words are ambiguous* do we 'resort to rules of construction or extrinsic aids.'" (emphasis added) (quoting *In re Estate of Nash*, 220 S.W.3d at 917)).

As I noted in *AIC Management v. Crews*, Justice Scalia, the foremost critic of supplementing clear statutory text with legislative history, has stated his position plainly:

> As today's opinion shows, the Court's disposition is required by the text of the statute. . . . That being so, it is not only (as I think) improper but also quite unnecessary to seek repeated support in the words of a Senate Committee Report—which, as far as we know, not even the full committee, much less the full Senate, much much less the House, and much much much less the President who signed the bill, agreed with. Since, moreover, I have not read the entire so-called legislative history, and have no need or desire to do so, so far as I know the statements of the Senate Report may be contradicted elsewhere.
>
> Accordingly, because the statute—the only sure expression of the will of Congress—says what the Court says it says, I join in the judgment.

246 S.W.3d 640, 650 n.5 (Tex. 2008) (Willett, J., concurring in the judgment) (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 267 (2004) (Scalia, J., concurring in the judgment)).

question what the statute unquestionably requires? The peril in citing such background materials even to reinforce what the statute already makes clear ("by its own terms,"[15] as the Court says today) is that it suggests the statute—the words that everyday Texans use to guide their behavior—is not in fact controlling, but is instead vulnerable to challenge by a stray comment entombed somewhere in the legislative record. Questions abound:

- What if the text, unambiguous on its face, commands X but a committee witness testifies Y?
- What if the text, unambiguous on its face, requires X but the judge dislikes the "consequences of [that] particular construction"?[16]
- What if the text, unambiguous on its face, compels X but that outcome clashes with what the judge considers "a just and reasonable result"?[17]
- What if the text, unambiguous on its face, mandates X but the judge believes that result subordinates the "public interest" to "private interest"?[18]

My view: judicial deference requires that judges read the laws that govern our lives in a manner faithful to what those laws actually say.

That said, I accept a confined role for extra-textual aids when laws are nebulous and susceptible to varying interpretations or when necessary to fill in gaps left (perhaps intentionally) by

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[15] __ S.W.3d at __.

[16] TEX. GOV'T CODE § 311.023(5) (the "consequences of a particular construction" is another permissive factor the Code Construction Act says courts may consider, "whether or not the statute is considered ambiguous on its face").

[17] *Id.* § 311.021(3) ("it is presumed" that the Legislature, in enacting a statute, intended "a just and reasonable result").

[18] *Id.* § 311.021(5) ("it is presumed" that the Legislature, in enacting a statute, intended that "public interest is favored over any private interest").

the Legislature. But even then, and preferably only then, we proceed "cautiously,"[19] mindful that such materials conflict as often as they converge, and that our goal is "to solve, but not to create, an ambiguity."[20]

As we have held, the "truest manifestation" of what lawmakers intended is what lawmakers enacted—"the literal text they voted on."[21] And where the Legislature's words yield a single inescapable interpretation, they are not only the best evidence of intent but the exclusive evidence. "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."[22]

The Legislature passes and the Governor signs bills, not bill analyses, and we are governed by laws, not by legislative histories. So long as judges resort to external materials even when statutes are clear, lawmakers and lobbyists will keep peppering the legislative record with their preferred interpretation, not to inform legislators enacting statutes but to influence judges interpreting them. And then, when litigation ensues, statutory construction devolves into statutory excavation. The legal scavenger hunt begins, and the often-contradictory tidbits are unearthed and cited—perhaps

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[19] *Sheshunoff*, 209 S.W.3d at 652 & n.4.

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

[21] *Sheshunoff*, 209 S.W.3d at 651.

[22] *AIC Mgmt.*, 246 S.W.3d at 650 (Willett, J., concurring in the judgment) (citing Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body.")).

inaccurately, selectively, or misleadingly[23]—in order to hoodwink earnest judges and enable willful ones to reach a decision foreclosed by the text itself.

Supplanting (or even supplementing) the clarity of what was passed by the legislative branch and signed by the executive branch with what an individual legislator thought, staffer wrote, witness testified, lobbyist assured, or interest group asserted invites jurisprudential kudzu. And once it takes hold, it threatens to choke off the surest guarantee of modest, no-favorites judging: taking the Legislature at its word.

Materials beyond the statute matter little, actually not at all, when the statute itself decides the case. Boiled down, my view is less prudish than prudent: since it is not necessary to look further, it is necessary not to look further.[24] Here, I would not look beyond the words of the chapter since the answer is found "[i]n the words of the chapter."[25]

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Don R. Willett
Justice

OPINION DELIVERED: May 7, 2010

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[23] *See Entergy*, 282 S.W.3d at 473 (Willett, J., concurring).

[24] *Cf. VanDevender v. Woods*, 222 S.W.3d 430, 432-33 (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. In such cases, 'the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further.'" (footnote omitted) (quoting *PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring))).

[25] __ S.W.3d at __.

IN THE SUPREME COURT OF TEXAS

NO. 08-0465

THE STATE OF TEXAS, PETITIONER,

v.

$281,420.00 IN UNITED STATES CURRENCY, RESPONDENT

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

Argued October 7, 2009

JUSTICE O'NEILL delivered the opinion of the Court.

Law enforcement officers seized a truck while it was being towed and discovered a large amount of cash hidden in the axle. In this forfeiture proceeding that followed, neither the truck's owner nor the person who arranged the tow came forward to assert an interest in the currency. The tow-truck driver, however, intervened in the suit and claimed the currency as the last person in possession. Upon determining that the State had failed to meet its burden to establish that the currency was contraband, a divided court of appeals awarded the cash to the tow-truck driver. Because we hold that the driver has not established a valid legal claim to the currency, we reverse the court of appeals' judgment and remand to the trial court for further proceedings.

I. Background

Johnny Mercado approached Gregorio Huerta, the owner of Greg's Towing, at a race track in Edinburg, Texas, and asked Huerta to tow a disabled Freightliner truck-tractor from Alvin to Mercedes for approximately $2,800. Huerta agreed, drove to Alvin that night to retrieve the truck, and returned to his office in Edinburg. Huerta contacted Mercado to request payment, and they planned for Huerta to follow Mercado with the truck to the final destination in Mercedes. When Mercado did not show up, Huerta became worried that the truck might be stolen and contacted Department of Public Safety Trooper Cesar Torres. Torres agreed to stop by Huerta's office to inspect the truck, but before he got there Mercado arrived and paid for the tow. Huerta informed Torres that it would no longer be necessary for him to come by, but Torres still had concerns about the truck and insisted on inspecting it. Together they devised a plan whereby Huerta would intentionally exceed the speed limit so that Torres would have probable cause to pull him over. When Torres stopped Huerta for speeding in San Juan, Mercado circled the area several times and then drove away.

Huerta gave Torres verbal and written permission to perform a road-side search of the truck cab. Unable to find anything during the field search, Torres asked Huerta to move the truck to the United States Customs point of entry at the International Bridge in Hidalgo for further inspection. There law enforcement officers examined the truck, x-rayed it, and searched it with drug sniffing dogs, but nothing was discovered. At some point, officers examined the center axle of the truck and, with Huerta's assistance, removed the housing around one of the axles. Inside the housing were a number of tightly-wrapped bundles containing $281,420 in United States currency.

The vehicle identification number and license plates established that Jesus Pulido is the truck's registered owner. Huerta contacted Mercado and left voice messages about the truck and the currency, but Mercado never responded to his inquiries. Torres told Huerta that if no one came forward to claim the money Huerta should get some sort of reward. When no one came forward, Huerta contacted Torres about a reward but was told he would have to speak to Torres's superiors. Huerta did not receive a reward for his role in the seizure.

The Hidalgo County District Attorney's Office commenced separate forfeiture proceedings against the truck and the currency pursuant to Chapter 59 of the Code of Criminal Procedure. Mercado and Pulido were served with citation, but neither answered or appeared in the suit. An attorney ad litem was appointed to represent Pulido's interest as the truck's registered owner. Approximately one month after the State initiated the proceedings, Huerta filed a petition seeking to intervene as the last person in possession of the currency at the time it was seized. According to Huerta, the currency was not contraband, Mercado and Pulido had abandoned any claims they held to the currency by failing to answer or appear, and Huerta's interest in the currency was superior to that of the State.

The jury found that the currency was not contraband, that Huerta was in actual or joint possession of the currency at the time of seizure,[1] and that Huerta should be awarded $70,000 (roughly 25%) of the currency found in the hub housing. The State moved for judgment

[1] Question 2 of the jury charge asked whether, "by the preponderance of the evidence . . . intervenor was in actual or joint possession of the currency at the time of seizure[.]" The charge defined "possession" as "actual care, custody, control, or management." It defined "actual possession" as "physical occupancy or control over property." Finally, it defined "joint possession" as "possession shared by two or more persons." The State did not object to the charge at trial.

notwithstanding the verdict claiming the money was contraband under Chapter 59 of the Code of Criminal Procedure and that Huerta did not have a valid legal claim to the currency. The trial court agreed, found the currency to be contraband, and ordered its forfeiture to the Hidalgo County Criminal District Attorney and DPS.

A divided court of appeals reversed the trial court's judgment, holding that the currency had not been shown to be contraband and that Huerta was entitled to the entire $281,420. ___ S.W.3d ___. The State no longer contests the court of appeals' determination that the currency was not contraband, leaving us to decide whether Huerta established his entitlement to the currency. We conclude that he did not.

II. Discussion

The Texas Code of Criminal Procedure provides the mechanism for determining whether property deemed contraband that is seized by the State is subject to forfeiture. *See* TEX. CODE CRIM. PROC. art. 59.01–.14. Contraband includes "property of any nature" that is used, or, for certain felonies, intended to be used, in the commission of one or more of the enumerated crimes in article 59.01(2) of the Code of Criminal Procedure. *Id*. art. 59.01(2). Contraband also includes proceeds gained from the commission of certain crimes, property acquired as a result of the commission of certain crimes, and property used to facilitate the commission of certain crimes. *Id.* art. 59.01(2)(c), (D), & (E). Property that is determined to be contraband is subject to seizure by the State. *Id*. art. 59.02(a). A seizure of contraband may be made without a warrant if "the seizure is incident to a search to which the owner, operator, or agent in charge of the property knowingly consents." *Id*. art.

59.02(b)(2). Once the property has been seized, the State has thirty days to commence a forfeiture proceeding. *Id*. art. 59.04(a).

The State must serve notice of the forfeiture proceeding on "the owner of the property" and "any interest holder in the property." *Id*. art. 59.04(b)(1)–(2). The owner of the property is one "who claims an equitable or legal ownership interest in the property." *Id*. art. 59.01(6). An interest holder is one who is a "bona fide holder of a perfected lien or a perfected security interest in the property." *Id*. art. 59.01(4). The officer who seizes the property has custody of the property. *Id*. art. 59.03(c). Further, the "person who was in possession of the property at the time it was seized shall be made a party to the proceeding." *Id*. art. 59.04(j). Huerta was not made a party to the currency-forfeiture proceeding by the State. Instead, he intervened in the suit on the ground that he had an interest in the currency as the person in possession of it at the time it was seized. *See id*. Specifically, Huerta claims he is entitled to the currency because his possessory interest is superior to that of the State.

When the State fails to meet its burden to prove that seized property is contraband under Chapter 59, it no longer has the authority to retain the property under that provision. In such a case, the State will usually assert no possessory interest and return the property to the person from whom it was seized. Here, however, the State contests Huerta's legal entitlement to the property. Huerta asserts two theories to support his claim. First, he argues that he is entitled to the currency as a bailee because the property was abandoned while in his possession. Alternatively, he argues that he is entitled to possession as the finder of the currency.

A. Bailment/Abandonment

Huerta first asserts that, as bailee of the Freightliner, he is entitled to the currency because it was abandoned by Mercado while in Huerta's possession. This argument, however, presumes that Huerta established a bailment as to the currency, something Huerta did not do. To create a bailment, there must be (1) delivery of personal property from one person, the bailor, to another, the bailee, for a specific purpose; (2) acceptance of delivery by the bailee; (3) an express or implied contract between the parties that the specific purpose will be realized; and (4) an agreement between the parties that the property will be either returned to the bailor or dealt with according to the bailor's direction. *See Cessna Aircraft Co. v. Aircraft Network, LLC*, 213 S.W.3d 455, 462–63 (Tex. App.—Dallas 2006, pet. denied); *see also Int'l Freight Forwarding, Inc. v. Am. Flange*, 993 S.W.2d 262, 263 (Tex. App.—San Antonio 1999, no pet.). That a bailment may have existed concerning the Freightliner does not mean that a bailment existed as to the currency. The bailee must, at a minimum, "*knowingly* [take the] property into possession or control" for there to be a bailment. *See Russell v. Am. Real Estate Corp.*, 89 S.W.3d 204, 211 (Tex. App.—Corpus Christi 2002, no pet.) (emphasis added) (citing *Rust v. Shamrock Oil & Gas Corp.*, 228 S.W.2d 934, 935 (Tex. Civ. App.—Amarillo 1950, no writ)). Huerta admitted at trial that he did not enter into an agreement with Mercado to transport the currency and that he was not aware of the currency before it was discovered in the axle. A bailee's duty of care extends to undisclosed items in a vehicle that are in plain view. *See Jack Boles Servs., Inc. v. Stavely*, 906 S.W.2d 185, 190 (Tex. App.—Austin 1995, writ denied). But if the undisclosed items are not in plain view, then the bailee's duty of care extends to items that are "reasonably anticipated to be found in the car based on the surrounding

circumstances." *Id.* (holding that the bailee's duty of care did not extend to an undisclosed piece of valuable artwork stored in trunk of valeted vehicle); *see also Ampco Auto Parks, Inc. v. Williams*, 517 S.W.2d 401, 403–05 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (holding that parking lot attendant company could not have reasonably foreseen that vehicle's trunk would be full of valuable artifacts). Although it is true, as Huerta notes, that *Stavely* and *Ampco* concerned a bailee's liability for undisclosed items of value stored in an automobile, in each case whether a bailment existed as to the undisclosed items — and thus whether the bailee could be held liable for their theft — was necessarily dependent upon establishment of a bailment contract. Thus, if undisclosed items are *not* in plain view and the bailee could not have reasonably anticipated that they would be in the vehicle, the bailment contract does not extend to those items. *Ampco* at 404–05. Huerta cannot claim possession of the currency as bailee without first establishing that there was a bailment as to the money. Because Huerta did not knowingly take possession of the cash when the truck was entrusted to him, no bailment was created with respect to the money.

Although it is not entirely clear, Huerta appears to believe that, with or without a bailment, he may claim the cash because it was abandoned while in his possession. However, even if such a claim were viable, one who seeks to acquire abandoned property must take possession of the property with an intent to acquire title. *See Trenolone v. Cook Exploration Co.*, 166 S.W.3d 495, 500–01 (Tex. App.—Texarkana 2005, no pet.) Huerta contends he had possession of the currency before it was seized by law enforcement officers because he was the first to remove it from the axle and the first to discover that the bundles contained currency. We disagree. Huerta removed the hub housing while assisting law enforcement and customs officials. By the time the currency was

discovered, Huerta had already turned the vehicle over to law enforcement, and it had been subjected to a roadside search, an x-ray, and a sniff search by dogs. The fact that Huerta was the first to remove the currency bundles from the axle does not establish that he was in legal possession of them. Moreover, Huerta never expressed an intent to acquire title to the currency; when Huerta inquired further about the money after it had been seized, he merely sought a reward for finding it, not the return of money that had been abandoned while in his possession. Huerta's theory of legal entitlement based upon simple abandonment is unavailing.

B. Mislaid/Lost Property

Huerta also claims a right to possession of the currency under a common law "treasure trove" or "finders keepers" doctrine. The treasure-trove doctrine applies to "[v]aluables found hidden in the ground or other private place, the owner of which is unknown." BLACK'S LAW DICTIONARY 1539 (8th ed. 2004); *see also Schley v. Couch*, 284 S.W.2d 333, 335 (Tex. 1953) (stating that such valuables generally consist of "money or coin, gold, silver, plate, or bullion"). However, we have previously declined to recognize the treasure-trove doctrine as part of Texas law. *Schley*, 284 S.W.2d at 335. Instead, we apply the common law distinctions of "lost" and "mislaid" property. *Id*. Accordingly, we examine Huerta's claim to the currency as either lost or mislaid property. *Id*.

Mislaid property includes "property which the owner intentionally places where he can again resort to it, and then forgets." *Id.* It is presumed that the owner or occupier of the premises on which the mislaid property is found has custody of the property. *Id*. The owner or occupier's possession of the property is superior to all except the true owner. *Id*. For example, in *Martin v. Johnson*, money that was found under a rug in a garage was found to be mislaid property. 365 S.W.2d 429,

430 (Tex. Civ. App.—Eastland 1963, no writ). As the owner of the premises on which the money was found, Johnson was determined to have a right to its possession as against an individual who claimed he had found the money, and as against the former occupants of the home. *Id*. In this case, by contrast, it is undisputed that Huerta did not own the "premises"—the Freightliner—on which the currency was found. Accordingly, Huerta cannot establish possession to the currency by characterizing it as mislaid property.

Neither can Huerta establish a right to possess the currency as lost property. In contrast to mislaid property, "lost" property includes "that which the owner has involuntarily parted with through neglect, carelessness or inadvertence." *Schley*, 284 S.W.2d at 335 (internal quotations and citation omitted). Unlike mislaid property, the owner or occupier of the premises on which lost property is found does not acquire title to the property. *Id*. Instead, the finder of lost property retains possession as against the owner of the premises on which the property is found, but not against the lost property's true owner. *Id*. In *Schley*, we held that money that had been placed in a jar and then buried was not lost property. *Id*. at 336. The circumstances surrounding the money in *Schley* "repell[ed] the idea that it ha[d] been lost." *Id*. Where the owner does not part with property as a result of carelessness or neglect, but instead demonstrates "a deliberate, conscious and voluntary [desire] to hide his [property] in a place where he thought it was safe and secure, and with the intention of returning to claim it at some future date," it is mislaid property. *Id*. The property in this case—$281,420 in various denominations found in tightly-wrapped bundles in the axle of a truck—was clearly deliberately hidden. As in *Schley*, the manner in which the money was placed in the axle forecloses any argument that it was lost rather than mislaid.

III. Disposition of Unclaimed Property Under Texas Code of Criminal Procedure Article 18.17

In his amicus curiae brief, the Solicitor General argues that property seized pursuant to Chapter 59 that is determined not to be contraband, but remains unclaimed, should be disposed of pursuant to Article 18.17 of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 18.17. Article 18.17 is intended to deal with the disposal of abandoned and unclaimed property. *Id*. That statute provides: "[property that] remain[s] unclaimed for a period of 30 days shall be delivered for disposition to a person designated by the municipality or the purchasing agent of the county in which the property was seized." *Id*. art. 18.17(a). Huerta asserts that because the State failed to elect Article 18.17 as a remedy during trial, it waived this argument. However, Article 18.17 is not a remedy but a procedure implemented by the Legislature to dispose of "[a]ll unclaimed or abandoned personal property of every kind" that has been seized by the State and is not subject to the limited exceptions outlined in the statute. *Id*. Accordingly, the State is not foreclosed from seeking to dispose of the currency pursuant to Article 18.17, though we express no opinion on the subject.

IV. Conclusion

Because Huerta failed to establish a valid legal claim to possession of the currency, we reverse the judgment of the court of appeals awarding the money to him, and remand the case to the trial court for further proceedings consistent with this opinion.

Harriet O'Neill
Justice

OPINION DELIVERED: May 14, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0504

MIDLAND WESTERN BUILDING L.L.C., PETITIONER,

v.

FIRST SERVICE AIR CONDITIONING CONTRACTORS, INC., RESPONDENT

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

PER CURIAM

When Midland Western Building, L.L.C. allegedly failed to pay for air conditioning services performed by First Service Air Conditioning Contractors, Inc., First Service sued Midland Western on a sworn account. First Service sought at least $21,693.56, the principal amount due on the account, plus attorney's fees.

At trial, attorney Brian Carney testified that $24,000 to $26,000 was a reasonable fee for preparing and trying the case, with an additional $7,000 to $10,000 for an appeal to the court of appeals and $5,000 for an appeal to this Court. Carney had reviewed First Service's legal bills before testifying, but the bills themselves were not introduced into evidence. Midland Western cross-examined Carney on the *Arthur Andersen*[1] factors, and Carney admitted that some of the bills involved work related to parties that were no longer in the case.

[1] *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

The jury awarded First Service $14,645.10 in damages but no attorney's fees, and the trial court signed a judgment in conformance with the verdict. First Service appealed, arguing that the trial court erred in failing to award mandatory attorney's fees because there was no evidence to support the jury's answer of zero attorney's fees, and First Service conclusively established its reasonable and necessary fees. The court of appeals, citing *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880 (Tex. 1990), noted that the only evidence regarding attorney's fees came from Carney, and "[w]hen the evidence is not contradicted by another witness, or contradicted by circumstances, and it is clear, direct, positive, and free from contradiction, inaccuracies, or circumstances that cast suspicion on the evidence, it is taken as true as a matter of law." ___ S.W.3d ___, ___. Concluding that Carney's testimony satisfied those requirements, the court of appeals reversed the trial court's judgment on attorney's fees and rendered judgment for $24,000 in fees.

We recently decided *Smith v. Patrick W.Y. Tam Trust*, ___ S.W.3d ___ (Tex. 2009), in which we held that an appellate court's award of the full amount of fees requested, despite the jury's rejection of a substantial portion of the damages sought, was improper because the fee, even if supported by uncontradicted testimony, was "unreasonable in light of the amount involved and the results obtained, and in the absence of evidence that such fees were warranted due to circumstances unique to this case." *Smith*, ___ S.W.3d at ___. Thus, "the evidence did no more than raise a fact issue to be decided by the jury." *Id*. at ___.

Such is the case here. The court of appeals' fee award was not supported by uncontradicted testimony, as Carney admitted on cross examination that some of the fees involved claims against

parties other than Midland Western. Thus, fees could not be awarded as a matter of law. *See id.* at ___; *Ragsdale*, 801 S.W.2d at 882.

The jury's award of no fees, however, was improper. First Service offered evidence of its attorney's fees and the value thereof. While the jury could have rationally concluded that a reasonable and necessary fee was less than the amount sought, an award of no fees was improper in the absence of evidence affirmatively showing that no attorney's services were needed or that any services provided were of no value. *Smith*, ___ S.W.3d at ___; *Cale's Clean Scene Carwash, Inc. v. Hubbard*, 76 S.W.3d 784, 787 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Accordingly, First Service is entitled to a new trial on attorney's fees.

We reverse the court of appeals' judgment and remand the case to the trial court for a new trial on attorney's fees. TEX. R. APP. P. 60.2(d)

Opinion Delivered: November 20, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0528

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,
PETITIONER,

v.

ANN M. FERNANDEZ, RESPONDENT

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

Argued December 15, 2009

JUSTICE GREEN delivered the opinion of the Court.

JUSTICE O'NEILL and JUSTICE GUZMAN did not participate in the decision.

In this case, as in *Frost National Bank v. Fernandez*, ___ S.W.3d ___ (Tex. 2010), we hold that Ann M. Fernandez's pleadings, taken as true, were sufficient for the district court to establish Fernandez's standing in a bill of review proceeding asserting inheritance rights relating to the estate of John G. Kenedy, Jr.'s sister. The district court's jurisdiction over Fernandez's heirship claims is exclusive when those claims constitute a direct attack on an earlier district court judgment, the estate has been closed for decades, and the decedent did not die intestate. *Id.* at ___ (discussing Texas Probate Code sections 5, 5A, and 48). We therefore reverse the court of appeals' judgment in part.

However, because the discovery rule does not apply to inheritance or heirship claims by non-marital children, *see id.* at ___, and Fernandez's claims were barred by the applicable statute of limitations, we render judgment reinstating the district court's judgment that Fernandez take nothing. In light of today's ruling, we conclude that none of Fernandez's claims for heirship or inheritance rights to the Kenedy estate remain viable, so we affirm the part of the court of appeals' judgment that reversed the district court's anti-suit injunction.

We set out the facts in detail in *Frost National Bank*, ___ S.W.3d at ___. This appeal arises from Fernandez's bill of review proceeding in the 105th District Court of Nueces County seeking to assert inheritance rights to the estate of Kenedy's sister, Sarita Kenedy East. East's 1960 will left most of her estate to The John G. and Marie Stella Kenedy Memorial Foundation and contained a residual clause under which the Foundation was the only beneficiary. In her bill of review proceeding, Fernandez seeks to set aside a June 26, 1975 judgment probating East's will. *See Trevino v. Turcotte*, 564 S.W.2d 682, 690 (affirming district court's 1975 judgment dismissing certain individuals from a suit contesting East's 1960 will). By 1987, East's property had been finally distributed and the estate closed. Fernandez now asserts that she is Kenedy's non-marital child and, therefore, East's niece. She claims she was a necessary party and should have been notified of a suit contesting East's will (the *Trevino* will contest) and made a party to the resulting settlement agreement, she seeks to set aside the 1975 judgment and East's 1960 will, and she seeks an accounting and distribution from the Foundation.

The district court granted summary judgment in favor of the Foundation and issued an anti-suit injunction preventing Fernandez from taking any action in any court inconsistent with its

judgments, including any attempt to repoen East's estate, establish a right to inherit from East's estate, set aside East's will, or recover an interest in property distributed from East's estate to the Foundation. The court of appeals reversed, holding that the probate court had dominant jurisdiction over the question of Fernandez's heirship, the resolution of which it held necessary to determine Fernandez's standing to pursue the *Trevino* bill of review. *Fernandez v. The John G. & Marie Stella Kenedy Mem'l Found.*, ___ S.W.3d ___, ___ (Tex. App.—Corpus Christi 2008, pet. granted) (mem. op.). Consequently, the court of appeals remanded the case for the district court's abatement. *Id.* at ___. The court of appeals also reversed the anti-suit injunction and rendered judgment against the Foundation on its request for injunctive relief. *Id.* at ___.

In *Frost National Bank*, we held that the district court had jurisdiction to render summary judgment in Fernandez's *Humble Oil* bill of review proceeding involving Kenedy's estate. ___ S.W.3d at ___. We first held that Fernandez's pleadings—in which she alleged that she is Kenedy's non-marital child—taken as true, were sufficient to establish Fernandez's standing. *Id.* at ___. This case is no different. In the *Trevino* bill of review, Fernandez pled that she is Kenedy's non-marital child, the Foundation asked the district court to assume paternity for purposes of its summary judgment motion, and Fernandez did not object to that request. We therefore conclude, as we did in *Frost National Bank*, that Fernandez's pleadings conferred standing. *See id.* at ___.

We next held in *Frost National Bank* that because Fernandez's claims were a direct attack on an earlier district court judgment, the district court had exclusive jurisdiction to determine Fernandez's standing, including resolving Fernandez's heirship claims. *Id.* at ___. The Texas Probate Code does not vest the probate court with jurisdiction when there was no open or pending

estate to which an heirship proceeding would be incident, and when the decedent left a will that disposed of all her property and the estate was fully administered and closed decades ago pursuant to a district court judgment. *Id.* at ___ (discussing sections 5, 5A, and 48 of the Texas Probate Code). Again, we see no reason to depart from that conclusion in this case. The 1975 judgment ordered that East's 1960 will and second codicil "not be set aside" and "upheld and confirmed" those instruments as East's last will and testament. The parties do not dispute that East's 1960 will and second codicil disposed of all her property or that the estate was fully administered and closed decades ago. Because there was no open or pending estate and, with that 1975 judgment in effect, no possibility of intestacy, the district court had exclusive jurisdiction over Fernandez's inheritance claims relating to East's estate, including Fernandez's heirship claims. Accordingly, we reverse the part of the court of appeals' judgment that remanded the case to the district court for abatement.

The discovery rule does not apply to bills of review in which non-marital children seek to set aside probate judgments. *Id.* at ___. When an heirship claim is brought after an administration of the decedent's estate or a conveyance of the decedent's property to a third party, courts have applied the four-year residual limitations period of Texas Civil Practice and Remedies Code section 16.051. *See, e.g.*, *Cantu v. Sapenter*, 937 S.W.2d 550, 552 (Tex. App.—San Antonio 1996, writ denied); *Smith v. Little*, 903 S.W.2d 780, 787–88 (Tex. App.—Dallas 1995), *rev'd in part on other grounds*, 943 S.W.2d 414 (Tex. 1997). Under any conceivable accrual date, the four-year statute of limitations ran well before Fernandez first asserted claims to the East estate. Fernandez conceded that, absent application of the discovery rule, her claims are time-barred. Because the four-year

residual limitations period expired long before Fernandez filed her bills of review, we reinstate the district court's summary judgment. *See Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 22 (Tex. 1987) (recognizing that, to avoid unnecessary delay, we may consider issues of law rather than remanding them to the court of appeals); *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970) (recognizing that we can affirm a trial court's judgment on a single valid ground); TEX. R. APP. P. 60.2(c) ("The Supreme Court may . . . reverse the lower court's judgment in whole or in part and render the judgment that the lower court should have rendered.").

In *Frost National Bank*, we affirmed the portion of the court of appeals' judgment that reversed the anti-suit injunction. *Id.* at ___. Here, because we do not foresee a continuing threat of Fernandez resuming this litigation in other courts, we likewise affirm the portion of the judgment relating to the anti-suit injunction and denial of the Foundation's request for injunctive relief. *See Univ. of Tex. v. Morris*, 344 S.W.2d 426, 429 (Tex. 1961) (recognizing that this Court is not constrained to the trial court record at the time an injunction was issued when events subsequent to the issuance of an anti-suit injunction "render the cause for injunctive relief entirely moot or academic"); *see also See Gannon v. Payne*, 706 S.W.2d 304, 307 (Tex. 1986) ("The circumstances of each situation must be carefully examined to determine whether the [anti-suit] injunction is required to prevent an irreparable miscarriage of justice.").

For the reasons expressed above and in *Frost National Bank v. Fernandez*, *id.* at ___, we reverse the portions of the court of appeals' judgment that relate to jurisdiction and abatement, render

judgment reinstating the district court's summary judgment that Fernandez take nothing, and affirm the portion of the court of appeals' judgment that relates to the anti-suit injunction.

_____
Paul W. Green
Justice

OPINION DELIVERED: April 16, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0529

THE JOHN G. AND MARIE STELLA KENEDY MEMORIAL FOUNDATION,
PETITIONER,

v.

ANN M. FERNANDEZ, RESPONDENT

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

Argued December 15, 2009

JUSTICE GREEN delivered the opinion of the Court.

JUSTICE O'NEILL and Justice GUZMAN did not participate in the decision.

In this case, we consider whether to uphold an anti-suit injunction that enjoins Ann M. Fernandez from pursuing claims in other courts asserting inheritance rights relating to the estate of Sarita Kenedy East or interests in property that East conveyed. We have already reinstated district court summary judgments that Fernandez take nothing in related district court bill of review cases regarding the estates of East and her brother, John G. Kenedy, Jr. *Frost Nat'l Bank v. Fernandez*, ___ S.W.3d ___, ___ (Tex. 2010); *The John G. & Marie Stella Kenedy Mem'l Found. v. Fernandez*, ___ S.W.3d ___, ___ (Tex. 2010). In each of those cases, we affirmed the part of the court of

appeals' judgment that reversed the anti-suit injunction. Because we conclude that none of Fernandez's claims for heirship or inheritance rights to the East estate remain viable, we likewise affirm the part of this court of appeals' judgment that relates to the district court's anti-suit injunction.

We set out the facts in detail in *Frost National Bank v. Fernandez*, ___ S.W.3d at ___. *See also Kenedy Mem'l Found.*, ___ S.W.3d at ___. This appeal arises from Fernandez's bill of review proceeding in the 105th District Court of Kenedy County attacking a 1978 judgment dismissing with prejudice a suit by Arnold Garcia, temporary administrator of East's estate, seeking to have declared void *inter vivos* mineral royalty assignments East made in 1960 and 1961 to The John G. and Marie Stella Kenedy Memorial Foundation (the *Garcia* suit). In her bill of review, Fernandez claimed that she is Kenedy's non-marital child and, as East's heir, she should have been notified of and made a party to the *Garcia* suit. Because she was not present when the 1978 judgment was rendered, Fernandez believes that the judgment is void. The district court granted summary judgment in favor of the Foundation and issued an anti-suit injunction preventing Fernandez from proceeding with probate matters relating to East's estate in any court. Fernandez did not appeal the summary judgment, challenging only the anti-suit injunction on appeal. Having reversed the district court and ordered it to abate the bill of review cases while Fernandez proceeded in probate court, the court of appeals held that "a district court that lacks probate jurisdiction cannot enjoin a party from proceeding in probate court," and noted that it did not find any support for an anti-suit injunction in that case. *Fernandez v. The John G. & Marie Stella Kenedy Mem'l Found.*, ___ S.W.3d ___, ___

(Tex. App.—Corpus Christi 2008, pet. granted) (mem. op.). The court of appeals reversed the anti-suit injunction and denied the Foundation's request for injunctive relief. *Id.* at ___.

In *The John G. and Marie Stella Kenedy Memorial Foundation v. Fernandez*, we reinstated the district court judgment based in part on our conclusion that Fernandez's attempt to prove that she is East's heir in the district court bill of review proceeding is barred by limitations. ___ S.W.3d at ___. The record shows that East made the conveyances at issue in this case in 1960 and 1961, she died in 1961, the district court rendered judgment probating East's will in 1975, the district court dismissed the *Garcia* suit seeking to set aside the conveyances in 1978, and the probate court closed East's estate in March 1987. By any conceivable accrual date, the residual four-year statute of limitations applicable to Fernandez's heirship claim expired more than fifteen years before she filed the *Garcia* bill of review in 2003. *See* TEX. CIV. PRAC. & REM. CODE § 16.051; *Kenedy Mem'l Found.*, ___ S.W.3d at ___; *Frost Nat'l Bank*, ___ S.W.3d at ___. The district court's summary judgment in this case foreclosed both Fernandez's heirship claim and her attempt to resurrect an attack on the conveyances at issue. Fernandez did not appeal any aspect of the summary judgment. Therefore, the 1978 order dismissing with prejudice the *Garcia* suit is binding.

Having held that the judgment probating East's will is binding, *Kenedy Mem'l Found.*, ___ S.W.3d at ___, and having now held that the 1978 *Garcia* judgment is binding, we see no possibility of Fernandez being able to establish that East died intestate, which would be necessary for the probate court to assert jurisdiction over Fernandez's heirship or inheritance claims relating to East's estate or *inter vivos* conveyances. Because the district court has exclusive jurisdiction over Fernandez's inheritance claims relating to both the Kenedy and East estates, we do not foresee a

continuing threat of Fernandez resuming this litigation in other courts. *See Frost Nat'l Bank*, ___ S.W.3d at ___; *Kenedy Mem'l Found.*, ___ S.W.3d at ___. Under the unique circumstances of this case, we therefore affirm the portion of the judgment relating to the anti-suit injunction and denial of the Foundation's request for injunctive relief. *See Univ. of Tex. v. Morris*, 344 S.W.2d 426, 429 (Tex. 1961) (recognizing that this Court is not constrained to the trial court record at the time an injunction was issued when events subsequent to the issuance of an anti-suit injunction "render the cause for injunctive relief entirely moot or academic"); *see also Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, 651 (Tex. 1996) (per curiam) (reciting requirement that "'a clear equity demands' the injunction" (quoting *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, 163 (Tex. 1986))); *Gannon v. Payne*, 706 S.W.2d 304, 307 (Tex. 1986) ("The circumstances of each situation must be carefully examined to determine whether the [anti-suit] injunction is required to prevent an irreparable miscarriage of justice.").

_____
Paul W. Green
Justice

OPINION DELIVERED: April 16, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0534

FROST NATIONAL BANK, FORMER EXECUTOR OF THE ESTATE OF ELENA SUESS KENEDY, DECEASED, AND FROST NATIONAL BANK AND PABLO SUESS, TRUSTEES OF THE JOHN G. KENEDY, JR. CHARITABLE TRUST, PETITIONERS,

v.

ANN M. FERNANDEZ, RESPONDENT

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

Argued December 15, 2009

JUSTICE GREEN delivered the opinion of the Court.

JUSTICE O'NEILL and JUSTICE GUZMAN did not participate in the decision.

Believing herself to be the non-marital child of John G. Kenedy, Jr., Ann M. Fernandez has initiated multiple proceedings in both district court and statutory probate court to set aside decades-old judgments and reopen the estates of Kenedy, his wife, and his sister, and to declare Fernandez an heir to those estates. The defendants filed motions for summary judgment in the district court arguing numerous grounds, including that because Fernandez's heirship claim was barred by limitations, she could not establish an interest in the estates and could not pursue bills of review. The district court granted summary judgment against Fernandez in a broadly-worded order that did

not specify the grounds. The principal issue on appeal is whether the district court had jurisdiction to render summary judgment when similar bill of review proceedings and applications for determination of heirship were pending in the probate court. The court of appeals held that the district court lacked subject matter jurisdiction and was required to abate its proceedings until the probate court first resolved questions of heirship. We disagree. Fernandez's pleadings and her direct attack on a previous judgment vested the district court with subject matter jurisdiction. Moreover, the Texas Probate Code does not authorize a probate court to exercise jurisdiction over heirship claims when an estate has been closed for decades and the decedent did not die intestate. We therefore reverse those parts of the court of appeals' judgment that relate to jurisdiction and abatement. Further, we hold that the discovery rule does not apply to inheritance or heirship claims by non-marital children, or bill of review claims to set aside probate judgments. Because Fernandez's claims were barred by the applicable statute of limitations, we render judgment reinstating the district court's judgment. In light of today's ruling, we conclude that none of Fernandez's claims for heirship or inheritance rights to the Kenedy estate remain viable, so we affirm the portion of the court of appeals' judgment that set aside the district court's anti-suit injunction.

I. Facts and Procedural Background

John G. Kenedy, Jr., died in 1948. In his holographic will, Kenedy left all his "property of every character and d[e]scription both personal and mixed" to his wife, Elena Suess Kenedy. After Kenedy's will was probated in the County Court of Kenedy County, Humble Oil & Refining Company, which leased mineral interests that were part of Kenedy's estate, brought a will construction suit in district court to resolve a potential ambiguity regarding whether Kenedy's will

disposed of all Kenedy's real property (the *Humble Oil* suit). On October 12, 1949,[1] the district court found that all of Kenedy's heirs were before it and held that the will did not leave an intestacy but instead passed his interest in any property to his wife. The judgment states that "as a matter of law" Kenedy was survived by no children and that "all persons who would have inherited any part of the Estate of John G. Kenedy, Jr., deceased, if he had died intestate as to all or any part of his estate, are parties to this suit and therefore all necessary and interested parties are included among the defendants herein." Kenedy's estate was distributed, taxed, and closed in 1952.[2]

Sarita Kenedy East, Kenedy's sister, died in 1961. East's 1960 will and codicils, which left the bulk of East's estate to The John G. and Marie Stella Kenedy Memorial Foundation and contained a residual clause leaving any remaining property to the Foundation, were admitted to probate later in 1961. After extensive litigation (the *Trevino* will contest), the district court dismissed several contests to the 1960 will and codicils. *See Trevino v. Turcotte*, 564 S.W.2d 682, 690 (Tex. 1978). As a part of that litigation, the district court entered a final judgment in 1975 pursuant to a settlement agreement as to some of the parties contesting East's 1960 will. We later affirmed the district court's dismissal judgment, *id.*, and the district court then transferred the

[1] The specific dates and sequence of events are generally not significant to the outcome of this case. We include them for purposes of organizing the complicated relevant procedural events, and to refer to certain specific orders entered by the various trial courts.

[2] In 1949, the probate court "ordered that the proceedings in [Kenedy's] Estate, in so far as the administration of this estate is concerned, be, and they are hereby closed, save and except as to such proceedings as are required in determining and fixing the Inheritance Tax, if any, due upon said Estate." Although the court signed an order fixing inheritance tax in 1952, it does not appear from the record that the court subsequently issued any other orders relating to Kenedy's estate.

Trevino will contest back to the County Court of Kenedy County for a final accounting of East's estate in 1986. The county court closed East's estate in 1987.

Apart from the contests to East's will, a temporary administrator of her estate had also filed an action to set aside certain *inter vivos* mineral royalty assignments East had made to the Foundation (the *Garcia* suit). The district court abated this action in 1964, after the Foundation argued that it would own the property at issue under East's will regardless of the status of the *inter vivos* transfers, if the *Trevino* will contest failed. After our opinion in *Trevino*, in September 1978 the district court dismissed the *Garcia* suit with prejudice.

Mrs. Kenedy passed away in 1984, leaving a will that bequeathed most of her estate to The John G. Kenedy, Jr. Charitable Trust.[3] That will was probated in 1984, the estate was closed in late 1987, and Mrs. Kenedy's interest in the real property at issue was distributed to the Trust. The La Parra Ranch, which was among Kenedy's real property assets that passed to Mrs. Kenedy, was the primary trust asset.[4]

Fernandez was born in 1925 to Maria Rowland, who was then unmarried and worked for the Kenedy family.[5] For years, Fernandez heard rumors and speculation that Kenedy was her father. Fernandez alleges that on Mother's Day of 2000, shortly before her death, Rowland revealed Kenedy's paternity when she told Fernandez's son, Dr. Ray Fernandez, that he bore a resemblance

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[3] We refer to the petitioners in this case collectively as the Trust.

[4] Kenedy owned approximately 200,000 acres of the La Parra Ranch at his death, and his sister, Sarita Kenedy East, owned the other half.

[5] Rowland married Desiderio Peña during Fernandez's childhood, and later married Tom Goates when Fernandez was in her twenties.

to his grandfather, Kenedy. Fernandez then began engaging in litigation to assert her putative right to inherit from the estates of Kenedy, his wife, and East.[6]

Fernandez filed multiple lawsuits contesting court orders and probate proceedings relating to those estates, and she seeks to reopen the estates and set aside distributions of real and personal property that were made decades ago in those probate proceedings. Fernandez, who did not receive notice of the suits pertaining the estates of Kenedy, his wife, and East, contends that she should have been a party to those suits, that the judgments in those cases are not binding and should be set aside, and that she is entitled to her intestate share. We discuss the relevant underlying proceedings and filings generally in chronological order.

In October 2001, Fernandez filed her initial suit, a bill of review in the County Court of Kenedy County seeking to set aside the order probating Kenedy's will, to reopen Kenedy's estate, and to be declared Kenedy's heir.[7] In May 2002, she filed another bill of review and application for declaration of heirship in Kenedy's estate in the County Court of Kenedy County. She filed additional bill of review proceedings in the County Court of Kenedy County relating to Mrs. Kenedy's estate and East's estate, also seeking a declaration of heirship for these estates.

Fernandez filed three petitions for bill of review in the district court for Kenedy County and Nueces County, seeking to set aside the *Humble Oil*, *Trevino*, and *Garcia* judgments. The district

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[6] In 2002, the County Court at Law No. 5 of Nueces County appointed Dr. Fernandez to serve as guardian of his mother's estate. It appears that he is now prosecuting the litigation on Fernandez's behalf.

[7] We describe this as a bill of review, since in substance this is what it was, although Fernandez did not style it as such, instead calling it an "application to set aside order probating will with application for declaration and determination of heirship." Fernandez's later filings in these probate cases were expressly referred to as bills of review.

court judgments in those bill of review cases are the subject of appeals currently before us. In May 2002, Fernandez filed the first of these bills of review in the 105th District Court of Nueces County relating to the *Trevino* will contest (*Trevino* bill of review).[8] This suit also sought an accounting and distribution of property including the mineral interests in the land once held by the Kenedys and East.

On June 28, 2002, Judge Guy Herman was appointed to be the statutory probate judge over the above-referenced County Court of Kenedy County matters.[9] On November 5, 2002, citing section 5B of the Texas Probate Code, Judge Herman transferred to himself and consolidated all of the four cases then pending in county court.[10] In the same orders, Judge Herman also purported to transfer to himself the cases then pending in district court, including the *Trevino* bill of review.[11]

Then, in May 2003, Fernandez filed in district court the other two bills of review that are now the subject of pending appeals. Fernandez initiated the underlying proceedings in the 105th District Court of Kenedy County with a bill of review to set aside the 1949 judgment from the *Humble Oil* will contest suit, arguing that she should have been notified of and made a party to the decades-

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[8] On appeal here as 08-0528, *The John G. & Marie Stella Kenedy Mem'l Found. v. Fernandez*.

[9] The appointment order stated that Judge Herman would hold all rights, powers, and privileges held by the regular judge of the court and the attendant jurisdiction of a statutory probate court. *See* TEX. GOV'T CODE § 25.0022.

[10] The cases were consolidated into cause no. 395, in which Fernandez then sought a determination of heirship and her share of an interest in intestate property.

[11] Along with the *Trevino* bill of review, Fernandez had filed a "petition with application for temporary restraining order," in *Fernandez v. Exxon Mobil Corp*., No. 02-2331-C (97th Dist. Ct., Nueces County), alleging that Humble Oil & Refining Company had become known as Exxon/Mobil. That particular suit is not before us on appeal.

earlier *Humble Oil* proceeding (*Humble Oil* bill of review).[12] She also filed a bill of review in the 105th District Court of Nueces County, seeking to set aside the 1978 East dismissal order, claiming that, as East's heir, she should have been notified of and made a party to the *Garcia* royalty suit (*Garcia* bill of review).[13]

In August 2003, Fernandez moved to abate the three district court bill of review cases, and for Judge Herman to transfer the remaining district court cases to himself.[14] The Foundation and Trust filed pleas to the jurisdiction challenging the probate court's jurisdiction to transfer the bill of review cases from the district court. *See In re The John G. & Marie Stella Kenedy Mem'l Found.*, 159 S.W.3d 133, 139 (Tex. App.—Corpus Christi 2004, orig. proceeding). On August 27, 2003, Judge Herman denied the pleas to the jurisdiction, *id.*, and signed a second order purportedly transferring and consolidating the *Humble Oil* and *Garcia* bill of review district court causes of action into the cause number assigned to the related cases. At this point, all three district court bill of review cases were purportedly transferred and consolidated by Judge Herman.

On petition for writ of mandamus, the court of appeals held that because there was no estate pending in the probate court, Judge Herman lacked authority under section 5B of the Texas Probate

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[12] This bill of review proceeding gave rise to the instant appeal. Originally, the *Humble Oil* suit had been cause no. 35 in the 28th District Court of Kenedy County. According to the Trust, the 105th District Court became the successor to the 28th District Court of Kenedy County on or about September 1, 1985.

[13] On appeal here as 08-0529, *The John G. & Marie Stella Kenedy Mem'l Found. v. Fernandez*.

[14] Fernandez first moved to abate the *Humble Oil* and *Garcia* bills of review in May 2003 so that Judge Herman could transfer the cases to himself. With regard to the *Trevino* bill of review, Judge Herman had already purported to transfer the case to himself. Later, in August 2003, Fernandez also moved to abate the *Trevino* bill of review, asserting that, "to the extent [the district court] retains the case," the court should stop its proceedings to let Judge Herman proceed.

Code to transfer the bill of review proceedings that were originally filed in district court. *Id.* at 146. The court of appeals directed Judge Herman to vacate his transfer orders relating to the three district court bills of review, *id.*, but the record does not show that this has yet happened.[15]

While that mandamus case was pending in the court of appeals, Fernandez sought to exhume Kenedy's remains pursuant to section 711.004 of the Texas Health and Safety Code. On June 18, 2004, two days after the court of appeals issued its mandamus ruling, Judge Herman concluded that he had jurisdiction to consider the exhumation motion. He then granted the motion to exhume to allow DNA testing to determine if Kenedy is Fernandez's biological father. After proceedings in the court of appeals and a hearing before Judge Herman, an exhumation date was set for July 10, 2004. *See In re Frost Nat'l Bank*, 2004 WL 1505527, at *1 (Tex. App.—Corpus Christi July 6, 2004, orig. proceeding) (per curiam) (denying petition for writ of mandamus seeking protection from the exhumation order). The Foundation and Trust filed petitions for writ of mandamus in this Court,[16] and we stayed the exhumation order.[17]

In January 2006, while the exhumation mandamus cases were pending in this Court, the Trust and Foundation moved for summary judgment in the *Trevino* and *Humble Oil* bill of review cases

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[15] No original proceeding was filed in this Court concerning whether Judge Herman abused his discretion by ordering a transfer from district court, as the court of appeals found.

[16] *In re The John G. & Marie Stella Kenedy Mem'l Found.*, 04-0607; *In re Frost Nat'l Bank*, 04-0608.

[17] On February 25, 2008, we abated those exhumation mandamus cases pending resolution of the underlying appeal and two related appeals. *See* 267 S.W.3d 75, 79 n.4 (Tex. App.—Corpus Christi 2008, pet. granted); 51 Tex. Sup. Ct. J. 446 (Feb. 15, 2008). We lifted our abatement after the court of appeals issued its opinions and judgments concerning the district court's summary judgments and anti-suit injunctions. *See* 51 Tex. Sup. Ct. J. 1407 (Sept. 26, 2008).

in district court.[18] The Foundation also moved for summary judgment in the *Garcia* bill of review case in May 2006. The motions presented various grounds for summary judgment, including Fernandez's lack of standing to pursue the bills of review and expiration of the applicable limitations period, both for an heirship determination and for the bill of review itself. Among other things, the Trust and Foundation argued that these bars precluded Fernandez from establishing a right to inherit from Kenedy or East, such that Fernandez could not establish a meritorious claim warranting a bill of review.

Meanwhile, the Foundation also filed an emergency application for temporary restraining order and a request for a permanent injunction in the *Trevino* and *Garcia* bills of review cases, and the Trust made similar filings in the *Humble Oil* bill of review case. The Trust and Foundation argued that Fernandez's filings in probate court were a continuing attempt to circumvent the district court's jurisdiction. The district court issued a temporary restraining order prohibiting Fernandez from proceeding with a motion she had filed in probate court, which sought to reopen Kenedy's estate and to have the bill of review proceedings transferred to the probate court and abated in the district court. Fernandez did not seek appellate court relief from that order.

The action in the district court proceeded. In March 2006, in the *Humble Oil* and *Trevino* bills of review, the district court denied Fernandez's motion to abate and denied a motion to transfer. Finally, on March 27, 2006, the district court rendered summary judgment for the Trust and Foundation without specifying the grounds in the *Trevino* and *Humble Oil* bill of review cases.

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[18] The Foundation sought summary judgment in the *Trevino* proceeding, and the Trust sought summary judgment in the *Humble Oil* proceeding.

On April 12, 2006, the district court issued permanent anti-suit injunctions in those two cases, enjoining Fernandez from taking actions inconsistent with the district court's judgment in the probate court or any other court, including any attempt to reopen the estates, establish a right to inherit from the estates, set aside the wills, or recover an interest in property distributed from the estates. The district court issued an order on April 25, 2006 that incorporated both the March 27 summary judgment and the April 12 injunctive relief. Fernandez appealed both the summary judgment and the anti-suit injunction in those two cases.

The district court also rendered summary judgment for the Foundation in the *Garcia* bill of review case on June 22, 2006.[19] The same day, as it had in the other two cases, the district court issued a permanent anti-suit injunction in this case. Fernandez appealed only the anti-suit injunction in the *Garcia* bill of review case.

Turning to the *Humble Oil* bill of review, the instant case before us, the court of appeals reversed, concluding that the probate court had dominant jurisdiction over the question of Fernandez's heirship and whether she had an interest in Kenedy's estate. 267 S.W.3d 75, 81–82 (Tex. App.—Corpus Christi 2008, pet. granted). Holding that abatement was required, the court remanded the case to the district court with instructions to abate the petition until the probate court resolves Fernandez's heirship application. *Id.* at 85. The court of appeals also reversed the anti-suit injunction and rendered judgment against the Trust on its request for injunctive relief. *Id.* The Trust appealed, and we granted the petition for review. 53 Tex. Sup. Ct. J. 15 (Oct. 23, 2009).

[19] The district court never ruled on Fernandez's motion to abate in the *Garcia* bill of review, or seemed to acknowledge Fernandez's attempts to transfer the case to Judge Herman. Its final summary judgment order stated categorically that all relief requested by Fernandez is denied.

On the *Trevino* bill of review, the court of appeals also reversed, again concluding that the probate court had dominant jurisdiction and remanding to the district court for abatement. *Fernandez v. The John G. & Marie Stella Kenedy Mem'l Found.*, ___ S.W.3d ___, ___ (Tex. App.—Corpus Christi 2008, pet. granted) (mem. op.). As in *Humble Oil*, the court of appeals reversed the anti-suit injunction and rendered judgment against the Foundation on its request for injunctive relief. *Id.* at ___. The Foundation appealed, and we granted that petition for review. 53 Tex. Sup. Ct. J. 15 (Oct. 23, 2009).

On the *Garcia* bill of review, the court of appeals again reversed, this time concluding only that the district court acted improperly by entering an anti-suit injunction. *Fernandez v. The John G. & Marie Stella Kenedy Found.*, ___ S.W.3d ___, ___ (Tex. App.—Corpus Christi 2008, pet. granted) (mem. op.). Because Fernandez did not appeal the summary judgment in this case, the court of appeals did not remand the case. Instead, the court of appeals reversed the anti-suit injunction and rendered judgment against the Foundation on its request for injunctive relief. *Id.* at ___. The Foundation appealed, and we granted that petition for review. 53 Tex. Sup. Ct. J. 15 (Oct. 23, 2009).

II. Summary Judgment

The Trust first argues that the district court had subject matter jurisdiction to render judgment that Fernandez take nothing in her bill of review suit, and that the court of appeals erroneously held that the district court must abate its bill of review proceedings to allow the probate court to determine heirship. "Whether a court has subject matter jurisdiction is a question of law." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (citing *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002)). "Whether a pleader has alleged facts that

affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed *de novo*." *Id.*

A. Jurisdiction

1. Fernandez's Pleadings

The Trust contends that Fernandez's pleading of facts supportive of standing vested the district court with subject matter jurisdiction over the *Humble Oil* bill of review case. We agree. Inherent in a court's jurisdiction is the authority to determine whether it can exercise subject matter jurisdiction over the case, including determining standing. *See Houston Mun. Employees Pension Sys. v. Ferrell*, 248 S.W.3d 151, 158 (Tex. 2007); *Camacho v. Samaniego*, 831 S.W.2d 804, 809 (Tex. 1992). Standing, which focuses on who may bring an action, is a prerequisite to subject matter jurisdiction. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 708 (Tex. 2001). To have standing to pursue a bill of review, a person generally must have been a party to the prior judgment or have had a then-existing interest or right that was prejudiced by the prior judgment. *See, e.g.*, *Rodriguez ex rel. Rodriguez v. EMC Mortg. Corp.*, 94 S.W.3d 795, 798 (Tex. App.—San Antonio 2002, no pet.); *Lerma v. Bustillos*, 720 S.W.2d 204, 205–06 (Tex. App.—San Antonio 1986, no writ). Fernandez contends that, because of her biological relationship to Kenedy, she has an interest in the Kenedy estate that was prejudiced by the 1949 *Humble Oil* judgment.

It has long been the rule that a plaintiff's good faith allegations are used to determine the trial court's jurisdiction. *See, e.g.*, *Brannon v. Pac. Employers Ins. Co.*, 224 S.W.2d 466, 469 (1949). A court may presume the truth of allegations supportive of standing to determine standing and dispose of litigation through summary judgment. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852

S.W.2d 440, 446 (Tex. 1993) ("[W]hen a Texas appellate court reviews the standing of a party sua sponte, it must construe the petition in favor of the party . . . ."); *Brown v. Todd*, 53 S.W.3d 297, 305 n.3 (Tex. 2001) ("Because standing is a component of subject matter jurisdiction, we consider [it] as we would a plea to the jurisdiction, construing the pleadings in favor of the plaintiff."); *see also Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995) (assuming that petitioner had standing to affirm summary judgment against petitioner); *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 403 (Tex. 1988) (assuming that party had standing to decide that challenge lacked merit). In this case, Fernandez pled in her bill of review petition in district court that she is Kenedy's non-marital child and, because of that relationship, she is entitled to an intestate inheritance if the district court's 1949 judgment negating intestacy is set aside. For purposes of determining standing, then, the district court could presume that Fernandez is, as she alleges, Kenedy's biological child. The Trust favors such an assumption, and Fernandez, who is hardly in a position to challenge it, made no objection on this basis.[20] We reject Fernandez's peculiar argument that the district court should not have assumed her pleaded basis for standing to be true.

The court of appeals believed that employing such a presumption amounts to conferring standing by estoppel. 267 S.W.2d at 81 (citing *Tex. Ass'n of Bus.*, 852 S.W.2d at 443–46). In this

[20] Fernandez also argues that the district court could not assume standing or rule on standing because that issue is currently pending with this Court in the mandamus cases regarding exhumation of Kenedy's body. *See In re The John G. & Marie Stella Kenedy Mem'l Found.*, 04-0607; *In re Frost Nat'l Bank*, 04-0608. She essentially suggests that this Court has exclusive jurisdiction over the standing (and heirship) issue because it is under consideration in the mandamus cases. But that position is inconsistent with her insistence that the probate court has exclusive jurisdiction, and it overstates the question before the Court in the exhumation cases. There, we must determine whether the probate court had authority to order the exhumation of Kenedy's body for DNA testing to determine the issue of Kenedy's paternity. Although the paternity issue may be related to Fernandez's standing to pursue bills of review to reopen the estates, we were not asked in the mandamus cases to decide the issue of Fernandez's standing in the district court.

case, the Trust did ask the district court to assume paternity for purposes of its summary judgment motion. But, as we have already discussed, Fernandez did not object to that request, and Fernandez's allegations, taken as true, were sufficient to establish standing. We have never said that presuming heirship in these sorts of cases amounts to conferring standing by estoppel or by agreement, or that this situation should depart from the general rule that the plaintiff's good faith allegations are used to determine jurisdiction. We see no reason to alter it now, as such a rule would prevent parties from ever stipulating to facts relating to parentage and would prevent courts from deciding dispositive motions not dependent on parentage (e.g., laches and limitations), without some sort of evidentiary inquiry into heirship claims. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) (recognizing that plaintiffs do not have to "put on their case simply to establish jurisdiction"). In this case, we conclude that Fernandez's pleadings conferred standing, regardless of whether the alleged relationship was true or subject to rebuttal on the merits.

2. Direct Attack on 1949 Judgment

Because Fernandez's claims are a direct attack on the 1949 *Humble Oil* judgment, brought by bill of review, the district court had authority to determine Fernandez's standing to proceed, including whether she can establish heirship. A bill of review is brought as a direct attack on a judgment that is no longer appealable or subject to a motion for new trial. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). Because it is a direct attack, a bill of review must be brought in the court that rendered the original judgment, and only that court has jurisdiction over the bill. *See, e.g.*, *In re The John G. & Marie Stella Kenedy Mem'l Found., et al.*, 159 S.W.3d 133, 141, 146 (Tex. App.—Corpus Christi 2004, orig. proceeding) (holding that Judge Herman "not only

erroneously concluded he had jurisdiction over these matters, but also actively interfered with the jurisdiction of the district courts");[21] *Richards v. Comm'n for Lawyer Discipline*, 81 S.W.3d 506, 508 (Tex. App.—Houston [1st Dist.] 2002, no pet.) ("Because a bill of review is a direct attack on a judgment, only the court rendering the original judgment has jurisdiction over the proceeding."); *Solomon, Lambert, Roth & Assocs. Inc. v. Kidd*, 904 S.W.2d 896, 900 (Tex. App.—Houston [1st Dist.] 1995, no writ) ("The requirement that a bill of review be filed in the same court that rendered the judgment under attack is a matter of jurisdiction . . . ."); *Martin v. Stein*, 649 S.W.2d 342, 346 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (per curiam) ("A bill of review or a petition in the nature of a bill of review is a proceeding in equity that has for its purpose the reversal or modification of a prior judgment of the same trial court. It is not a means of appeal of a judgment of one trial court to another trial court."); *cf. Austin Indep. Sch. Dist. v. Sierra Club,* 495 S.W.2d 878, 881 (Tex. 1973) ("A direct attack is a proceeding instituted for the purpose of correcting the earlier judgment. It may be brought in the court rendering the judgment or in another court that is authorized to review the judgment on appeal or by writ of error. The purpose of a direct attack is to change the former judgment and secure the entry of a correct judgment in lieu of the earlier incorrect one."). Here, the district court that rendered the 1949 will construction judgment has

[21] In its opinion in the instant case, the court of appeals explained the apparent conflict between its earlier mandamus ruling on Judge Herman's transfer order and the underlying holding that "the probate court holds exclusive jurisdiction over the heirship and probate matters at the center of Fernandez's petition for an equitable bill of review." 267 S.W.2d at 82. The court claims that its earlier ruling arose out of an original proceeding involving the limited issue of the probate court's authority to *transfer* the *Humble Oil* case to itself. *Id.* at 83. But the court's first step in analyzing that issue was to determine whether the bills of review were filed in the proper court, i.e., the court in which the judgment was entered. *In re Kenedy Mem'l Found.*, 159 S.W.2d at 143 ("Here, the three transferred bills of review were originally filed in the courts that rendered the judgments under attack."). The court then went on to hold that a bill of review seeking to reopen an estate closed long ago does not render the estate "pending" as that word is used in section 5B of the Probate Code. *Id.* at 143–46. We do not see the distinction and read the opinions to be inconsistent.

exclusive jurisdiction over any attack on that judgment by bill of review. *See In re Kenedy Mem'l Found.,* 159 S.W.3d at 143–44, 146 (holding that, because the bill of review cases in the underlying proceedings were properly filed in the courts that rendered the judgments under attack, jurisdiction attached in the district court). It follows that, under the facts of this case, all issues bearing on the validity of Fernandez's attack on that earlier judgment are necessarily resolvable by the district court as part of its determination of the bill of review. When the district court has exclusive jurisdiction over the subject matter of a claim, Fernandez cannot procure relief in the probate court by characterizing the issue as solely one of heirship. *See, e.g.*, *Taylor v. Hill*, 249 S.W.3d 618, 625 (Tex. App.—Austin 2008, pet. denied) (holding that district court had jurisdiction over partition action and rejecting argument that claim requiring determination of heirs' interest must be heard only in probate court); *Trevino v. Lerma*, 486 S.W.2d 199, 200 (Tex. Civ. App.—Beaumont 1972, no writ) (holding that district court had exclusive jurisdiction to hear suit to set aside deed and that claimants "could procure no relief in the probate court under the provisions of § 48 of the Probate Code").

3. Probate Code

The court of appeals believed that "[t]he real jurisdictional problem plaguing the summary judgment is that it was rendered by a district court that did not have control over the heirship issues that are central to Fernandez's petition." 267 S.W.3d at 81. The court held that whether Fernandez had an interest in Kenedy's and East's estates "is undoubtedly a probate question that must be resolved by the probate court and, in this case, cannot be resolved in the district court." *Id.* at 82. But the only given authority for this conclusion was a footnote in *Palmer v. The Coble Wall Trust*

Co., Inc., 851 S.W.2d 178, 180 n.3 (Tex. 1992), which does not mention exclusive jurisdiction and does not hold that only a county court acting in probate has jurisdiction over heirship claims in the circumstances presented here. The cited footnote primarily addresses counties in which there is a statutory county court or a statutory probate court, *id.*, which is not the case in Kenedy County. However, the footnote does go on to explain:

> To further complicate matters, the district courts exercise some probate jurisdiction. The Probate Code provides that "[t]he district court shall have original control and jurisdiction over executors, administrators, guardians and wards under such regulations as may be prescribed by law." TEX. PROB. CODE § 5(a) (Supp. 1992). In those counties where there is no statutory court exercising probate jurisdiction, most probate matters must be filed in the constitutional county court, *id*. § 5(b); however, the county judge may transfer contested matters to the district court, which may then hear them "as if originally filed in district court." *Id*. In this situation the county court retains jurisdiction over the uncontested portions of the case. *Id*. The county judge may also request the assignment of a statutory probate judge to hear contested matters. *Id*.

Palmer, 851 S.W.2d at 180 n.3. Neither section 5(b) of the Probate Code nor the footnote in *Palmer* addresses the situation at hand, which involves attacks on district court judgments in cases where the estates were fully administered and closed decades ago. In fact, the Probate Code does not authorize probate courts to exercise jurisdiction in these circumstances, where a decedent died testate and his or her estate was fully administered and closed.

In counties such as Kenedy with no statutory probate court, county court at law, or other statutory court exercising probate jurisdiction, "all applications, petitions, and motions regarding probate and administrations shall be filed and heard in the county court," except that in contested probate matters, the contested portion can be assigned to a statutory probate court judge or

transferred to district court. TEX. PROB. CODE § 5(b).[22] "All courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate." *Id.* § 5(f). "'[I]ncident to an estate' . . . include[s] the probate of wills, the issuance of letters testamentary and of administration, and the determination of heirship, and also include[s], but [is] not limited to, all claims by or against an estate, . . . all actions to construe wills, . . . and generally all matters relating to the settlement, partition, and distribution of estates of deceased persons." *Id.* § 5A(a). But we have said that a "court empowered with probate jurisdiction may only exercise its probate jurisdiction over matters incident to an estate when a probate proceeding related to such matters is already pending in that court." *Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581, 585 (Tex. 1993); *see* TEX. PROB. CODE § 5A(a), (b). Therefore, the probate court in this case could exercise jurisdiction over Fernandez's heirship claim only if, before Fernandez brought that claim, a probate proceeding was already pending in that court. In this case, there is no open or pending estate in the probate court to which an heirship proceeding would be incident and, thus, the Probate Code does not authorize the probate court's exercise of jurisdiction to determine heirship. *See*

[22] What is widely referred to—and cited—as the Texas Probate Code is technically still located in the Texas Revised Civil Statutes, having never been codified according to the Legislature's 1963 mandate to the Texas Legislative Council. *See* TEX. GOV'T CODE § 323.007 (calling for "a permanent statutory revision program for the systematic and continuous study of the statutes of this state and for the formal revision of the statutes on a topical or code basis"). It was, however, revised in 2009, in preparation for codification. *See* Act of June 3, 2009, 81st Leg., R.S., ch. 1351, 2009 Tex. Gen. Laws 4273–82. Much of it will be redesignated and codified in the newly-adopted Texas Estates Code, which will not become operative until 2014. *See id.* § 15, 2009 Tex. Gen. Laws 4282. Some former probate provisions will not be codified, however. For example, the 81st Legislature repealed parts of section 5 of the Probate Code, effective in 2009. *See id.* § 12(h), 2009 Tex. Gen. Laws 4279. The jurisdictional provisions of section 5 were effectively replaced by new jurisdictional provisions, located in sections 4A–4H. *See id.* § 12(b), 2009 Tex. Gen. Laws 4275–78. Because these revisions do not affect our analysis in the instant case, we will continue to cite and refer to the relevant previous sections of the Probate Code in this opinion. *See id.* §12(i), 2009 Tex. Gen. Laws 4279 ("An action filed or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose.").

Schwartz v. Jefferson, 520 S.W.2d 881, 889 (Tex. 1975) ("The mere filing of a bill of review does not affect the finality of the judgment which is sought to be set aside."); *In re Kenedy Mem'l Found.*, 159 S.W.3d at 145 (acknowledging that the estates of Kenedy, his wife, and East "were closed long ago and not reopened by the mere filing of the bills of review," so none of the estates were "pending"). Indeed, if the mere filing of a bill of review or an application for declaration of heirship were to reopen a closed estate and render it "pending" within the meaning of the Probate Code, no estate or probate judgment would ever truly be final because such judgments would always be subject to additional litigation in courts other than those that issued the judgments.

Moreover, section 48 of the Probate Code provides that a proceeding to declare heirship may be filed in the probate court only when a person died intestate as to some or all of his or her property, when a will has been probated or estate administered but real or personal property was omitted, or when there has not been a final disposition. TEX. PROB. CODE § 48(a) (permitting suit for declaration of heirship "[w]hen a person dies intestate" and "there shall have been no administration in this State upon his estate" or when a will has been probated or an estate administered but property was "omitted from such will or from such administration"); *see id.* § 3(o) (defining "heirs" as "those persons . . . who are entitled under the statutes of descent and distribution to the estate of a decedent who dies intestate"). That is not the case here. Because Kenedy left a will that disposed of all his property, as determined by the district court in the *Humble Oil* suit, and because his estate was fully administered and closed, the Probate Code does not authorize the probate court to determine

heirship.[23] *See Cogley v. Welch*, 34 S.W.2d 849, 853 (Tex. Comm'n App. 1931, judgm't adopted) (holding that court has "absolutely no authority . . . to exercise jurisdiction to declare heirship" when decedent died testate); *McMahan v. Naylor*, 855 S.W.2d 193, 194–95 (Tex. App.—Corpus Christi 1993, writ denied) (recognizing that issue of intestacy should be determined before heirship); *Guajardo v. Chavana*, 762 S.W.2d 683, 684–85 (Tex. App.—San Antonio 1988, writ denied) (holding that heirship is not justiciable before intestacy is established); *Buckner Orphans Home v. Berry*, 332 S.W.2d 771, 775–76 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.) (holding that putative heirs "would first have to annul the wills left by deceased" before they had "such interest as would entitle them to come into the probate court asking for a declaration of heirship, or claiming rights in the estate as heirs") . Authority to decide Fernandez's heirship claims rests solely with the district court as part of its exclusive jurisdiction over the bills of review.[24]

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[23] Fernandez also relies on section 42(b) of the Probate Code, relating to the rights of non-marital children to inherit from their fathers, which states in part:

> A person claiming to be a biological child of the decedent, who is not otherwise presumed to be a child of the decedent, or claiming inheritance through a biological child of the decedent, who is not otherwise presumed to be a child of the decedent, may petition the probate court for a determination of right of inheritance.

TEX. PROB. CODE § 42(b). But section 42 was enacted in 1955, years after Kenedy died, and only the statutes in effect at the time of death govern disposition of the estate. *See Dickson v. Simpson*, 807 S.W.2d 726, 727 (Tex. 1991). Moreover, as the court of appeals recognized, the predecessor statute to section 42 precluded a non-marital child from inheriting from her father's estate unless the parents subsequently married and the child's father recognized the child as his own. 267 S.W.3d at 81 (citing Act to Regulate the Descent and Distribution of Intestates' Estates approved Jan. 28, 1840, Republic of Texas, First Session of Third Congress, *reprinted in* 2 *H.P.N. Gammel, The Laws of Texas 1822–1897,* at 306–09 (Austin, Gammel Book Co. 1898)); *see Dickson*, 807 S.W.2d at 727. Neither of those circumstances exist here. We therefore reject the contention that section 42(b), or even the previous statute governing inheritance rights of non-marital children, gives the probate court jurisdiction in this case.

[24] Fernandez does not seem to dispute that if the district court were to decide her heirship claim, it could do so on the issue on the basis of limitations, without having to determine paternity at the outset. We address the district court's summary judgment below. Additionally, we acknowledge that if it were possible for Fernandez to successfully set aside the 1949 *Humble Oil* judgment and have Kenedy's will construed to effectuate some intestacy, the probate court might then have jurisdiction under section 48 of the Probate Code.

B. Abatement

The Trust challenges the court of appeals' holding that the later-filed case—the *Humble Oil* bill of review in the district court—must be abated to allow resolution of the earlier filed applications for declaration of heirship in the probate court.[25] 267 S.W.3d at 83. As a general rule, "the court in which suit is first filed acquires dominant jurisdiction to the exclusion of coordinate courts." *Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581, 586 (Tex. 1993). We need not decide whether the general rule of dominant jurisdiction applies in this case, or in cases involving later-filed direct attacks that are exclusively within the jurisdiction of another court, because here Fernandez's claims are not within the jurisdiction of the probate court.[26] *See Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 622 (Tex. 2005) (holding that a dominant-servient inquiry was not implicated where the pleadings in the second-filed case could not be equally maintained in the first); *Schuele v. Schuele*, 119 S.W.3d 822, 824 (Tex. App.—San Antonio 2003, no pet.) (holding that the concept of dominant jurisdiction may apply only "when separate suits are filed in courts with concurrent jurisdiction"). Accordingly, we reverse the portion of the court of appeals' judgment remanding the case to the district court for abatement.

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[25] The Trust also contends that Fernandez failed to preserve any argument regarding abatement in her briefing to the court of appeals. Although Fernandez did not specifically identify abatement as one of the issues presented, she complained about the district court's refusal to abate in her anti-suit injunction discussion. Even assuming Fernandez preserved the abatement argument, we conclude that the grounds for abatement were not met.

[26] We note that even if the probate court were required to determine heirship before subject matter jurisdiction attached in the district court, abatement may not be the proper remedy. *See State v. Morales*, 869 S.W.2d 941, 949 (Tex. 1994) ("When a court lacks jurisdiction, its only legitimate choice is to dismiss.").

C. Merits

Although the court of appeals did not review the merits of the summary judgment, the Trust asks us to affirm that judgment, noting that the judgment does not involve and could not be affected by resolution of Fernandez's heirship claim. To avoid unnecessary delay, we may consider issues of law rather than remanding them to the court of appeals. *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 22 (Tex. 1987); *see* TEX. R. APP. P. 60.2(c) ("The Supreme Court may . . . reverse the lower court's judgment in whole or in part and render the judgment that the lower court should have rendered."). We therefore next consider whether Fernandez's claims are barred by limitations, one of the grounds on which the Trust sought summary judgment and Fernandez addressed on appeal.[27] *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970) (recognizing that we can affirm a trial court's judgment on a single valid ground). We review a trial court's grant of summary judgment *de novo*. *Tex. Mun. Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184, 192 (Tex. 2007). A defendant who conclusively negates at least one of the essential elements of a cause of action or conclusively establishes an affirmative defense is entitled to summary judgment. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995).

[27] The Trust contends that Fernandez did not adequately challenge all potential summary judgment grounds and, consequently, we must affirm the summary judgment. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970) ("The judgment must stand, since it may have been based on a ground not specifically challenged by the plaintiff . . . ."). Fernandez admits that she did not respond to every argument made in the motions for summary judgment but claims that she did address every ground on which summary judgment was sought, including limitations. *See id.* (requiring challenge of the grounds only, not every argument in a motion for summary judgment). Whether Fernandez made a sufficiently complete challenge or not, our result does not change.

1. Limitations

When limitations plainly bars a putative heir from proving her heirship, a court is not required to waste time and resources on a paternity determination before disposing of her claims. *See Little v. Smith*, 943 S.W.2d 414, 423 (Tex. 1997) (affirming summary judgment barring belated claims for inheritance, without first determining whether putative heir was, in fact, decedent's biological granddaughter). The district court in this case granted summary judgment on both no-evidence and traditional motions for summary judgment in a broadly-worded order that does not specify its reasons. Among other grounds, the motions asserted the affirmative defense of limitations and argued that the discovery rule does not apply because its application would frustrate the state's policy of preserving finality in probate proceedings.

When an heirship claim is brought after an administration of the decedent's estate or a conveyance of the decedent's property to a third party, courts have applied the four-year residual limitations period of Texas Civil Practice and Remedies Code section 16.051. *See, e.g.*, *Cantu v. Sapenter*, 937 S.W.2d 550, 552 (Tex. App.—San Antonio 1996, writ denied); *Smith v. Little*, 903 S.W.2d 780, 787–88 (Tex. App.—Dallas 1995), *rev'd in part on other grounds*, 943 S.W.2d 414 (Tex. 1997). Under any conceivable accrual date, the four-year statute of limitations ran well before Fernandez first asserted claims to the Kenedy and East estates. Fernandez conceded that the residual statute of limitations applies and has never denied that it bars her heirship claim absent the application of the discovery rule to save her claims, arguing that we should apply the discovery rule in heirship cases such as this.

2. Discovery Rule

"Texas courts have refused to apply the discovery rule to claims arising out of probate proceedings in most instances . . . ." *Little*, 943 S.W.2d at 420. Fernandez does not cite a single case holding that the discovery rule applies to save a non-marital child's heirship claim. Indeed, we have not applied the discovery rule in such a context. *See Natural Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 198 (Tex. 2003) ("This is tantamount to saying that the running of limitations is suspended until the record titleholder obtains actual knowledge of what it owns. This is a novel proposition indeed. It would mean, for example, that limitations would be suspended whenever heirs did not realize that they had inherited an interest. That has never been the law in Texas.") We have, however, held that the rule does not apply to belated claims of inheritance brought by adoptees. *Little*, 943 S.W.2d at 420. In that case, we recognized the difficulty of promptly bringing inheritance claims:

> In many cases, however, adoptees may be unable to timely assert inheritance rights, even with the exercise of the utmost diligence. Not all adoptees may know that they are adopted within the applicable limitations period. Even if they know that they are adopted, they may not know where they were born or, more to the point, where the adoption proceedings occurred, so that they may attempt to obtain access to their birth records. Conducting a meaningful search for your identity is difficult if you do not know where to begin that search. And assuming an adoptee found the correct court to petition, that court could well refuse to open adoption records if the only basis for doing so was to allow the adoptee to see if any inheritance claims existed.

Id. at 418. A non-marital child who grows up not knowing the identity of her father could be said to face similar difficulties. But the Court in *Little* balanced those concerns against a "strong public interest in according finality to probate proceedings," declining to apply the discovery rule. *Id.* at 421 (analyzing legislative policy governing adoption). Although the *Little* context of the legislative

scheme governing adoption is distinguishable from the instant case, the Court's reasoning in *Little* applies with equal force to belated inheritance claims brought by non-marital children. *See Turner v. Nesby*, 848 S.W.2d 872, 877–78 (Tex. App.—Austin 1993, no writ) (holding that a state's interest in orderly administration of estates and finality of judgments distributing estates can provide a basis for barring a non-marital child's claims against an estate, even if meritorious); *see also* TEX. PROB. CODE §§ 40, 42(b) (demonstrating that section 42(b), which allows non-marital children to inherit from their biological parents, is in all relevant respects the same as section 40, which allows adopted children to inherit from their biological parents). We have long recognized the importance of according finality to judgments, and we have held courts to stringent bill of review standards to protect that policy favoring finality. *See, e.g.*, *Transworld Fin. Servs. Corp. v. Briscoe*, 722 S.W.2d 407, 407 (Tex. 1987) ("The grounds upon which a bill of review can be obtained are narrow because the procedure conflicts with the fundamental policy that judgments must become final at some point."); *Alexander v. Hagedorn*, 226 S.W.2d 996, 998 (Tex. 1950) ("As said by the Supreme Court of California, 'Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice.'" (quoting *Pico v. Cohn*, 25 P. 970, 971 (Cal. 1891)); *Johnson v. Templeton*, 60 Tex. 238, 238 (1883) ("Where the final judgment of a court of competent jurisdiction has been once solemnly pronounced, it ought not to be lightly disturbed. It is alike the interest of individual suitors and of the public at large that there should be at some period an end put to litigation."). Indeed, if we were to apply the discovery rule in this context, we would subject estates to open-ended litigation, a result squarely at odds with the policy that has informed our jurisprudence for more than a century. *See Kerlin v. Sauceda*, 263 S.W.3d 920, 932 & n.28 (Tex.

2008) (Brister J., concurring) ("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.").

Fernandez argues that application of the discovery rule is constitutionally required and that the United States Supreme Court already weighed the relevant policies and found the policy in favor discovery rule application to allow non-marital children to assert their inheritance rights to be the stronger interest. *See Reed v. Campbell*, 476 U.S. 852, 856 (1986); *Trimble v. Gordon*, 430 U.S. 762, 776 (1977). We disagree. In *Trimble v. Gordon*, the United States Supreme Court struck down on equal protection grounds a statute that allowed non-marital children to inherit from their intestate mothers only, while children of a marriage could inherit from both their intestate mothers and their fathers. 430 U.S. at 767. Under the Court's analysis, a state could not provide for the total statutory disinheritance of a child from a father's estate where the child was born out of wedlock without subsequent marriage of his or her parents. *Id.* Later, in *Reed v. Campbell*, the Court struck down a Texas statute barring non-marital children from inheriting from their fathers except under special circumstances, such as where their parents had subsequently married. 476 U.S. at 857. Although a state cannot completely bar the inheritance of non-marital children, the Court clearly indicated that states may place reasonable limitations on such inheritance, so that estates do not remain subject to claims indefinitely:

> The state interest in the orderly disposition of decedents' estates . . . justifies the enforcement of generally applicable limitations on the time and the manner in which claims may be asserted. After an estate has been finally distributed, the interest in finality may provide an additional, valid justification for barring the belated assertion of claims, even though they may be meritorious and even though mistakes of law or fact may have occurred during the probate process.

Id. at 855–56; *see Lalli v. Lalli*, 439 U.S. 259, 268 (1978) (stating that the Court has long recognized that a state's goal to provide for the just and orderly disposition of property at death "is an area with which the States have an interest of considerable magnitude"). Neither the United States Supreme Court nor this Court has held that the discovery rule applies to claims made by non-marital children, and we see no reason to change course today.[28]

Because the discovery rule does not apply in this case, and because Fernandez concedes that absent application of the discovery rule her claims are time-barred, we need not consider when Fernandez discovered or by the exercise of reasonable diligence should have discovered the truth of her paternity.[29] Instead, because the four-year residual limitations period expired long before Fernandez filed her bills of review, we reinstate the district court's summary judgment.[30] *See*

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[28] We have also never applied the discovery rule in the context of equitable bills of review. Fernandez argues that the discovery rule applies to save bill of review claims that would otherwise be time-barred, citing cases in which courts of appeals have applied the discovery rule in cases of extrinsic fraud. *See, e.g.*, *Vandehaar v. ALC Financial Corp.*, 25 S.W.3d 406, 409 & n.2 (Tex. App.—Beaumont 2000, pet. denied); *Defee v. Defee*, 966 S.W.2d 719, 722 (Tex. App.—San Antonio 1998, no pet.). In this case, we do not reach the question of whether extrinsic fraud, or some other circumstances, might compel application of the discovery rule to equitable bills of review.

[29] The Trust asserts that even if Fernandez could invoke the discovery rule, summary judgment was proper because the evidence shows that Fernandez was on inquiry notice of her alleged claim of paternity before Kenedy's death and decades before filing her bills of review. Fernandez testified that, based on comments made by her cousins, she suspected Kenedy might be her father as early as age 14 or 15. Fernandez also said that she suspected Kenedy was her father because he brought her dolls for Christmas, and fruit. Fernandez further stated that as a young adult, sometime around her early twenties, she heard her stepfather say several times to her mother that he was "supporting somebody else's fun," and that he was going to get child support from Kenedy for Fernandez. But Fernandez did not bring the bills of review for more than 50 years, until she was 76. Fernandez says it has been well established that she was not aware of her status as a non-marital child until 2000, when her mother confirmed that Kenedy was her father. We need not resolve this dispute, as we conclude that the discovery rule does not apply in this context as a matter of law.

[30] We note that a bill of review is generally available to a party who exercised due diligence in pursuing all adequate legal remedies against a former judgment and did not ignore available legal remedies. *Wembley Inv. Co. v. Herrerra*, 11 S.W.3d 924, 927 (Tex. 1999) (per curiam). Further, relief by equitable bill of review will generally be granted to a party which, "through no fault of its own, [was] prevented from making a meritorious claim or defense by

Ladehoff v. Ladehoff, 436 S.W.2d 334, 336 (Tex. 1968) (holding that a judgment admitting a will to probate is "binding upon the whole world and specifically upon persons who have rights or interest in the subject matter, and this is so whether those persons were or were not personally served").

III. Anti-suit Injunction

The court of appeals held that because its summary judgment was improper and its proceedings should have been abated, the district court could not enter an anti-suit injunction. 267 S.W.3d at 84–85. A court may exercise its discretion to issue an anti-suit injunction in four circumstances: "1) to address a threat to the court's jurisdiction; 2) to prevent the evasion of important public policy; 3) to prevent a multiplicity of suits; or 4) to protect a party from vexatious or harassing litigation." *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 623 (Tex. 2005). "The party seeking the injunction must show that 'a clear equity demands' the injunction." *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, 651 (Tex. 1996) (per curiam) (quoting *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, 163 (Tex. 1986)). Because we hold that the probate court lacks jurisdiction over Fernandez's heirship claims, we do not foresee a continuing threat of Fernandez resuming this litigation in other courts. Accordingly, while we disagree with the court of appeals' reasoning, we affirm the portion of the judgment that the district court's anti-suit injunction be reversed and the Trust's request for injunctive relief be denied. *See Univ. of Tex. v. Morris*, 344 S.W.2d 426, 429 (Tex. 1961) (recognizing that this Court is not constrained to the trial court record

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the fraud, accident, or wrongful act of the opposing party." *Id.* We need not determine whether, on these facts, relief by bill of review was available to Fernandez.

at the time an injunction was issued when events subsequent to the issuance of an anti-suit injunction "render the cause for injunctive relief entirely moot or academic"); *see also See Gannon v. Payne*, 706 S.W.2d 304, 307 (Tex. 1986) ("The circumstances of each situation must be carefully examined to determine whether the [anti-suit] injunction is required to prevent an irreparable miscarriage of justice.").

IV. Conclusion

For the reasons expressed above, we reverse the portions of the court of appeals' judgment that relate to jurisdiction and abatement. We hold that the discovery rule does not apply to heirship and inheritance claims brought by non-marital children, or to bill of review claims to set aside probate judgments. We therefore render judgment reinstating the district court's summary judgment. We affirm the portion of the court of appeals' judgment that relates to the anti-suit injunction.

_____
Paul W. Green
Justice

OPINION DELIVERED: April 16, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0551

THE STATE OF TEXAS, PETITIONER,

v.

CHARLES LYNN BROWNLOW AND MARLENE H. BROWNLOW, RESPONDENTS

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

Argued December 16, 2009

JUSTICE JOHNSON delivered the opinion of the Court.

JUSTICE GUZMAN did not participate in the decision.

The State obtained an easement to construct a mitigation pond on Charles and Marlene Brownlow's property to collect water that would result from a highway expansion project. The State built the pond and used most of the excavated dirt for highway construction purposes in another location. The Brownlows sued the State for inverse condemnation as to the dirt it removed. The State asserted sovereign immunity from suit in a plea to the jurisdiction. The trial court granted that plea and dismissed the suit. The court of appeals reversed. We hold that the easement did not grant the State the right to use the excavated dirt for highway construction, the Brownlows' suit states a takings claim under the Texas Constitution, and the State does not have sovereign immunity from the suit. We affirm the court of appeals' judgment.

I. Background

When the State initiated plans to widen State Highway 35 in Brazoria County, it calculated that the expanded highway required construction of a floodplain mitigation pond. The State elected to build the mitigation pond on part of a tract of land owned by Charles and Marlene Brownlow. It initiated condemnation proceedings by which it sought a fee estate in 12.146 acres of the Brownlows' land. Eventually the parties came to an agreement embodied in an Agreed Judgment by which the State received a permanent easement over the 12.146 acres. A recital in the judgment noted that the State sought the property "for highway purposes." The judgment then ordered that the easement was granted

> for the purpose of opening, constructing, and maintaining a detention facility in, over, and across the [Brownlows' land], together with the right, at all times of ingress, egress, and regress in[,] over[,] on and across such tract of land for the purpose of making additions to, improvements on, and repairs to said detention facility or any part thereof.

The property description and a construction plan was appended to the judgment.

In accordance with the construction plan for the pond, the State excavated in excess of 87,500 cubic meters of dirt from its easement. Despite the Brownlows' protests, the State removed most of the excavated dirt and used it in the Highway 35 expansion project, so the Brownlows sued for inverse condemnation. They claimed that the State unconstitutionally took the excavated dirt, entitling them to compensation. The State filed a plea to the jurisdiction. It argued that the Agreed Judgment gave it the right to use the dirt for highway construction purposes, it was within its rights to remove and use the dirt, and that it was immune from suit on the basis of sovereign immunity.

The trial court granted the State's plea and dismissed the case. The court of appeals reversed, holding that the dirt belonged to the Brownlows and they could maintain their takings suit. 251 S.W.3d 756, 762. We granted the State's petition for review.

The State argues that (1) the Agreed Judgment implicitly grants it the right to use all materials located in the easement to construct, repair, or improve roadways, (2) it is entitled to use the dirt for highway construction purposes because such use is reasonably necessary to ensure its full enjoyment of the easement, and (3) it has compensated the Brownlows in full. Thus, the State asserts the Brownlows do not possess a compensable interest in the excavated dirt and their takings claim is defective. The Brownlows argue that the express terms of the Agreed Judgment allow the easement to be used for "opening, constructing, and maintaining" the mitigation pond and the State cannot remove the dirt and use it for highway construction without paying additional compensation.

We agree with the Brownlows.[1]

II. Discussion

A. Constitutional Taking

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." TEX. CONST. art. I, § 17(a). An inverse condemnation may occur if, instead of initiating proceedings to condemn property through its powers of eminent domain, the government intentionally physically appropriates or otherwise unreasonably interferes with the owner's right to use and enjoy his or her property.

[1] Although we conclude that the Brownlows' suit is not barred by sovereign immunity, the Brownlows must still prove the elements of their inverse condemnation claim.

Westgate, Ltd. v. State, 843 S.W.2d 448, 452 (Tex. 1992); *see Gen. Servs. Comm'n v. Little-Tex. Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001). The essence of an inverse condemnation proceeding is that the government has intentionally taken or unreasonably interfered with an owner's use of property and the property owner is attempting to recover compensation for the lost or impaired rights. *See City of Abilene v. Burk Royalty Co.*, 470 S.W.2d 643, 646 (Tex. 1971). Sovereign immunity from suit does not protect the State from a claim under the takings clause. *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007).

When the State acquires fee simple title to land through a condemnation proceeding, it acquires the land as well as appurtenances to and buildings on the land. *Brunson v. State*, 418 S.W.2d 504, 506 (Tex. 1967) (quoting 3 NICHOLS ON EMINENT DOMAIN § 9.2(5) (1965)). However, "[w]here only an easement is acquired[,] the owner retains title to the land and all that is ordinarily considered part of the land." *Id.* If only an easement is acquired, it is the State's burden to assure that the document granting the easement expressly addresses any "special arrangements or provisions in the easement taking." *Id.* at 507. The State's burden flows from the principle that "[a]n easement's express terms, interpreted according to their generally accepted meaning . . . delineate the purposes for which the easement holder may use the property." *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 701 (Tex. 2002). An easement, unlike a possessory interest in land, "is a nonpossessory interest that authorizes its holder to use the property for only particular purposes." *Id.* at 700. An easement does not transfer rights by implication "'except what is reasonably necessary' to fairly enjoy the rights expressly granted." *Id.* at 701 (quoting *Coleman v. Forister*, 514 S.W.2d 899, 903 (Tex. 1974)). If the rule were otherwise, "easements would effectively become

possessory, rather than nonpossessory, land interests." *Id.* at 702. The emphasis placed on an easement's express terms serves the important public policy of promoting certainty in land transactions. *Id.*

B. Application

In its plea to the jurisdiction, the State argued that the Brownlows failed to state a takings claim because the Agreed Judgment gave the State the right to use the dirt for highway construction purposes and the Brownlows did not have a compensable interest in the dirt the State removed. *See Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 644 (Tex. 2004) ("[T]o recover under the constitutional takings clause, one must first demonstrate an ownership interest in the property taken."). The heart of the State's argument is that the Agreed Judgment expressly or implicitly gives it the right to remove the dirt excavated from the Brownlows' land and use it in highway construction, or that, in any event, use of the dirt is reasonably necessary for the State to fully enjoy the easement rights it was expressly granted. The Agreed Judgment, however, sets out the purposes of the easement as "opening, constructing, and maintaining" a mitigation pond; it does not grant the State rights to use the Brownlows' property for other purposes. *See Marcus Cable*, 90 S.W.3d at 701 ("[I]f a particular purpose is not provided for in the grant, a use pursuing that purpose is not allowed."). Using the dirt at a site remote from the Brownlows' property to construct a highway does not constitute a use related to either (1) opening, (2) constructing, or (3) maintaining a mitigation pond on the Brownlows' property. The purpose of a mitigation pond is to hold water.

Nor does a recital in the Agreed Judgment that the State first sought the Brownlows' property for "highway purposes" expressly or implicitly grant the State a right to use the dirt from the

easement for highway construction. It was incumbent on the State to be sure the property rights it needed were acquired and encompassed within the language of the Agreed Judgment. *See Brunson*, 418 S.W.2d at 507 ("[I]t should be the burden of the condemning authority to have its judgment speak expressly of special arrangements or provisions in the easement taking."). The Agreed Judgment mentions "highway purposes" a single time, and that is in the recitals. In contrast, at five different points—twice in the granting clauses and three times in the recitals—the Agreed Judgement announces that the State is acquiring the easement for the purpose of "opening, constructing, and maintaining" a detention facility. Express decretal language in a judgment controls over recitals. *Magnolia Petroleum Co. v. Caswell*, 1 S.W.2d 597, 600 (Tex. Comm'n App. 1928, judgm't adopted); *see Nelson v. Britt*, 241 S.W.3d 672, 676 (Tex. App.—Dallas 2007, no pet.) ("[W]here there appears to be a discrepancy between the judgment's recital and decretal paragraphs, a trial court's recitals, which precede the decretal portions of the judgment, do not determine the rights and interests of the parties."). Therefore, a single statement in the recitals that the State "sought and prayed for the acquisition, for highway purposes" is not clear enough to carry the State's burden. It does not unambiguously indicate that the State has the right to use the Brownlows' property for purposes unrelated to "opening, constructing, or maintaining" the mitigation pond generally, or more specifically, as highway construction material.

The State argues that under longstanding precedent, it has the right to use all materials located in the easement for the purpose of constructing, repairing, or improving roadways. It argues this right tacitly inures to every condemned easement under *City of San Antonio v. Mullaly*, 33 S.W.

256 (Tex. Civ. App.—San Antonio 1895, no writ), and *City of La Grange v. Brown*, 161 S.W. 8 (Tex. Civ. App.—Austin 1913, writ ref'd). We disagree that the cited cases are controlling here.

In both *Mullaly* and *Brown* the plaintiffs claimed that the cities unlawfully took gravel, dirt, and materials from dedicated streets and adjacent properties while grading and maintaining their streets. *Mullaly*, 33 S.W. at 256; *Brown*, 161 S.W. at 10. The cities used that material for grading and maintaining streets in other areas. *Mullaly*, 33 S.W. at 256; *Brown*, 161 S.W. at 10. The courts in both cases upheld the cities' use of the material taken from the streets for constructing and grading streets elsewhere. The court in *Mullaly* held that the plaintiffs were not entitled to damages for materials the city took from above grade level in the street; it stated:

> Although the fee to a street may be in the adjoining lot owner, a city grading the street has the right to take from any portion of it the gravel or other material situated above the grade line, and use the same in improving or repairing that or any other of its streets, and without compensation to the owners of the property abutting on the portion of the street from whence the gravel or other material may be taken.

33 S.W. at 256.

In *Brown*, the plaintiffs sought to enjoin the city from taking gravel and materials for constructing and maintaining city streets elsewhere, including a road outside the city limits. 161 S.W. at 9. The trial court permanently enjoined the city from removing gravel from one street. *Id.* In dissolving the injunction, the court of appeals stated:

> [T]he correct rule is that when a street, or other highway, has been legally established, the officer or governing body charged with the duty of opening up, constructing, and maintaining such street or highway has the right to remove soil, gravel, and other like material from one part of such street or highway to another portion of that or some other street or highway, for the purpose of constructing or maintaining the latter . . . .
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> . . . [As to] that portion of this case which involves the right of the city of La Grange to remove gravel and soil from the streets abutting upon appellees' property for the purpose of improving a highway outside the limits of the city, we think a sufficient answer is that, under article 769 of the Revised Statutes of 1911, the city of La Grange was authorized to construct and maintain a street or roadway from the city limits to its waterworks plant, and that it had the same power and authority in reference to that street or roadway that it had as to any street within the corporate limits.

Id. at 10, 12.

While the courts in *Mullaly* and *Brown* held that the cities could use materials removed from the streets during the grading process to construct and grade other roads, they were not considering materials removed from easements other than easements for city streets. *See Mullaly*, 33 S.W. at 256 ("[A] city *grading the street* has the right to take . . . the gravel or other material situated above the grade line.") (emphasis added); *Brown*, 161 S.W. at 10 (holding that the city had the right to "remove soil, gravel, and other like material from one part of such *street or highway*") (emphasis added). Grading, constructing, and maintaining streets necessarily involves cutting, moving, and redistributing dirt and other materials because, as the court in *Brown* explained, street grading does not involve just the leveling of one street but conforming a number of streets to grade level for proper drainage and sewerage purposes. *Brown*, 161 S.W. at 11 (quoting *City of New Haven v. Sargent*, 38 Conn. 50, 55-56 (Conn. 1871)). In contrast, the soil removed from the Brownlows' property was not removed as part of the grading process nor was the property in the highway right of way. The materials could be removed only for the specific purpose of opening, constructing, and maintaining the mitigation pond. *Brown* and *Mullaly* are not controlling.

Ultimately, the facts and issues before us are closer to those presented to this Court in *Brunson* than those presented to the courts of appeals in *Mullaly* and *Brown*. In *Brunson*, the State asserted its power of eminent domain and obtained a judgment granting it an easement "for highway right-of-way-purposes" across the Brunsons' property. 418 S.W.2d at 505. A trailer house, cabana, and other improvements were located on the easement. *Id.* After the condemnation judgment was signed, the Brunsons removed the improvements from their land. *Id.* The State sued the Brunsons for conversion and recovered possession of the improvements. *Id.* The Brunsons contended that they owned the improvements because the easement granted by the judgment in the condemnation action did not transfer title to the permanent improvements. This Court held that the Brunsons were correct:

> The easement . . . carried with it the right of the State to remove any improvements on the land which would interfere with the full and beneficial use of the easement rights but did not take away the subsisting ownership of the [Brunsons] in the improvements and [their] right to remove them.
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> . . . .
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> . . . [T]he parties to an easement condemnation may agree upon the disposition of permanent improvements which may be involved and upon a corresponding basis for payment of compensation . . . . But it should be the burden of the condemning authority to have its judgment speak expressly of special arrangements or provisions in the easement taking; otherwise, the ownership of the landowner in improvements which are a part of the realty, and his right to remove them, will be enforced. Here the judgment is clear and unambiguous in its terms. It does no more than award the State the easement which it sought for right-of-way purposes over the land of Petitioners and fixes the amount of the damages therefor.

Id. at 506-07. Thus, we held that the State could move the improvements, but it did not own them because title to them was not granted by the condemnation suit judgment.

As to the matter before us, the State had the right to excavate the dirt from its easement on the Brownlows' property in order to open and construct the mitigation pond—the reason for its acquisition of the easement. Further, it could use the excavated dirt to maintain the pond. But the easement did not give the State the right to use the dirt for any other purposes—just as the easement in *Brunson* did not give the State more rights to the improvements than to remove those that interfered with its nonpossessory interest.

The State also argues that it was entitled to use the dirt to construct a highway embankment because doing so was necessary to fully enjoy its easement. We agree that "an unlimited easement carries with it all rights as are reasonably necessary for enjoyment consistent with its intended use." *Coastal Indus. Water Auth. v. Celanese Corp. of Am.*, 592 S.W.2d 597, 601 (Tex. 1979). But the rights reasonably necessary for full enjoyment of an easement are limited. They do not encompass rights foreign to the purpose for which the easement is granted. The servient estate holder retains these rights. *See Brunson*, 418 S.W.2d at 506 ("'Where only an easement is acquired the owner retains title to the land and all that is ordinarily considered part of the land.'") (quoting 3 NICHOLS ON EMINENT DOMAIN § 9.2(5) (1965)). By using the excavated dirt to build the highway embankment, the State exercised a right neither granted by the easement nor reasonably necessary for the State to fully enjoy the easement for the purpose it was granted.

Finally, the State urges that it does not owe the Brownlows further compensation for the excavated dirt because the Brownlows were fully compensated in the original condemnation proceeding. The State supports its position with two arguments.

First, it urges that when a tract of land is condemned for road construction purposes, a presumption arises that the damages allowed are for all lawful elements of damages that could reasonably have been foreseen and determined at the time of condemnation. It contends that because the construction plans attached to the Agreed Judgment stated the cut volume of the mitigation pond would be 87,544 cubic meters, the Brownlows were on notice about how much dirt the State intended to excavate and use, and damages stemming from the removal of the dirt were reasonably foreseeable. In making this argument, the State relies on *City of La Grange v. Pieratt*, 175 S.W.2d 243 (Tex. 1943). There, the State sought to widen State Highway 71, which was also a La Grange city street. *Id.* at 244. The City and the State entered into a contract setting out details of the project and authorizing the State to perform the construction. *Id.* The construction plans called for using part of a tract of land owned by Pieratt, on which he operated a filling station. *Id.* After attempts to purchase the necessary part of Pieratt's property failed, the City initiated condemnation proceedings and obtained, in fee, the required parcel. *Id.* at 244-45. Several months after the condemnation proceedings were completed, Pieratt brought an inverse condemnation claim, alleging that the highway construction project had damaged his business and he was entitled to additional compensation for lost profits. *Id.* at 245. This Court held that Pieratt was not entitled to additional compensation because it was reasonably foreseeable at the time of the initial condemnation proceeding that he might suffer a loss of profits as a result of the road work:

> The work of improving this street was done by a contractor, substantially in accordance with the contract submitted to the City by the State Highway Department. This contract was attached to the ordinance authorizing the Mayor to enter into it on behalf of the City, and must have constituted a public record. There is no contention that there was any undue delay in performing the contract, or that the contractor did

> anything unusual, unreasonable, or negligent in its use of the street while improving it.
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> . . . [W]here a part of a tract of land is condemned for street or road purposes, and the owner claims consequential damages to the land left, on account of the loses of profits arising from an established business being conducted thereon, while the road or street improvements are in progress, such a claim may and should be presented at the condemnation proceeding, if it is of such a nature that it could reasonably have been foreseen and determined at the time.

Id. at 245-46.

Pieratt does not dictate the outcome in this case. Under the circumstances there, part of Pieratt's property was condemned for inclusion in the construction project and it was reasonably foreseeable from the publicly available project plans that construction activities could affect Pieratt's business located on the remainder of the property. In today's case, the State could not use an easement on the Brownlows' property for its intended purpose of a mitigation pond without excavation work taking place, but it could do so without removing and using the excavated dirt for highway construction. The work plans were attached to the condemnation judgment, and it was reasonably foreseeable that material would be excavated in order to both create and subsequently maintain a holding pond. But the State does not claim that the construction plans or the judgment granting its easement stated that the State would take title to the excavated dirt or incorporate it as a permanent part of the highway project off of the Brownlows' property. That the pond was made necessary by a highway construction project, did not make it reasonably foreseeable to the Brownlows that the excavated dirt would be removed and used to build the embankment when that purpose was not included in the language granting the easement. *See Marcus Cable*, 90 S.W.3d at

702 ("The emphasis our law places upon an easement's express terms serves important public policies by promoting certainty in land transactions.").

Second, the State argues that it fully compensated the Brownlows for the excavated dirt when it acquired the easement because the value of the fee estate over which its easement runs and the value of an easement for highway purposes are substantially equivalent. It is true that sometimes the fee simple value of land and the value of an easement across that land may be the same. *See Thompson v. Janes*, 252 S.W.2d 933, 934 (Tex. 1952) (explaining that when an "easement leaves [a] landowner with some beneficial use of the land . . . then the damages for condemnation thereof . . . will be less than the value of the fee," but when an easement deprives a landowner of all beneficial use of the land, "the landowner may recover as damages the market value of the land"). Whether the two values are the same is a matter of proof. *Id.* (noting that in condemnation proceedings where there is no substantial difference in value between the easement and fee, the damages sustained may be proven with evidence of the full value of the land taken). Here, the State and the Brownlows agreed on a price for the easement granted by the Agreed Judgment. Just as the judgment in *Brunson* was clear and unambiguous, the judgment in the condemnation suit between the State and the Brownlows is clear and unambiguous. *See Brunson*, 418 S.W.2d at 507. Regardless of what the State may have sought, the judgment awarded it an express easement for a particular purpose and fixed the amount of the damages for that easement. That judgment is final. It is not subject to collateral attack by claims that the price agreed upon was full value for the 12.146 acres, as opposed to an agreed price for the easement expressly granted. *See id.* (explaining that the condemnation judgment in *Brunson* was "not subject to impeachment or collateral attack" by the

State; that is, the State could not sue the Brunsons for conversion, essentially collaterally attacking the condemnation judgment).

III. Conclusion

The Brownlows' suit states a takings claim, and the State does not have sovereign immunity from it. We affirm the court of appeals' judgment. We remand to the trial court for further proceedings.

_____

Phil Johnson
Justice

OPINION DELIVERED: August 27, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0570

IN RE ADM INVESTOR SERVICES, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE GREEN delivered the opinion of the Court.

JUSTICE WILLETT filed a concurring opinion.

In this case, we consider whether the trial court abused its discretion by denying a motion to dismiss premised on a forum-selection clause. We conclude that it did. The real party in interest did not overcome the presumption against the relator's waiving its right to enforce the forum-selection clause, or satisfy her burden to demonstrate that enforcing the clause would be unreasonable and unjust. Accordingly, we conditionally grant the relator's petition for writ of mandamus and order the trial court to dismiss the case as to the relator.

I

Jetta Prescott executed an agreement in 2001 with ADM Investor Services, Inc., allowing ADM to trade commodities on Prescott's behalf. Texas Trading Company Incorporated acted as a broker and guarantor in the transaction. When Prescott's account balance reached a deficit greater than $50,000.00, ADM was authorized to close her account and collect the deficit from Texas Trading. In early 2004, Prescott's balance reached a deficit of $57,844.29. ADM closed her account

and collected the deficit from Texas Trading's CEO, Charles Dawson. Dawson filed suit in his individual capacity in Hopkins County against Prescott and obtained a judgment against her.

Prescott then sued both Texas Trading and ADM in Rains County, alleging several legal theories including fraud, breach of fiduciary duty, and negligence. Texas Trading simultaneously filed an answer and a motion to transfer venue to Hopkins County. ADM responded to the suit by filing an answer, a motion to dismiss, and, alternatively, a motion to transfer venue to Hopkins County. ADM's motion to dismiss relied on the choice-of-law and forum-selection clause in its agreement with Prescott, which reads:

> All actions or proceedings arising directly, indirectly or otherwise in connection with, out of, related to, or from this Agreement or any transaction covered hereby shall be governed by the law of Illinois and may, at the discretion and election of [ADM], be litigated in courts whose situs in [sic] within Illinois.

A hearing was set for Texas Trading's motion to transfer venue. ADM acknowledged the setting for this hearing in a letter to Prescott's counsel, but then elected not to appear so as to avoid potentially waiving its motion to dismiss. Instead, approximately three months after filing its answer and motion to dismiss, ADM requested a separate hearing on its motion to dismiss. After the hearing on Texas Trading's motion to transfer venue, the trial court granted that motion. The trial court later conducted a hearing on ADM's motion to dismiss, which it denied. The trial court explained its reasoning in a letter, stating that although the forum-selection clause would be enforceable if ADM were the lone defendant, "[i]t seems unreasonable to the Court for Plaintiff to have to pursue the same cause of action against two defendants in two different states." Nothing in the record before us indicates whether the trial court ruled on ADM's motion to transfer venue to

Hopkins County, where Prescott's claims remain pending against Texas Trading. The court of appeals denied ADM's petition for writ of mandamus on the alternative ground that ADM waived enforcement. 257 S.W.3d 817, 822 (Tex. App.—Tyler 2008).

II

Prescott primarily argues to us that ADM waived enforcement by failing to request a hearing sooner or appear at the hearing on Texas Trading's motion to transfer venue, which prevented the trial court from being able to determine the proper forum for the entire case to be heard. Prescott also argues that Dawson, as ADM's agent, waived the forum-selection clause by his earlier lawsuit against Prescott, and that Texas Trading, as ADM's agent, waived the clause by moving to transfer venue. In the alternative, Prescott argues that it would be unreasonable or unjust to enforce the forum-selection clause.

Mandamus will issue if the relator establishes a clear abuse of discretion for which there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004). We have consistently granted petitions for writ of mandamus to enforce forum-selection clauses because a trial court that improperly refuses to enforce such a clause has clearly abused its discretion. *See In re AIU Ins. Co.*, 148 S.W.3d 109, 114–15 (Tex. 2004).

A party waives a forum-selection clause by substantially invoking the judicial process to the other party's detriment or prejudice. *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 559 (Tex. 2004) (per curiam); *see also AIU*, 148 S.W.3d at 121. There is a strong presumption against such waiver. *See Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008) (observing strong presumption against waiver of arbitration clause); *Automated*, 156 S.W.3d at 559 (stating that waiver

in arbitration clause context is analogous to forum-selection clauses). In *Perry Homes*, we adopted a test considering the totality of the circumstances. 258 S.W.3d at 596. But merely participating in litigation does not categorically mean the party has invoked the judicial process so as to waive enforcement. *Automated*, 156 S.W.3d at 559–60. Waiver can be implied from a party's unequivocal conduct, but not by inaction. *See Perry Homes*, 258 S.W.3d at 593.

We disagree with the court of appeals that ADM waived enforcement. Simultaneously filing an answer and motion to transfer venue with a motion to dismiss falls short of substantially invoking the judicial process to Prescott's detriment or prejudice. Indeed, in both *AIU* and *Automated*, the defendants participated in the litigation process much more substantially. *See AIU*, 148 S.W.3d at 121 (defendant filed answer and request for jury before filing its motion to dismiss); *Automated*, 156 S.W.3d 558–60 (defendant filed answer with counterclaims and served substantial discovery requests before filing its motion to dismiss). ADM's approximately three-month delay in requesting a hearing also does not compel us to find waiver. We do not consider the length of any delay separate from the totality of the circumstances. *See Perry Homes*, 258 S.W.3d at 595–97. Here, despite the gap between filing and requesting a hearing, ADM did nothing "unequivocal" to waive enforcement. *See id*. at 593. Moreover, we have considered comparable delays before without finding waiver. *See AIU*, 148 S.W.3d at 121 (five-month delay); *Automated*, 156 S.W.3d 558 (four-month delay).

We also reject any agency theory that holds ADM as waiving enforcement because of the actions taken by Texas Trading, an initial co-defendant, or its CEO, Dawson. "An agent's authority to act on behalf of a principal depends on some communication by the principal either to the agent (actual or express authority) or to the third party (apparent or implied authority)." *Gaines v. Kelly*,

235 S.W.3d 179, 182 (Tex. 2007). "Because an agent's authority is presumed to be co-extensive with the business entrusted to his care, it includes only those contracts and acts incidental to the management of the particular business with which he is entrusted." *Id.* at 185. Nothing in the record suggests that the scope of any agency relationship between ADM and Texas Trading, its broker, encompasses the actual authority to waive the forum-selection clause during litigation. Likewise, nothing suggests that ADM communicated to Prescott that Texas Trading would have such authority.

Prescott has also failed to establish an exception under which the trial court's refusal to enforce the forum-selection clause would be permissible. A trial court abuses its discretion in refusing to enforce a 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. *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231–32 (Tex. 2008) (per curiam). The burden of proof is heavy for the party challenging enforcement. *AIU*, 148 S.W.3d at 113. When inconvenience in litigating in the chosen forum is foreseeable at the time of contracting, the challenger must "show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id*. (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)); *see also Lyon*, 257 S.W.3d at 234 ("By entering into an agreement with a forum-selection clause, the parties effectively represent to each other that the agreed forum is not so inconvenient that enforcing the clause will deprive either party of its day in court, whether for cost or other reasons.").

Prescott failed to meet her heavy burden to establish that enforcing the forum-selection clause will be unreasonable or unjust, or seriously inconvenient. The mere existence of another defendant does not compel joint litigation, even if the claims arise out of the same nucleus of facts. *See In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 680 (Tex. 2009) (per curiam) ("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."). Indeed, as the case reaches us, the trial court already separated the case, isolating ADM as a defendant in Prescott's suit in Rains County. Still, our conclusion would not differ even if ADM and Texas Trading were co-defendants in a single forum. Nothing in the record establishes that Prescott could not proceed in Illinois. Moreover, while a trial in Texas is undoubtedly more convenient for a Texas resident, Prescott failed to prove that a trial in Illinois would deprive her of her day in court. *See Lyon*, 257 S.W.3d at 234. Prescott's circumstances here are thus not sufficient to meet the heavy burden she has to avoid a forum-selection clause. *See AIU*, 148 S.W.3d at 113.

We observe that Prescott asserted in her brief to this Court that her "health will prevent her from prosecuting her claims in two different states." The record shows that Prescott presented an affidavit to the trial court, opposing Texas Trading's motion to transfer venue to Hopkins County. Prescott swore that she was nearing the age of 80, suffered chronic health problems including fibromyalgia and heart problems, often had difficulty walking, and had been hospitalized several times in recent months. Prescott believed that her "case will be severely prejudiced if transferred to Hopkins County." Although we are sympathetic to Prescott's health concerns, the record does not establish that requiring her to pursue her claims against ADM in Illinois, the forum to which she

agreed in 2001, would be unreasonable or unjust. Further, even assuming that health concerns could render a selected forum sufficiently inconvenient to preclude enforcement of a forum-selection clause, we believe that Prescott's conclusory statements are insufficient to establish such inconvenience. *Cf. Lyon*, 257 S.W.3d at 234 ("If merely stating that financial and logistical difficulties will preclude litigation in another state suffices to avoid a forum-selection clause, the clauses are practically useless.").[1]

By allowing for exceptions when enforcement of forum-selection clauses would be unreasonable or unjust, or seriously inconvenient, we, as the Supreme Court in *M/S Bremen*, have recognized that there may be extreme circumstances that courts cannot presently anticipate or foresee; but we have not established a bright-line test for avoiding enforcement of forum-selection clauses. *See M/S Bremen*, 407 U.S. at 17 (speculating that exceptional circumstances could exist such as a forum-selection clause in a contract of adhesion, or a controversy that the parties could never have had in mind).[2] We have consistently refused to close the door to the possibility that exceptional circumstances could exist, even as we have chosen not to confront them in particular cases. *See, e.g.*, *Int'l Profit Assocs.*, 274 S.W.3d at 679–80; *Lyon*, 257 S.W.3d at 231–32; *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex. 2005). Here, though, we need not

[1] In considering the circumstances of this case, we offer no opinion as to whether, in a different case, health concerns might be sufficient grounds to preclude enforcement of a forum-selection clause, or what sort of proof of such health concerns would be required.

[2] The Supreme Court clarified in *Carnival Cruise Lines, Inc. v. Shute* that its use of "serious inconvenience of the contractual forum" in *M/S Bremen* was in the context of a hypothetical agreement between two Americans to resolve a local dispute in a remote alien forum, not an agreement to resolve the dispute in another state. 499 U.S. 585, 594 (1991).

elaborate on these exceptions any further because the sparse record in this mandamus case does not demonstrate such exceptional circumstances.

III

We conclude that Prescott did not overcome the presumption against ADM's waiving its right to enforce the forum-selection clause by showing that ADM substantially invoked the judicial process. We also conclude that Prescott failed to satisfy her burden to demonstrate that enforcement of the forum-selection clause would be unjust and unreasonable. Accordingly, we hold that the trial court abused its discretion in denying ADM's motion to dismiss. There is no adequate remedy by appeal when a trial court refuses to enforce a forum-selection clause. *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 679 (Tex. 2007). For these reasons, without hearing oral argument, TEX. R. APP. P. 52.8(c), we conditionally grant ADM's petition for writ of mandamus and direct the trial court to vacate its February 11, 2008 order and grant ADM's motion to dismiss. We are confident the trial court will comply, and the writ will issue only if it fails to do so.

_____
Paul W. Green
Justice

OPINION DELIVERED: February 19, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0570

IN RE ADM INVESTOR SERVICES, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE WILLETT, concurring.

I join the Court's result and write separately only to add a brief word on the evidentiary burden borne by a party asserting medical hardship to escape a forum-selection clause, an issue of first impression in this Court. Also, while today's case is a sub-par vehicle given its slim record, I believe the Court should one day clarify something else in medical-hardship cases: the meaning of phrases like "seriously inconvenient" and "unreasonable or unjust" — two of the bases for avoiding a forum-selection clause — and, relatedly, whether physical ailments can qualify as "special and unusual circumstances" sufficient to defeat enforcement. Actions to enforce forum-selection clauses arrive at the Court via mandamus, and it seems unfair to conclude a lower court clearly abused its discretion by acting without reference to guiding principles if the principles they must reference supply scant guidance.

1. What sort of health-related evidence would suffice to escape a forum-selection clause?

I agree that Jetta Prescott's affidavit detailing her myriad health woes is, standing alone, insufficient to avoid the contracted-for forum. The lesson of *In re Lyon*, as the Court notes, is that

the mere assertion of "financial and logistical difficulties" is not enough to negate a forum-selection clause, lest such clauses become "practically useless."[1] Ease of evasion is certainly no less a concern when the claimed hardship is physical rather than financial. So I agree that a party asserting medical infirmities must offer more than her own testimony.

I would go a step further, however, and make clear for the bench and bar what sort of evidence *would* suffice. Boiled down, a party opposing a forum-selection clause bears a "heavy burden"[2] of proving a heavy burden — that trial in the chosen forum would be unjustly onerous. And if the assertion is health-related, a health professional should do the asserting. In my view, first-party patient testimony is insufficient (though perhaps not always necessary), and third-party provider testimony is necessary (though perhaps not always sufficient). Specifically, a competent medical provider should attest that the patient's condition makes travel to the agreed forum not merely inconvenient or impracticable, but medically prohibited. This is the approach adopted in a recent federal-court case involving an 81-year-old New York resident who broke her hip on a cruise ship and argued "inconvenience" to defeat transfer of her personal-injury suit to Washington State under a forum-selection clause.[3] Both the plaintiff and her orthopedic surgeon described her condition, the surgeon testifying she could tolerate a plane flight, although it would be difficult and

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[1] *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 234 (Tex. 2008) (per curiam).

[2] *In re AIU Ins. Co.*, 148 S.W.3d 109, 113 (Tex. 2004).

[3] *See Caputo v. Holland Am. Line, Inc.*, No. 08-CV-4584, 2009 WL 2258326 (E.D.N.Y. July 29, 2009) (stating an 81-year-old plaintiff whose recent hip surgery made her unable to walk alone or sit for extended periods could have made the requisite showing if she had shown she was physically unable to fly to the selected forum).

she would suffer discomfort.[4] The court held that while this plaintiff failed to make the requisite showing — she proved only that travel would be unpleasant, not unfeasible — a plaintiff whose physical limitations bar travel can satisfy the heavy burden of proof required to set aside a forum-selection clause on grounds of inconvenience.[5] If health concerns are ever held to preclude enforcement, this type of proof, at minimum, seems necessary.

2. In a forum-selection clause case involving a medically infirm party, what do "seriously inconvenient" and "unreasonable or unjust" mean?

A litigant may defeat enforcement of a forum-selection clause by showing one of four things:

(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.[6]

Today's case focuses on grounds (1) and (4) above, and while I understand that the slender record makes this case a less-than-ideal vehicle for extended analysis, I believe we should one day explain more fully how these rather opaque phrases apply to assertions of medical hardship.

Most Texas cases avoid fleshing out the term "seriously inconvenient"; the only discernible "definition" seems to emerge from piecing together examples of what various courts have held *not*

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[4] *Id.* at *1-2.

[5] *Id.* at *4.

[6] *Lyon*, 257 S.W.3d at 231-32. Despite the disjunctive "or," which signals textual separateness, we seemed to intermingle grounds (1) and (4) in *In re Lyon*, asking "whether Pennsylvania is such an inconvenient forum that enforcing the forum-selection clause would produce an unjust result." *Id.* at 233.

to be seriously inconvenient.[7] Many cases recite the general standard from *M/S Bremen v. Zapata Off-Shore Co.,*[8] essentially that "a forum clause . . . may [] be 'unreasonable' and unenforceable if the chosen forum is seriously inconvenient for the trial of the action," and conclude the party's proof fell short.[9] None of the cases, however, are medical-hardship cases; today's case is the first, meaning Texas courts have no guidance for discerning the confusing, but apparently consequential, line between "inconvenient" (clause enforced) and "seriously inconvenient" (clause evaded) . . . not to mention what separately qualifies as "unreasonable or unjust" in the context of someone asserting health maladies that arose after the clause was adopted.

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[7] *See, e.g.*, *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 679, 680 (Tex. 2009) (per curiam) (holding that even though plaintiff may have to pursue two suits, one in Illinois and one in Texas, that is not the type of unusual and special circumstances that shows litigating in the contracted-for forum would be so gravely difficult and inconvenient that plaintiff would be deprived of its day in court; also, Illinois is not a remote alien forum for purposes of forum-selection agreements); *Lyon,* 257 S.W.3d at 233-34 (clause was not so inconvenient to the lessee that enforcing it would produce an unjust result, even though lessee claimed it lacked the financial or logistical ability to pursue its claims in Pennsylvania); *AIU*, 148 S.W.3d at 112-13 (rejecting argument that many if not most potential witnesses regarding coverage issues were in Texas and therefore trial in New York would be seriously inconvenient); *First ATM, Inc. v. Onedoz, Inc.,* No. 03-08-00286-CV, 2009 WL 349164, at *3 (Tex. App.—Austin Feb. 13, 2009, no pet.) (mem. op.) (holding that unsupported pleadings regarding a party's financial condition and its expected costs of litigation in Texas did not show that litigating in Texas would be so inconvenient that party would be deprived of its day in court); *Bailey v. Sorenson Labs., Inc.*, 217 B.R. 523, 527 (Bankr. E.D. Tex. 1997) (finding that mere fact that debtor had experienced financial difficulties resulting in bankruptcy was not sufficient to preclude enforcement of a forum-selection clause on the theory that it had become seriously inconvenient).

[8] 407 U.S. 1, 16 (1972) (the Supreme Court also noted: "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause," *id*. at 17). The Court later clarified in *Carnival Cruise Lines, Inc. v. Shute* that the inconvenience discussion in *The Bremen* was in the context of a hypothetical agreement between two Americans to resolve a local dispute in a remote alien forum, not an agreement to resolve the dispute in another of the United States. 499 U.S. 585, 594 (1991). *See Lyon*, 257 S.W.3d at 234.

[9] *See, e.g.*, *AIU*, 148 S.W.3d at 112-13; *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 692-93 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *In re Talent Tree Crystal*, No. 01-05-00686-CV, 2006 WL 305015, at *4 (Tex. App.—Houston [1st Dist.] Feb. 9, 2006, no pet.) (mem. op.); *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 621 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

Cases involving medical hardship strike me as somewhat unique. Financial or logistical burdens may be easily anticipated; not so with many medical burdens.[10] The Court notes that when a forum's inconvenience is foreseeable at the time of contracting, the party opposing enforcement must "show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."[11] True, but in conducting that analysis we must also confront what we confirmed just last year: a party asserting inconvenience can avoid enforcement by proving that "special and unusual circumstances developed *after* the contracts were executed" such that litigation in the chosen forum would work a deprivation of its day in court.[12] So can exacting evidence of severe medical ailments constitute "special and unusual circumstances" in certain cases?

The Court never mentions this "special and unusual circumstances" basis for negating a forum-selection clause, but that is immaterial here. Mrs. Prescott's only evidence of post-contract medical problems is her lone affidavit, which even if wholly persuasive, is wholly insufficient. Accordingly, we need not consider the affidavit's substance (or lack thereof) and whether Mrs. Prescott's ailments qualify as "special and unusual circumstances."

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[10] Parties ought not bear an expectation of prognostication when it comes to their health, required to foretell whether future maladies might make a potential out-of-state trial too onerous. Infirmities are inevitable, but that doesn't make them foreseeable such that healthy parties who execute a forum-selection clause must consider whether health woes years or decades down the road might pose a travel problem. Cross-country travel may be undemanding for a healthy 60-year-old who signs a forum-selection clause but inconceivable for an ailing almost-80-year-old who contests one.

[11] __ S.W.3d __ (citing *AIU*, 148 S.W.3d at 113 (quoting *The Bremen*, 407 U.S. at 18)).

[12] *Int'l Profit Assocs.*, 274 S.W.3d at 680 (emphasis added). *See also Lyon*, 257 S.W.3d at 234 (noting no "proof of special and unusual circumstances" and "no evidence that . . . conditions changed from the time the agreements were executed").

In sum, this Court has never addressed, nor has *any* Texas appellate court, whether medical concerns can negate a forum-selection clause. Given the ubiquity of such clauses in everyday contracts, both commercial and consumer, I hope a future case with a more-developed record gives us an opportunity to clarify how the various bases for avoiding enforcement apply when a party asserts serious medical hardship. This seems only fair. Actions to enforce forum-selection clauses reach us via mandamus,[13] a remedy "controlled largely by equitable principles,"[14] and we must determine if the court below clearly abused its discretion in denying enforcement. It seems inequitable to fault lower courts for acting without reference to guiding principles if there are few on-point principles to be referenced.

I understand why the Court declines to use today's imperfect case to dive deeper and provide greater specificity for forum-selection cases involving medical hardship, but I hope a future case will give us occasion to say more.

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Don R. Willett
Justice

OPINION DELIVERED: February 19, 2010

[13] *See Lyon*, 257 S.W.3d at 231 ("There is no adequate remedy by appeal when a trial court refuses to enforce a forum-selection clause, and such clauses can be enforced via mandamus.").

[14] *Int'l Profit Assocs.*, 274 S.W.3d at 676.

IN THE SUPREME COURT OF TEXAS

NO. 08-0580

GEOFFREY ZIMMERMAN, M.D., PETITIONER,

v.

WENDY GONZALEZ ANAYA, INDIVIDUALLY AND A/N/F OF CHRISTOPHER GABRIEL HERNANDEZ, DECEASED, RESPONDENTS

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

PER CURIAM

By statute, a state employee may appeal an interlocutory order denying a motion for summary judgment based on an assertion of immunity. TEX. CIV. PRAC. & REM. CODE § 51.014(5). The issue here is whether a resident physician, working at a public hospital under an agreement with his private medical school, may take an interlocutory appeal as though he were a state employee. Following its recent decision in *Klein v. Hernandez*, 260 S.W.3d 1 (Tex. App.–Houston [1st Dist.] 2008, pet. granted), the court of appeals concluded, in a memorandum opinion, that the physician could not and dismissed the appeal. ___ S.W.3d ___. The court in *Klein* held that a resident physician at the same private medical school, Baylor College of Medicine, working at the same public hospital, Ben Taub Hospital in Houston, was not entitled to an interlocutory appeal under section 51.014(5) of the Civil Practices and Remedies Code because he was not an "actual" state employee. *Klein*, 260 S.W.3d at 9-11.

Today, we reverse the court of appeals's judgment in *Klein* and hold that, under the Texas Health and Safety Code, a resident physician at a private medical school is to be treated like a state employee for purposes of section 51.014(5) when the underlying litigation arises from a residency program coordinated through a supported medical school, like Baylor, at a public hospital, like Ben Taub. *Klein v. Hernandez*, ___ S.W.3d ____(Tex. 2010) (applying TEX. HEALTH & SAFETY CODE §§ 312.006 – .007 and TEX. CIV. PRAC. & REM. CODE § 51.014(5)). Accordingly, in light of our opinion in *Klein* and without hearing oral argument in this case, we grant the petition for review, reverse the court of appeals's judgment, and remand to that court to consider the merits of the appeal. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: May 7, 2010.

IN THE SUPREME COURT OF TEXAS

NO. 08-0592

FRESH COAT, INC., PETITIONER,

v.

K-2, INC., RESPONDENT

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

Argued December 17, 2009

JUSTICE WILLETT delivered the opinion of the Court.

This indemnity case concerns products-liability litigation in the residential construction industry. Specifically, we examine a synthetic stucco manufacturer's duty to indemnify a contractor under Chapter 82 of the Texas Civil Practice and Remedies Code. Two threshold questions are paramount: (1) Is synthetic stucco a "product"? and (2) Is the contractor that installs it on a house a "seller"? We answer yes to both, meaning Chapter 82 applies. We also conclude that the manufacturer's statutory obligation to indemnify the contractor covers a settlement payment made by the contractor to the homebuilder where the contractor may have been independently obligated by contract to indemnify the homebuilder. We therefore affirm in part and reverse in part the court of appeals' judgment, and render judgment for Fresh Coat, Inc. in accord with the trial court's original judgment.

I. Background

K-2, Inc. manufactures synthetic stucco components that are collectively referred to as EIFS, an acronym for exterior insulation and finishing system. Fresh Coat, Inc. contracted with a homebuilder, Life Forms, Inc., to install EIFS on the exterior walls of several homes that Life Forms was building. Fresh Coat purchased K-2's EIFS and installed it with the help of K-2's instructions and training.

Over 90 homeowners sued K-2, Life Forms, and Fresh Coat, alleging the EIFS allowed water penetration that in turn caused structural damage, termite problems, and mold. The plaintiffs alleged the EIFS was defectively designed, manufactured, and marketed, and also asserted claims for negligence, deceptive trade practices, negligent misrepresentation, and breach of warranty. Life Forms filed cross-claims against Fresh Coat and K-2, seeking indemnity for losses from the homeowners' claims. Fresh Coat sought indemnity from K-2.

K-2, Life Forms, and Fresh Coat settled with the homeowners. Fresh Coat paid the homeowners just over $1 million. Fresh Coat also settled with Life Forms, paying $1.2 million to cover part of Life Forms' payment to the homeowners. The case proceeded to trial on various claims the defendants brought against each other. This appeal concerns claims Fresh Coat asserted against K-2. Fresh Coat sought indemnity from K-2 for its settlements with the homeowners and Life Forms, as well as $726,642 in attorney fees. The claims were tried to a jury, and Fresh Coat received a judgment for all the damages requested.

The court of appeals affirmed the trial court's judgment except with regard to the settlement payment Fresh Coat made to Life Forms.[1] The court rejected K-2's arguments that its EIFS was not a "product" and that Fresh Coat was not a "seller," and upheld the indemnity award as to the payment to the homeowners. However, with respect to Fresh Coat's settlement with Life Forms, the court agreed with K-2 that it owed Fresh Coat no statutory indemnity duty because Fresh Coat would have been liable to Life Forms under the contract between the two regardless of whether either of them caused a defect in the EIFS.

K-2 and Fresh Coat each filed petitions in this Court. K-2 argues that the court of appeals erred in awarding Fresh Coat indemnification for the homeowners' settlement because under Chapter 82 EIFS is not a product, and Fresh Coat is not a seller.[2] Fresh Coat argues that the court of appeals erred in denying Fresh Coat indemnity from K-2 for Fresh Coat's settlement with Life Forms.

II. Discussion

Chapter 82 governs a manufacturer's indemnity obligations arising from a "products liability action." Section 82.002(a) states:

> 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.

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[1] 253 S.W.3d 386, 399.

[2] K-2 does not argue, however, that the evidence compels the conclusion that Fresh Coat's installation of EIFS caused the loss rather than the product itself. K-2 instead focuses upon Fresh Coat's contractual liability. As discussed below, a jury found that K-2 was responsible for the loss, not Fresh Coat; K-2 does not challenge that jury finding.

A. Is EIFS a "Product" Under Chapter 82?

Section 82.002(a) applies to losses arising from a products-liability action, which Section 82.001(2) defines as

> any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories.

K-2 argues that EIFS was not a "defective product" for purposes of Chapter 82. K-2 claims the "product" was the finished EIFS wall of the home, if not the home, while Fresh Coat argues that Life Forms purchased EIFS components plus the services required for its installation, and that the synthetic stucco system is the product. K-2 does not dispute that EIFS is a product as it was sold by K-2; rather K-2 claims that, after the EIFS components were purchased by Fresh Coat, they were not resold as products.

Under K-2's definition of product, products that become part of homes cannot be the subject of indemnity claims by homebuilders and their contractors if those homebuilders and contractors are sued by homeowners. Instead, K-2 claims that products placed into the stream of commerce are not products once they become integrated into a house, which is real property, even if they were products for all purposes beforehand. We agree with the court of appeals that Chapter 82 contains no such limitation.

Chapter 82 itself does not define "product," but it defines "seller" as

> 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.[3]

From that definition, a product is something distributed or otherwise placed, for any commercial purpose, into the stream of commerce for use or consumption.

We hold that the EIFS provided by Fresh Coat was a "product" as that word is used in the text of Chapter 82. K-2 does not dispute that it is a manufacturer under Chapter 82 and that it placed its EIFS — which it admits is a product — into the stream of commerce. As the court of appeals noted, "The record establishes that the EIFS is a synthetic stucco system made of component parts manufactured by [K-2]."[4] Likewise, the EIFS was used by Life Forms in the construction of homes, in addition to whatever use it was put to by homeowners. At least as to Fresh Coat's transaction with Life Forms, the EIFS was "used."

Other definitions of "product" also comport with how products are described in Chapter 82. Black's Law Dictionary defines "product" as "[s]omething that is distributed commercially for use or consumption and that is usu[ally] (1) tangible personal property, (2) the result of fabrication or processing, and (3) an item that has passed through a chain of commercial distribution before ultimate use or consumption."[5] The Third Restatement of Torts uses a similar definition for "product":

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[3] TEX. CIV. PRAC. & REM. CODE § 82.001(3).

[4] 253 S.W.3d at 392.

[5] BLACK'S LAW DICTIONARY 1245 (8th ed. 2004).

> A product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property . . . .[6]

Each party argues that comment e to Section 19 of the Restatement supports that party's own definition of product. However, comment e merely addresses whether a person is a product seller, not whether something is a product. Even so, it is unclear from comment e whether things such as EIFS — products that may become attachments to real property for other legal purposes — would be considered products.[7]

Chapter 82's definition of manufacturer is also instructive. Section 82.001(4) defines "manufacturer" as

> 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.

Under this definition, a manufacturer is anyone who builds, formulates, or assembles the product *or any component part thereof*. Thus, even if K-2 were correct that an EIFS wall is the relevant

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[6] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 (1998).

[7] Comment e clarifies that "courts have been reluctant to impose products liability on sellers of improved real property," but that "courts have treated sellers of improved real property as product sellers in a number of contexts." For instance,

> [w]hen a building contractor who sells a building that contains a variety of appliances or other manufactured equipment, the builder, together with the equipment manufacturer and other distributors, are held as product sellers with respect to such equipment notwithstanding the fact that the built-in equipment may have become, for other legal purposes, attachments to and thus part of the underlying real property.

Id. Comment e also notes that builders may be held liable as product sellers even with regard to homes when they sell prefabricated homes or other cookie-cutter-type homes as part of a large development.

"product," a manufacturer may be liable for defects in "any component part thereof." This language suggests the word "product" should not be read narrowly to exclude EIFS.

None of the sources discussed above, including Chapter 82, except from the definition of product those things that may become an integral part of a home. Moreover, the Legislature could have easily excluded such products from the definition of product, or from "products liability actions" as that term is defined in Chapter 82. The Legislature could have added a few words to carve out components of homes or components of homes that become fixtures by some definition. Yet there is nothing in the text that can be read to exclude EIFS from being the type of defective product that can give rise to a products-liability action.

The courts of appeals appear not to have dealt with the specific question of whether a home component can be a product for purposes of Chapter 82, but they have applied Texas products-liability law to *subcomponents* of homes.[8] K-2 cites no statutory text that indicates a narrow definition of "product" elsewhere, so we decline to read the term "product" more narrowly than it appears from the language of Chapter 82. We accordingly hold that the EIFS is a product under Chapter 82.

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[8] *See, e.g.*, *Temple EasTex, Inc. v. Old Orchard Creek Partners, Ltd.*, 848 S.W.2d 724, 731–32 (Tex. App.—Dallas 1992, writ denied) (treating fiberboard as a product for purposes of products-liability claims); *Bennett v. Span Indus., Inc.*, 628 S.W.2d 470, 472 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.) (noting that had there been a defect in a component installed in a building, that defect might have supported a legitimate claim of products liability); *Cupples Coiled Pipe, Inc. v. Esco Supply Co.*, 591 S.W.2d 615, 615–16, 618 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.); *Hovenden v. Tenbush*, 529 S.W.2d 302, 305–06 (Tex. Civ. App.—San Antonio 1975, no writ) (treating used bricks in a building as defective products after walls made with the bricks deteriorated).

B. Is Fresh Coat a "Seller" Under Chapter 82?

K-2 contends that even if EIFS is a product, Fresh Coat is not a seller. K-2 says Fresh Coat did not place EIFS into the stream of commerce since EIFS was applied to walls that were part of newly constructed homes. K-2 further characterizes Fresh Coat as a service provider, not a product seller, because Fresh Coat provided EIFS installation services. Fresh Coat acknowledges it provided EIFS installation services, but claims it was a product seller *and* a service provider, and that companies that do both may be considered product sellers under Chapter 82.

In Chapter 82, "seller" is defined as

> 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.[9]

Section 82.002(d) elaborates with regard to a manufacturer's duty to indemnify:

> For purposes of this section, a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer's instructions shall be considered a seller.

We agree with the court of appeals that "Chapter 82's definition of 'seller' does not exclude a seller who is also a service provider, nor does it require the seller to only sell the product."[10] That approach is consistent with the Third Restatement of Torts, which recognizes that a product seller may also provide services.[11]

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[9] TEX. CIV. PRAC. & REM. CODE § 82.001(3).

[10] 253 S.W.3d at 393.

[11] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 19, 20 (1998).

We further agree with the court of appeals that Fresh Coat provided legally sufficient evidence that it is a product seller for purposes of Chapter 82. It is undisputed that Fresh Coat installed EIFS according to K-2's instructions. Moreover, K-2 trained and certified Fresh Coat personnel in the installation of its EIFS system. Under its contract with Life Forms, Fresh Coat was to provide "labor, services and/or materials, equipment, transportation, or facilities necessary" in order to provide "synthetic stucco application and finish." As the court of appeals noted, witnesses testified that Fresh Coat was in the business of providing EIFS products combined with the service of EIFS installation.[12] The products K-2 sold to Fresh Coat included base coat, mesh, and finish coat.

Chapter 82, like the Restatement, anticipates that a product seller may also provide services. Thus, we conclude that when a company contracts to provide a product that is alleged to be defective — like the EIFS system in this case — the company's installation services do not preclude it from also being a seller. Accordingly, as to indemnity for Fresh Coat's settlement with the homeowners, we affirm the court of appeals' judgment.

C. Effect of Fresh Coat's Contract with Life Forms

Section 82.002(a) imposes a duty on manufacturers to indemnify sellers for a "loss arising out of a products liability action." It provides an exception "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."

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[12] 253 S.W.3d at 393.

K-2 does not argue that the statutory exception should apply because Fresh Coat improperly installed the EIFS, an argument that would apply equally to Fresh Coat's settlements with Life Forms and the homeowners.[13] Instead, K-2 argues it should not have to indemnify Fresh Coat for the settlement payment Fresh Coat made to Life Forms because Fresh Coat's contract with Life Forms contained an indemnity provision. The court of appeals agreed with K-2, concluding Fresh Coat's settlement payment to Life Forms was not subject to indemnity under Chapter 82 because it "was based solely on Fresh Coat's independent liability under the contract" between Fresh Coat and Life Forms.[14] A Fresh Coat attorney testified that Fresh Coat indemnified Life Forms because its contract with Life Forms required indemnification regardless of any fault on the part of Life Forms. The contract indeed states in a "Contractor's Indemnity" provision that Fresh Coat agrees to indemnify and hold Life Forms harmless for any claims in favor of homeowners and others "on account of" property and other losses "in any way occurring, incident to, arising out of or on [sic] connection with . . . the work performed by the contractor . . . ."

Under Section 82.002(a), Fresh Coat's settlement with Life Forms "ar[ose] out of a products liability action." Fresh Coat's settlement indisputably arose out of homeowner claims against Life Forms that were settled. Those underlying homeowner claims, as well as Life Forms' indemnity cross-claim against Fresh Coat, were brought in a "products liability action," which, under Section

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[13] As noted above, the jury was instructed to exclude from its calculation of Fresh Coat's loss "any amount that constitutes loss caused by Fresh Coat's own negligence, intentional misconduct, or other act or omission, if any (such as negligently modifying or altering the product), for which Fresh Coat is independently liable." The jury did not find the exception applicable, and K-2 does not argue that the jury's finding of loss is unsupported by legally sufficient evidence.

[14] 253 S.W.3d at 396.

82.001(2), is broadly defined to include actions for damage allegedly caused by a defective product "whether the action is based in strict tort liability . . . negligence . . . or any other theory or combination of theories." As explained above, the claims in this case involved a "product." Further, since Fresh Coat was a "seller" under Section 82.002(a), that provision requires indemnity from K-2 for Fresh Coat's settlement with Life Forms unless the exception found in Section 82.002(a) applies.

The court of appeals reasoned that Fresh Coat could not recover its settlement payment to Life Forms from K-2 since Fresh Coat was independently liable for the loss in the contract. However, the statute does not except the manufacturer from its indemnity obligation whenever the seller is contractually liable to another. The exception applies only 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."[15]

The court of appeals excluded from its analysis all the language of the exception preceding "for which the seller is independently liable." The jury, however, was correctly instructed to exclude from its calculation of Fresh Coat's loss "any amount that constitutes loss caused by Fresh Coat's own negligence, intentional misconduct, or other act or omission, if any (such as negligently modifying or altering the product), for which Fresh Coat is independently liable." The jury did not find the exception applicable.

The court of appeals focused solely on Fresh Coat's independent liability, and did not find the *reason* for that liability relevant. Fresh Coat argues that Section 82.002(a) creates an exception

[15] TEX. CIV. PRAC. & REM. CODE § 82.002(a).

for the manufacturer's duty to indemnify that only applies when the seller tortiously causes a loss. We agree with Fresh Coat that K-2 has not proven that Fresh Coat caused the loss via the type of act or omission contemplated in the statute.

Section 82.002(a) excepts the manufacturer from indemnity only when it proves that a loss was *"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."[16] K-2 argues it should not be liable for contractual obligations that it was not a party to, namely, any losses Fresh Coat suffered solely as a result of its contract with Life Forms rather than as a result of Fresh Coat's products-liability obligations. But Section 82.002(a) does not exempt manufacturers from their indemnity obligations for "any loss . . . for which the seller is independently liable." Such a reading disregards the 20 words between "any loss" and "for which . . . ."

Moreover, Section 82.002(e) expressly provides that the manufacturer's "duty to indemnify under this section . . . is in addition to any duty to indemnify established by law, contract, or otherwise." Thus, Section 82.002(e) suggests that the indemnification duty under Chapter 82 is not affected by the mere creation of other contracts or obligations to indemnify.

Our "ultimate purpose" when construing statutes "is to discover the Legislature's intent."[17] Presuming that lawmakers intended what they enacted,[18] we begin with the statute's text,[19] relying

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[16] *Id.* (emphasis added).

[17] *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 89 (Tex. 2001); *see also Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999).

[18] *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006).

[19] *Meritor*, 44 S.W.3d at 89; *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 960 (Tex. 1999).

whenever possible on the plain meaning of the words chosen.[20] In addition, "we examine the entire act to glean its meaning,"[21] try to give meaning to each word,[22] and avoid treating statutory language as surplusage where possible.[23] Finally — and essential here — we "presume that 'the entire statute is intended to be effective.'"[24]

The 20 words in Section 82.002(a) that K-2 ignores make clear that what is important is not merely whether a seller is independently liable, but *why*. Otherwise, all of those intervening words in Section 82.002(a) would be needless. Although we have not previously held that what matters is not merely whether but *why* a seller is independently liable, this Court has suggested as much: "To escape this duty to indemnify, the indemnitor must prove the indemnitee's independent *culpability*."[25]

Section 82.002(a) exempts from indemnity a seller's own "negligence, intentional misconduct," or act "such as negligently modifying or altering the product" for which the seller would be independently liable. Section 82.002(a) does not always exempt losses arising from a contractual indemnity obligation. We express no opinion as to whether a loss need always be

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[20] *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003).

[21] *Meritor*, 44 S.W.3d at 90; *see also Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998).

[22] *Perkins v. State*, 367 S.W.2d 140, 146 (Tex. 1963).

[23] *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 402 (Tex. 2000).

[24] *Meritor*, 44 S.W.3d at 90 (quoting TEX. GOV'T CODE § 311.021(2)).

[25] *Gen. Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 255 (Tex. 2006) (emphasis added); *see also Meritor*, 44 S.W.3d at 90 ("In using the phrase 'caused by,' rather than 'allegedly caused by,' the Legislature indicated that a mere allegation that the seller was negligent would not suffice to invoke the exception.").

tortious to fit within the ambit of Section 82.002(a) — the statute includes "other act[s] or omission[s]" that may not necessarily be tortious. On today's facts, though, K-2 has not conclusively established a loss for which it is exempt from indemnity.

Both the text of Section 82.002(a) and the other provisions of Chapter 82, such as 82.002(e), lead us to conclude that K-2 failed to prove that Fresh Coat's settlement payment to Life Forms was caused by the type of act or omission for which K-2 owes no indemnity under the statutory exception.

III. Conclusion

Chapter 82's text does not limit "product" to exclude items that may later become part of a house wall. Also, a "seller" under Chapter 82 may include those who sell both products and services, so that a person who contracts to both provide and install a single product may be considered a seller of that product. Finally, we hold that a manufacturer is not exempt from *any* loss for which a seller is independently liable. The statutory exception to indemnity is limited to losses caused by the seller's tortious or otherwise culpable act or omission for which the seller is independently liable. We therefore affirm in part and reverse in part the court of appeals' judgment, and render judgment for Fresh Coat in accord with the trial court's original judgment.

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Don R. Willett
Justice

OPINION DELIVERED: August 20, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0644

JOHNNY CARROLL, INDIVIDUALLY AND AS TRUSTEE OF THE JOHNNY CARROLL TRUST, PETITIONER,

v.

LETHA FRANCES CARROLL AND DONALD CARROLL, RESPONDENTS

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

PER CURIAM

In this case, the 66th District Court of Hill County transferred a suit seeking the removal of a trustee and other relief to the county court at law. When the suit was filed, the Texas Property Code provided that district courts have original and exclusive jurisdiction over all proceedings concerning trusts, including proceedings to appoint or remove a trustee, determine the liability of a trustee, or require an accounting by a trustee. Act of May 26, 1997, 75th Leg., R.S., ch. 1375, § 5, 1997 Tex. Gen. Laws 5162, 5163 (amended 2005 and 2007) (current version at TEX. PROP. CODE § 115.001(a)). Because the Texas Property Code vests exclusive jurisdiction over the claims in this case in the district court, we hold that the county court at law had no jurisdiction to grant the relief sought and the judgment it rendered was void.

Letha and Ray Carroll were the parents of Johnny and Donald. Ray Carroll died in 1987, leaving an irrevocable testamentary trust called the Johnny Carroll Trust. Ray named Johnny as the trustee and Letha as the beneficiary of the trust. In November 2005, Donald and Letha sued Johnny, individually and as trustee, in the 66th District Court of Hill County.[1] They alleged that Johnny failed to provide an accounting, engaged in self-dealing, wasted trust assets, and failed to file income tax returns. Donald and Letha requested that the court order an accounting, remove Johnny as trustee, and award damages for his alleged misconduct.

In February 2006, the case was transferred to the Hill County Court at Law. By partial summary judgment that court removed Johnny as trustee, ordered him to provide an accounting, and ordered the trust records to be turned over to Donald, the successor trustee. In a final default judgment signed October 3, 2006, the county court awarded Donald and Letha $1 million for breach of fiduciary duty, $2.8 million in exemplary damages, and $15,000 in attorney's fees. Johnny filed a motion for new trial on January 5, 2007, claiming he never received notice of the October 3 trial setting and did not receive notice of the default judgment until December 4. The county court never ruled on the motion and it was overruled by operation of law.

Johnny appealed, and Letha filed a brief in support requesting that the default judgment be set aside and the case remanded for a jury trial. The court of appeals treated the county court's failure to rule on the motion for new trial as an implied finding that Johnny received timely notice of the default judgment. ___ S.W.3d ___. Thus, the court of appeals treated Johnny's motion for new trial as untimely and deemed his appeal a restricted appeal. *Id.* at ___. Finding no error apparent on the face of the record, the court denied Johnny's restricted appeal. *Id.* at ___. The court

[1] Donald appeared both individually and as Attorney and Agent-in-Fact for Letha.

of appeals did, however, strike the $2.8 million exemplary damages award because Donald and Letha's pleadings failed to assert any claim that would support punitive damages. *Id.* at ___. Johnny filed this petition for review, to which only Letha responded, again in favor of Johnny's petition.[2]

Johnny challenges the county court's jurisdiction over the case for the first time in this Court. Jurisdiction over the subject matter of an action may not be conferred or taken away by consent or waiver, and its absence may be raised at any time. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). Accordingly, Johnny's failure to assert the jurisdictional defect below does not preclude our review.

When the suit was filed, section 115.001 of the Texas Property Code provided:

> a district court has original and exclusive jurisdiction over all proceedings concerning trusts, including proceedings to . . . appoint or remove a trustee; . . . determine the . . . liability of a trustee; [and] require an accounting by a trustee.

TEX. PROP. CODE § 115.001(a).[3] The only exceptions to the district court's exclusive jurisdiction are limited and do not apply here.

Texas Government Code section 25.0003 governs the jurisdiction of county courts at law, also known as statutory county courts, and vests them with concurrent jurisdiction with the district courts in certain worker's compensation cases and in civil cases in which the matter in controversy exceeds $500, but does not exceed $100,000, as alleged on the face of the petition. TEX. GOV'T.

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[2] Donald filed no briefing with this Court.

[3] The Legislature amended the statute in 2007 to state that:

> [t]he list of proceedings described by [section 115.001(a)] over which a district court has exclusive and original jurisdiction is not exhaustive. A district court has exclusive and original jurisdiction over a proceeding by or against a trustee or a proceeding concerning a trust under [section 115.001(a)] whether or not the proceeding is listed in [section 115.001(a)].

Act of May 16, 2007, 80th Leg., R.S., ch. 451, § 11, 2007 Tex. Gen. Laws 801, 804–05. All citations in this opinion are to the 2005 version in effect when the suit was filed.

CODE § 25.0003(c). However, that section also explicitly states that statutory county courts do not have the jurisdiction granted to statutory probate courts by the Texas Probate Code. *Id.* § 25.0003(f). The jurisdiction of the Hill County Court at Law is specifically governed by Texas Government Code section 25.1112, which grants the court concurrent jurisdiction with the district court in felony cases and family law cases and proceedings. *Id.* § 25.1112 (a). The district courts may only assign cases to the county courts at law that are within the county court at law's jurisdiction. *See id.* §§ 25.1112 (g), (h). Neither section 25.1112 nor section 25.0003 provide a statutory county court with concurrent jurisdiction when another court is vested with exclusive jurisdiction. *See*, *e.g.*, *AIC Mgmt. v. Crews*, 246 S.W.3d 640 (Tex. 2008) (holding that subject matter jurisdiction is determined by the more specific statute). *See also* TEX. GOV'T. CODE § 25.0001(a). Nothing in the Texas Government Code confers jurisdiction upon the Hill County Court at Law over proceedings listed in Texas Property Code section 115.001. *See id.* §§ 25.0003, 25.1112.

In this case, Johnny and Letha sought removal of a trustee, an accounting by a trustee, and appointment of a successor trustee, together with money damages and attorney's fees. Removal of a trustee, an accounting by a trustee, and appointment of a successor trustee are all "proceedings concerning a trust" expressly governed by the statute and fall under the exclusive jurisdiction of the district court. TEX. PROP. CODE § 115.001(a). As such, transfer to the Hill County Court at Law was improper because it was apparent from the pleadings that the county court lacked jurisdiction over the claims. Because the Hill County Court at Law had no jurisdiction over the claims, its judgment was void. *See State ex rel. Latty v. Owens*, 907 S.W.2d 484, 485 (Tex. 1995). Because the county court's judgment was void, we do not reach Johnny's other arguments challenging the judgment.

Accordingly, without hearing argument, we grant the petition for review, reverse the court

of appeals' judgment, vacate the county court's judgment, and remand the case to the county court with instructions to transfer the case back to the 66th District Court of Hill County for further proceedings. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: January 15, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0669

DAN KELLY AND LAURA HOFSTATTER, PETITIONERS,

v.

GENERAL INTERIOR CONSTRUCTION, INC., RESPONDENT

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

Argued November 18, 2009

JUSTICE GUZMAN delivered the opinion of the Court.

To establish personal jurisdiction in Texas courts over nonresident defendants, plaintiffs must plead a connection between the defendants' alleged wrongdoing and the forum state. Asserting statutory and common law claims, General Interior Construction, Inc. (GIC), a Texas corporation, sued Daniel Kelly and Laura Hofstatter (collectively, the Officers), both Arizona residents. Absent from GIC's pleadings, however, is any allegation that Kelly and Hofstatter committed any acts giving rise to these claims in Texas. Because the Officers filed a special appearance proving that they do not live in Texas, they successfully negated all alleged bases for personal jurisdiction in Texas courts. We accordingly reverse in part the court of appeals and render judgment dismissing GIC's claims against the Officers for lack of personal jurisdiction.

I. Background

Kelly and Hofstatter are the sole shareholders and officers of Diva Consulting, Inc., an Arizona-based general contractor that Meristar Hospitality Corporation, a non-Texas entity, hired to renovate a Houston hotel. Diva then entered into subcontracting agreements with various companies, including Texas-based GIC, to perform the work. During construction Kelly made several trips to Houston to oversee the project. Diva also sent change orders and payments to and received invoices from these Texas companies, while receiving funds from Meristar to pay for the work.

Disputes arose between Diva and GIC, with the former claiming that GIC did substandard work requiring substantial expenditures to remedy, and the latter claiming that Diva did not pay the entire contract amount. Meristar ultimately filed a lawsuit against Diva and various subcontractors, including GIC. GIC filed cross-claims against Diva and third-party claims against the Officers, asserting claims for breach of contract, violations of Chapter 162 of the Texas Property Code (Texas Trust Fund Act),[1] and fraud.

[1] Texas law provides that payments made to a contractor or its officers, agents, or directors are trust funds if made under a contract for the improvement of real property in this state. *See* TEX. PROP. CODE § 162.001(a). The contractor or its officers, agents, or directors who receive or control the funds are trustees thereof. *Id.* § 162.002. The beneficiaries of the trust funds are persons who provide labor or materials for the project. *See id.* § 162.003. A trustee who acts, *inter alia*, with intent to defraud by using, disbursing, or otherwise diverting "trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries" misapplies the trust funds. *Id.* § 162.031. "Intent to defraud" means, as relevant here, that the trustee so used trust funds obtained by means of an affidavit under Texas Property Code § 53.085 containing false information relating to the trustee's payment of the obligations. *Id.* § 162.005(1)(C); *see also id.* § 53.085 (requiring the affiant, upon request of the payor, to aver that subcontractors, laborers, and materialmen have been paid in full).

Regarding the trust-fund claims, GIC alleged that the Officers "were the trustee[s] of all payments made to [Diva] by [Meristar]"; that GIC was "a beneficiary of the trust money paid to the trustees"; and that the Officers "provided affidavits to [Meristar] stating that all subcontractors (including [GIC]) were paid or would be paid" when in fact those statements were "untrue." In its fraud claim, GIC referred to its trust-fund allegations and alleged that "the material representations made by [Diva] were false and were made with the intention that GIC would rely thereon." The only mention of Texas in GIC's pleading is the incorporation by reference of Diva's contract with GIC, which identifies the Houston hotel as the job site. GIC did not allege that the Officers lived in Texas, that they conducted business in Texas, or that any of the operative facts of the trust-fund and fraud claims occurred in Texas.

The Officers filed a special appearance, stating they were residents of Arizona, did not own property in Texas, did not employ anyone in Texas, and did not conduct business in Texas in their personal capacities. The trial court denied the special appearance, and a divided court of appeals affirmed in part, reversing only as to the breach-of-contract claim.[2]

The majority reasoned that the Texas Trust Fund Act reaches past the corporation to hold its officers personally liable for violations of the Act: "[W]e must focus only on whether [GIC] has pleaded that the Officers, regardless on behalf of [Diva] or in their individual capacities, controlled and directed funds received for the [hotel] project." 262 S.W.3d 79, 86. Finding that GIC had so pleaded, the court upheld the trial court's order. The court used similar reasoning regarding the fraud

[2] GIC has not sought review of the court of appeals' judgment regarding the breach-of-contract issue.

claim, concluding that "[t]he Officers' alleged fraud sufficiently 'relates to' conduct purposefully directed toward Texas." *Id.* at 86–87. In response to the dissent's claim that the Officers had no connection with Texas, the majority pointed to the following facts: "The record reveals that performance under the construction contract was to be performed exclusively in Texas. The Officers sent and directed payments to [GIC] in Texas. Kelly made site visits to the Texas work site. The Officers received numerous invoices from Texas regarding the [hotel] project." *Id.* at 86 n.5.

The dissent found no connection between the Officers and Texas for either claim:

> In its third-party petition, [GIC] alleges that the Officers acted with intent to defraud by providing false affidavits to Meristar and that the Officers violated section 162.005(1)(C) of the Texas Property Code. [GIC] also asserts that the Officers fraudulently represented that [GIC] would be paid in full under its contract with Diva. Notably, [GIC] does not allege that any of these acts occurred in Texas. Moreover, in its third-party petition, [GIC] does not allege that the Officers committed any act whatsoever in Texas or that they conducted any business whatsoever in Texas. Therefore, [GIC's] third-party petition lacks sufficient allegations to invoke the trial court's personal jurisdiction over the Officers, and the Officers, thus, could satisfy their burden of negating all bases of personal jurisdiction merely by presenting evidence that they are not residents of Texas.

Id. at 93 (Frost, J., dissenting). Because the Officers established that they do not live in Texas, the dissent would have reversed the trial court's denial of the Officers' special appearance.

The Officers petitioned this Court for review, which we granted. 52 Tex. Sup. Ct. J. 792 (June 5, 2009). We have jurisdiction because there is a dissent in the court of appeals. *See* TEX. GOV'T CODE § 22.225(c); *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 793 (Tex. 2002).

II. Standard of Review

Whether a court can exercise personal jurisdiction over nonresident defendants is a question of law, and thus we review de novo the trial court's determination of a special appearance. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007); *BMC Software*, 83 S.W.3d at 794. "When [as here] 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." *BMC Software*, 83 S.W.3d at 795 (citing *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 666 (Tex. 1987); *In re W.E.R.*, 669 S.W.2d 716, 717 (Tex. 1984)).

III. Discussion

A. In Personam Jurisdiction

A nonresident defendant is subject to the personal jurisdiction of Texas courts if (1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction does not violate federal and state constitutional due process guarantees. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 356 (Tex. 1990). The broad "doing business" language in Texas's long-arm statute allows the trial court's jurisdiction to "reach as far as the federal constitutional requirements of due process will allow." *Moki Mac*, 221 S.W.3d at 575 (quoting *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991)). Personal jurisdiction is consistent with due process "when the nonresident defendant has established minimum contacts with the forum state, and the exercise of jurisdiction comports with traditional notions of fair play and substantial justice." *Id.* (internal quotation marks omitted) (quoting *Int'l Shoe Co. v. Washington*,

326 U.S. 310, 316 (1945)). "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." *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009) (internal quotation marks omitted) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

GIC argues that the trial court had only specific jurisdiction over its claims against the Officers. "Specific jurisdiction . . . 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. In a specific jurisdiction analysis, we focus . . . on the relationship among the defendant, the forum[,] and the litigation." *Id.* (alteration in original) (citations and internal quotation marks omitted).

B. Special Appearance

Our special-appearance jurisprudence dictates that the plaintiff and the defendant bear shifting burdens of proof in a challenge to personal jurisdiction. We have consistently held that the plaintiff bears the initial burden to plead sufficient allegations to bring the nonresident defendant within the reach of Texas's long-arm statute. *See id.* at 337; *Moki Mac*, 221 S.W.3d at 574; *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 807 (Tex. 2002); *BMC Software*, 83 S.W.3d at 793; *McKanna v. Edgar*, 388 S.W.2d 927, 930 (Tex. 1965). Once the plaintiff has pleaded sufficient jurisdictional allegations, the defendant filing a special appearance bears the burden to negate all bases of personal jurisdiction alleged by the plaintiff. *E.g.*, *Retamco Operating*,

278 S.W.3d at 337.[3] Because the plaintiff defines the scope and nature of the lawsuit, the defendant's corresponding burden to negate jurisdiction is tied to the allegations in the plaintiff's pleading.[4]

If the plaintiff fails to plead facts bringing the defendant within reach of the long-arm statute (i.e., for a tort claim, that the defendant committed tortious acts in Texas), the defendant need only prove that it does not live in Texas to negate jurisdiction. *See Siskind v. Villa Found. for Educ., Inc.* 642 S.W.2d 434, 438 (Tex. 1982) ("[T]he only evidence offered to negate jurisdiction was [a defendant's] testimony that she and the other individuals were residents of Arizona. . . . In view of [the plaintiff's] failure to allege any act by these individuals in Texas, we believe that the

[3] The adoption of the special appearance was a significant development in Texas law. For most of its history prior to 1962, Texas law did not recognize a special appearance, and a nonresident defendant who appeared in a Texas court waived any objection to personal jurisdiction. *See Atchison, Topeka & Santa Fe Ry. Co. v. Stevens*, 206 S.W. 921, 921 (Tex. 1918) ("A special appearance is unknown to our practice. The filing by a defendant of any defensive pleading, though it be only for the purpose of challenging the jurisdiction of the court, constitutes an appearance and a submission to the jurisdiction of the forum."); *see also York v. Texas*, 137 U.S. 15, 21 (1890) (holding that Texas's rule disallowing special appearances did not violate due process); E. Wayne Thode, *In Personam Jurisdiction; Article 2031B, the Texas "Long Arm" Jurisdiction Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279, 292–97 (1964) (recounting early special-appearance jurisprudence). Thus, a nonresident defendant wishing to challenge personal jurisdiction in Texas had but one choice—default and challenge jurisdiction collaterally when the plaintiff came to enforce the judgment in the defendant's home state. Faced with a waiver of any objection to jurisdiction or a default on the merits, the nonresident defendant had to choose between two unpleasant alternatives. Seeking to remedy this dilemma, this Court promulgated Texas Rule of Civil Procedure 120a, which allows nonresident defendants to specially appear for the sole purpose of challenging the trial court's jurisdiction over them or their property. *See* TEX. R. CIV. P. 120a.

[4] While the pleadings are essential to frame the jurisdictional dispute, they are not dispositive. Rule 120a requires a special appearance to be made by sworn motion, TEX. R. CIV. P. 120a(1), and also requires the trial court to "determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony," TEX. R. CIV. P. 120a(3). Even so, this additional evidence merely supports or undermines the allegations in the pleadings.

[defendants] have sustained their burden.").[5] When the pleading is wholly devoid of jurisdictional facts, the plaintiff should amend the pleading to include the necessary factual allegations, *see* TEX. R. CIV. P. 63, thereby allowing jurisdiction to be decided based on evidence rather than allegations, as it should be.

The defendant can negate jurisdiction on either a factual or legal basis. Factually, the defendant can present evidence that it has no contacts with Texas, effectively disproving the plaintiff's allegations. The plaintiff can then respond with its own evidence that affirms its allegations,[6] and it risks dismissal of its lawsuit if it cannot present the trial court with evidence establishing personal jurisdiction.[7] Legally, the defendant can show that even if the plaintiff's alleged facts are true, the evidence is legally insufficient to establish jurisdiction; the defendant's contacts with Texas fall short of purposeful availment; for specific jurisdiction, that the claims do not arise from the contacts; or that traditional notions of fair play and substantial justice are offended by the exercise of jurisdiction.[8]

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[5] *See also Perna v. Hogan*, 162 S.W.3d 648, 653 (Tex. App.—Houston [14th Dist.] 2005, no pet.) ("If the plaintiff does not plead jurisdictional allegations, *i.e.*, that the defendant has committed any act in Texas, the defendant can satisfy its burden of negating all bases of personal jurisdiction by presenting evidence that it is a nonresident at the special appearance hearing."); *Frank A. Smith Sales, Inc. v. Atl. Aero, Inc.*, 31 S.W.3d 742, 747 (Tex. App.—Corpus Christi 2000, no pet.) ("[The plaintiff's] third-party petition stated only that [the defendant] had committed acts of negligence, without specifying what those negligent acts were, or where they occurred. Therefore, [the] petition fell well short of pleading sufficient allegations to show jurisdiction in Texas.").

[6] If the plaintiff's evidence does not fall within the scope of the factual allegations in the pleading, then the plaintiff should amend the pleading for consistency.

[7] The losing party in the trial court can challenge the factual sufficiency of the evidence in the court of appeals. *E.g.*, *BMC Software*, 83 S.W.3d at 794.

[8] The losing party in the trial court can challenge the legal sufficiency of the evidence in the court of appeals and in this Court. *E.g.*, *id.* The trial court's legal conclusions are, as noted, reviewed de novo. *See id.*

C. Analysis

Turning to the case at hand, the only relevant prong of the Texas long-arm statute extends jurisdiction over a nonresident who "commits a tort in whole or in part in this state." TEX. CIV. PRAC. & REM. CODE § 17.042(2).[9]

GIC failed to plead facts within the reach of the long-arm statute because it did not allege that the Officers committed any tortious acts in Texas. As noted, GIC's live pleading contains no allegations that the Officers' wrongdoing occurred in Texas. Regarding the fraud claim, GIC did allege several fraudulent acts (e.g., providing false affidavits to Meristar and misrepresenting to GIC that it would be paid in full), but it did not allege that any fraudulent acts occurred in Texas. Regarding the trust-fund claims, GIC did not allege that the Officers used or retained the trust funds in Texas, nor that they submitted false affidavits to Meristar in Texas. Thus, although GIC has alleged two claims of wrongdoing, it has not alleged that any acts giving rise to these two claims occurred in Texas.

Because GIC failed to plead jurisdictional facts, the Officers could, and did, meet their burden to negate all bases of jurisdiction by proving that they do not live in Texas. *See Siskind*, 642 S.W.2d at 438. GIC did not challenge that fact, nor did it present any responsive evidence establishing the requisite link with Texas. The most relevant piece of evidence is an affidavit of GIC's president stating that Laura Hofstatter promised him payment. But even this affidavit does

[9] We recognize that § 17.042 is non-exclusive, *see BMC Software*, 83 S.W.3d at 795, but GIC does not separately allege that the Officers conducted business in Texas, and the only remaining claims against them are for tortious activity, making this subsection directly applicable. Section 17.042(1), regarding performance of a contract in Texas, does not apply as the Officers were not parties to Diva's contract with GIC, nor did they guarantee it.

not state where this conversation occurred or make any connection with Texas. In short, GIC's rebuttal evidence is as silent as its pleadings regarding the Officers' Texas contacts related to its claims. Having met their burden of proof, the Officers' special appearance should have been granted.

Although the trier-of-fact may ultimately conclude that Kelly and Hofstatter violated the Texas Trust Fund Act and committed fraud, the mere commission of an act does not grant Texas courts jurisdiction over the actor. Rather, as we have frequently emphasized, the requirements of due process must be upheld, particularly the connection between the defendant, the forum, and the litigation in the specific jurisdiction context. *See, e.g.*, *Retamco Operating*, 278 S.W.3d at 338.

The majority in the court of appeals focused on a corporate officer's potential for individual liability under the Texas Trust Fund Act, finding sufficient GIC's allegations that the Officers controlled and directed funds received under Diva's contract with Meristar. *See* 262 S.W.3d at 84–86. But the mere existence of a cause of action does not automatically satisfy jurisdictional due process concerns. A state is powerless to create jurisdiction over a nonresident by establishing a remedy for a private wrong and a mechanism to seek that relief. Instead, jurisdictional analysis always centers on the *defendant's* actions and choices to enter the forum state and conduct business. *See, e.g.*, *Int'l Shoe*, 326 U.S. at 316 (focusing the inquiry on the defendant's presence in, or contacts with, the forum state); *Retamco Operating*, 278 S.W.3d at 338 ("We focus on the defendant's activities and expectations when deciding whether it is proper to call the defendant before a Texas court."); *Moki Mac*, 221 S.W.3d at 575 ("[O]nly the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person."); *Michiana Easy Livin'*

Country, Inc. v. Holten, 168 S.W.3d 777, 784–85 (Tex. 2005) ("[I]t is essential in each case that there be some act by which the *defendant purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (quoting *Hanson*, 357 U.S. at 253)). The concept of minimum contacts is rooted in the notion that a defendant may reasonably be haled into the forum state's courts when it purposefully, not randomly or fortuitously, engages in activities there. *See, e.g.*, *Michiana*, 168 S.W.3d at 785. Thus, merely pleading that Kelly and Hofstatter violated the Texas Trust Fund Act is not enough; GIC must also plead and, when challenged by the defendants, present evidence that the Officers' relevant acts (i.e., those connected to GIC's claims) occurred, at least in part, in Texas.

The court of appeals also erred by allowing GIC's fraud claim to proceed despite the lack of allegations and evidence that any part of the claim originates from the Officers' conduct in Texas. *See* 262 S.W.3d at 86–87. The court reasoned that "[t]he Officers' alleged fraud sufficiently 'relates to' conduct purposefully directed toward Texas." *Id.* But we rejected the concept of directed-a-tort jurisdiction in *Michiana*, instead affirming the importance of the defendant's contacts with the forum state. *See* 168 S.W.3d at 788–92. While we noted that "on one occasion the United States Supreme Court found specific jurisdiction based on alleged wrongdoing intentionally directed at a forum resident," the defendant's conduct in that case still "constituted a substantial 'presence' in the state." *Id.* at 789 (discussing *Calder v. Jones*, 465 U.S. 783 (1984)). Here, as noted, GIC has not alleged that the Officers engaged in activities that constitute any presence—let alone a substantial presence—in this state.

IV. Conclusion

Because GIC's pleadings lack Texas-specific allegations, the Officers negated all jurisdictional bases by proving that they do not live in Texas, and GIC has not presented any evidence to the contrary.[10] Accordingly, we reverse in part the court of appeals and render judgment dismissing GIC's claims against Kelly and Hofstatter for lack of personal jurisdiction.

Eva M. Guzman
Justice

OPINION DELIVERED: January 15, 2010

[10] Because we decide this case based on the lack of alleged minimum contacts with Texas, we do not discuss the fair-play-and-substantial-justice prong of personal jurisdiction.

IN THE SUPREME COURT OF TEXAS

NO. 08-0696

THE UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER AT DALLAS, PETITIONER,

v.

LARRY M. GENTILELLO, M.D., RESPONDENT

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

PER CURIAM

Dr. Larry M. Gentilello sued the University of Texas Southwestern Medical Center at Dallas under the Texas Whistleblower Act, alleging that he was demoted and stripped of two faculty chair positions for reporting violations of Medicare and Medicaid regulations to his supervisor. The Medical Center filed a plea to the jurisdiction, asserting that Gentilello's claims were barred by governmental immunity because he failed to allege a violation under the Whistleblower Act. The trial court denied the plea to the jurisdiction and the Medical Center 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 affirmed, holding that Gentilello need only allege a whistleblower violation, and that consideration of the elements of section 554.002(a) of the Government Code was precluded because those elements were not jurisdictional, but rather

"underlying elements of a Whistleblower suit." 260 S.W.3d 221, 226. However, in *State v. Lueck*, 290 S.W.3d 876, 883 (Tex. 2009), we held that "the elements of section 554.002(a) can be considered to determine both jurisdiction and liability." Accordingly, whether the reporting of violations of Medicare and Medicaid regulations to a supervisor is 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, under the analysis set forth in *Lueck*, Gentilello has alleged a violation under the Act. *See* TEX. GOV'T CODE § 554.002(a).

OPINION DELIVERED: December 18, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0740

IN RE UNION PACIFIC RAILROAD COMPANY, RELATOR

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

PER CURIAM

In this case, we consider whether a trial court abused its discretion when it compelled a rail transportation company to produce confidential "rate structures," which include formulas to determine shipping rates charged to customers. We hold that it did, as the defendant met its burden of establishing that the information sought is protected by the trade secret privilege and the plaintiff failed to demonstrate how the information is "necessary or essential to the fair adjudication of the case." *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 732 (Tex. 2003). We, therefore, conditionally grant the writ of mandamus.

A Union Pacific Railroad Company train collided with another train in Bexar County in 2004, after the Union Pacific train failed to stop at a signal. The Union Pacific train derailed, a fire resulted, and a loaded tank car (the 16th of 74 cars) was breached, resulting in the release of toxic chlorine gas. Union Pacific was transporting the gas for Occidental Chemical Corporation (OxiChem).

A number of nearby residents, including Kathleen Constanzo, claim to have been injured due to inhalation of the gas. Constanzo sued Union Pacific, alleging negligence and gross negligence.[1] She alleged that Union Pacific's train failed to stop at the signal, a fact Union Pacific does not dispute. She also claims that Union Pacific should have positioned the chlorine car farther toward the rear of the train and that hazardous material should not have been placed next to steel cars.

During discovery, Constanzo deposed Timothy O'Brien, Union Pacific's Manager of Chemical Transportation Safety. Part of the deposition focused on positioning of the cars. Constanzo claims O'Brien testified that Union Pacific had no obligation to treat hazardous materials differently than other materials, and that Union Pacific could place a hazardous materials car anywhere in the train, except not within five cars of the engine. As a result of this deposition, Constanzo sought Union Pacific's hazardous material rate structures—the rates Union Pacific charges for rail shipping and the methods used in computing those rates. Constanzo originally sought to depose the "corporate representative with most knowledge concerning shipping rates for hazmat interstate and how those rates are calculated and arrived at." Union Pacific filed a motion to quash the notice and sought a protective order preventing compliance. After a hearing, the trial court denied both of Union Pacific's motions, but limited disclosure of the deposition testimony and related documents to the attorneys of record and their employees. After Union Pacific expressed an intent to seek mandamus relief, Constanzo sought to narrow the scope of the request to only

[1] In its petition for writ of mandamus, Union Pacific also listed, as real parties in interest: Karen Mueller, as parent and next friend of Christian Mueller; Johnny Pavelka and Debra Pavelka, as parents and next friends of Brooke Pavelka, Collin Pavelka, and Kossiopia Pavelka. Union Pacific has since informed the Court that it settled with these parties, leaving Constanzo as the only remaining real party in interest.

OxiChem rate structures for chlorine chemicals, as compared to non-hazardous materials, for the period from June 2003 to June 2005. Constanzo also proposed a protective order, similar to the one already issued by the trial court, to protect the confidentiality of the material. Several days later, before Union Pacific responded, Constanzo propounded a new deposition notice (the one now at issue), requesting:

> CORPORATE REPRESENTATIVE WITH MOST KNOWLEDGE CONCERNING SHIPPING RATES FOR INTERSTATE HAZMAT BASED ON THE FOLLOWING PARAMETERS:
>
> 1. The Rate structure for Occidental Chemical Corporation for the handling of hazmat materials for the time period of June 2003 through June 2005.
>
> 2. The Rate structure for the handling of chlorine chemicals compared to the rate structure for non hazmat material that is hauled for Occidental Chemical Corporation for the time period of June 2003 through June 2005.

Union Pacific again sought to quash the notice, and sought a protective order. The trial court again denied Union Pacific's motions, and ordered the information disclosed only to the attorneys and necessary employees.[2]

Union Pacific filed a mandamus petition with the Fourth Court of Appeals, which denied it. ___ S.W.3d ____ (Tex. App.—San Antonio 2008). Union Pacific now seeks mandamus relief in this Court, arguing that the information is protected by the trade secret privilege, that the information

[2] When Union Pacific filed its petition for writ of mandamus, underlying proceedings were pending in the 73rd Judicial District Court and the 288th Judicial District Court in Bexar County. Honorable Karen H. Pozza, presiding judge of the 407th Judicial District Court in Bexar County, signed the pretrial order at issue in this mandamus proceeding. When courts use central docketing, as in Bexar County, we generally treat the judge who signed the order as the respondent. *In re Schmitz*, 285 S.W.3d 451, 454 (Tex. 2009).

is protected by contractual confidentiality provisions and federal law, and that the request is overly broad and unduly burdensome. We need not reach Union Pacific's second and third arguments, as we agree that the information is protected by the trade secret privilege.

"[W]hen trade secret privilege is asserted as the basis for resisting production, the trial court must determine [(1)] whether the requested production constitutes a trade secret; [(2)] if so, the court must require the party seeking production to show reasonable necessity for the requested materials." *In re Bass*, 113 S.W.3d 735, 738 (Tex. 2003). If the information is a trade secret and the requesting parties do not need it, an order that requires disclosure is a clear abuse of discretion. *Id*. at 745.

To determine whether a trade secret exists, we weigh the six factors set forth in the Restatement of Torts in the context of the surrounding circumstances: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Bass*, 113 S.W.3d at 739 (citing RESTATEMENT OF TORTS § 757 cmt. b. (1939); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 reporter's note cmt. d. (1995)). Union Pacific provided affidavits by Robert G. Worrell, Senior Assistant Vice President for Chemicals, and Louise A. Rinn, Associate General Counsel, addressing each of the Restatement elements, explaining why this rate information is valuable within the trade. Worrell explained:

> The manner and method that Union Pacific employs to calculate and arrive at shipping rates . . . is confidential, proprietary and a trade secret of Union Pacific. The information is not generally known or readily available to Union Pacific's competitors or its customers or other businesses. The information is not even generally known throughout the company. Rather, the information is known only to a limited number of Union Pacific employees and certain management employees.

Worrell also discussed the harm to Union Pacific should the information be found by competitors, as it would provide them a pricing advantage. Worrell even explained that Congress recognized the importance of the rates, prohibiting their disclosure in certain instances. *See, e.g.*, 49 U.S.C. § 11904 (prohibiting railroads from disclosing "information about the contents of a contract authorized under [49 U.S.C.] section 10709 . . . that may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor, the business transactions of the shipper or consignee"). Rinn reiterated these points, also explaining the time, expense, and manpower expended on setting the rates, which makes it "extremely difficult to replicate this information." Although Constanzo never concedes the point, she does not dispute whether the rate structures are trade secrets. Union Pacific's affidavits establish trade secret protection under the Restatement factors, and Constanzo presents no evidence to the contrary.

Once trade secret status has been established, the burden shifts to Constanzo to establish that the information is "necessary or essential to the fair adjudication of the case, weighing the requesting party's need for the information against the potential of harm to the resisting party from disclosure." *Bridgestone/Firestone*, 106 S.W.3d at 732. We have not "state[d] conclusively what would or would not be considered necessary for a fair adjudication, indicating instead that the application of the test would depend on the circumstances presented." *Id.* "[T]he degree to which information is necessary

in a case depends on the nature of the information and the context of the case." *Id*. But, "the test cannot be satisfied merely by general assertions of unfairness;" instead, "a party . . . must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." *Id*. at 732–33; *see also Bass*, 113 S.W.3d at 743 ("Necessity depends on whether the trade secret's production is 'material and necessary to the litigation.'" (quoting *In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d 609, 615 (Tex. 1998))).

Constanzo claims the rate information is necessary to "rebut Union Pacific's claim that placing hazmat cars in the back of the train would be cost-prohibitive." Union Pacific admitted, however, that it is financially capable of bearing the costs of repositioning the railcars. In addition, Constanzo argues she needs to highlight that "Union Pacific recognized a higher duty in its pricing but ignored that duty in practice," and needs the rate structures to demonstrate that discrepancy. She states that Union Pacific admitted it charges higher rates for shipping hazardous materials than for shipping non-hazardous materials, which Union Pacific suggests relates to additional shipping costs. Even if we assume that Constanzo needs to make this argument, we do not see why Constanzo "needs" the actual rate structures to advance the argument. Constanzo claims she has no alternative means of proving that Union Pacific recognized, yet disregarded, a higher duty with respect to hazardous materials. It is unclear to us, and Constanzo has not explained, why she needs the *specific* rate structures to advance this negligence theory. The trial court transcript indicates that Constanzo is seeking the rate structures for purposes of establishing damages, but Constanzo does not make that argument before this Court. Nevertheless, we note that we would have difficulty concluding that

evidence of damages, even punitive damages, could not be found anywhere but through trade secrets. Constanzo has not met her burden of pointing to the specific reason the information is needed. *See Bridgestone/Firestone*, 106 S.W.3d at 733.

The potential harm to Union Pacific due to possible disclosure is also problematic. Constanzo first points to the protective order. The trial court did enter an order restricting those who could view the rate structures, but that alone does not ensure that an order will not violate the trade secret privilege. *See id.* at 731–32 (granting mandamus relief where trial court ordered relator to disclose trade secrets only to three attorneys and an expert witness and only on paper that could not be photocopied). Constanzo claims the order is narrow, but we disagree. The order requires Union Pacific to release rate structures related to all hazardous materials shipped for OxiChem from June 2003 through June 2005. It also requires the release of all OxiChem rate structures for chlorine chemicals for the same time period. Worrell explained the potential harm associated with this disclosure: "Disclosure of the information would irreparably harm Union Pacific because it would provide competitors with an advantage in predicting Union Pacific pricing and undercutting Union Pacific efforts to market and conduct its business with its customers in a competitive fashion."

Constanzo failed to meet her burden of establishing that the rate structures are "material and necessary" to the case. *Bass*, 113 S.W.3d at 743. "[N]o adequate appellate remedy exists if a trial court orders a party to produce privileged trade secrets absent a showing of necessity." *Id.* at 745. Accordingly, without hearing oral argument, TEX. R. APP. P. 52.8(c), we conditionally grant Union Pacific's petition for writ of mandamus and direct the trial court to vacate its May 9, 2008 order

compelling production of rate structures and issue further orders consistent with this opinion. We are confident the trial court will comply. The writ will issue only if it fails to do so.

OPINION DELIVERED: September 25, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0773

GALLAGHER HEADQUARTERS RANCH DEVELOPMENT, LTD., CHRIS HILL, AND JULIE HOOPER, PETITIONERS,

v.

CITY OF SAN ANTONIO AND CITY PUBLIC SERVICE, RESPONDENTS

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

PER CURIAM

Order Remanding for Findings of Fact

Petitioners Gallagher Headquarters Ranch Development, Ltd., Chris Hill, and Julie Hooper sued Respondent City of San Antonio and its agencies for breaching a "contract with the voters" because the City allegedly used money dedicated to purchase land for conservation purposes to instead purchase land from Gallagher to build an electrical grid. Funding for the project had been approved by voter referendum. The trial court granted summary judgment to the City and awarded the City attorneys' fees. The court of appeals affirmed on the merits, but remanded the attorney fees claim for a new trial. Petitioners appealed the court of appeals' affirmance of the summary judgment.

During the pendency of the petition at this Court, the City filed a motion to dismiss pursuant to settlement. The City alleges that it settled three cases, including this case, and filed with its motion a Mediated Settlement Agreement (the "Agreement"), signed less than a month after the court of appeals issued its opinion in this case. The Agreement recites two condemnation cases in probate courts in Bexar County, against Christopher C. Hill, et al., and Gallagher Headquarters Ranch Development, et al.[1] The Agreement does not include the caption for the case before this Court, and was not signed by Hooper. However, the parties agreed that the previously mentioned condemnation cases and "all related claims and controversies" between the signatories "are hereby settled." The City also agreed to waive its claim for attorney fees in this case, an issue on which it was successful at the court of appeals. Finally, the release language states that each party to the Agreement releases the other "from any and all claims . . . whether or not asserted in the above case . . . arising from or related to the events and transactions which are the subject matter of this cause." The City contends that the issues in this case—whether the City violated the "contract with the voters" by using tracts of land through a program called Proposition 3 to build part of an electrical grid—were related to the controversies in the condemnation actions.

Petitioners argue that the Agreement does not cover this petition. First, petitioners note that Julie Hooper is not a signatory to the Agreement. Second, Petitioners argue that the Agreement only

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[1] *City of San Antonio, Texas, acting by and through the City Public Service Board of San Antonio v. Christopher Hill, et al.*, No. 2005-ED-0029 (Probate Court No. 1, Bexar County, Texas); *City of San Antonio, Texas, acting by and through the City Public Service Board of San Antonio v. Gallagher Headquarters Ranch Development, Ltd., et al.*, No. 2005-ED-0031 (Probate Court No. 2, Bexar County, Texas).

resolves the specifically enumerated condemnation cases and the severable attorneys fees claim. Finally, Petitioners argue that the motion is premature, as the parties agreed that any dispute over the interpretation or performance of the Agreement would be brought to the original mediator in an attempt to resolve the same. The City replies that the language of the Agreement controls the outcome of this case; that agreeing to drop the attorneys fees issue without also dismissing this lawsuit is a nonsensical reading of the Agreement; and that Julie Hooper has no standing to continue as a petitioner, or, in the alternative, that the petition should be dismissed as to the other petitioners.

Interpretation of an unambiguous contract is an issue of law. *E.g.*, *SAS Institute, Inc. v. Breitenfeld*, 167 S.W.3d 840, 841 (Tex. 2005). However, when a contract is ambiguous, extrinsic evidence may be used to determine the intent of the parties. *E.g., Progressive County Mut. Ins. Co. v. Kelley*, 284 S.W.3d 805, 807–08 (Tex. 2009) (considering extrinsic evidence in interpreting an insurance agreement due to a latent ambiguity as to the intent of the parties). Here, a latent ambiguity appears to exist, as it is unclear whether the case at issue here is covered by the Agreement and release, even construing the release language narrowly. *See Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991) (recognizing that a claim must be "mention[ed]" in a settlement release to be effective, and that general, categorical releases are narrowly construed). Further, whether this case "aris[es] from or [is] related to the events and transactions which are the subject matter of this cause" will guide resolution of the motion to dismiss, yet the parties provide little briefing and almost no evidence for this Court to determine whether the Agreement's release encompasses the issues underlying this petition.

Accordingly, we abate the petition and remand the case to the trial court to conduct all necessary proceedings[2] and prepare findings of fact on the issue of whether this case is encompassed within the scope of the Agreement. The trial court shall submit its findings to this Court no later than May 3, 2010. The parties may, within thirty days after the trial court's findings are submitted, provide a supplementary brief to this Court, no longer than twenty-five pages, addressing those findings and the following two issues: (1) whether the Agreement moots the case before the Court, and (2) whether petitioner Hooper has standing to pursue the litigation.

OPINION DELIVERED: February 12, 2010

[2] Paragraph 9 of the settlement agreement requires the parties to attempt further mediation if a dispute arises "with regard to the interpretation and/or performance of this Agreement." As part of the remand proceedings, the trial court may order the parties to mediate this dispute if they have not already done so.

IN THE SUPREME COURT OF TEXAS

NO. 08-0780

CHRYSLER INSURANCE CO., PETITIONER,

v.

GREENSPOINT DODGE OF HOUSTON, INC., RESPONDENT

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

PER CURIAM

JUSTICE GUZMAN did not participate in the decision.

This case arises out of an insurance coverage dispute, involving liability policies insuring a corporation and its officers, among others. The issue here concerns the corporation's coverage for defamation. The policies excluded coverage for defamatory statements an insured knew to be false, and the insurance company refused coverage on the basis of this exclusion. The court of appeals concluded, however, that this known-falsity exclusion did not apply to the corporation because no corporate officer knew that the defamatory statements, made by other corporate employees, were false when made. The court accordingly affirmed, in part, a judgment awarding damages for the insurer's failure to defend and indemnify its insured. 265 S.W.3d 52.

A corporation's knowledge, however, is not limited to what its officers know, but may include other employees' knowledge, if those employees are corporate vice-principals. The employees who made the defamatory statements here, although not officers, were found to be

corporate vice-principals. They were also found to have knowledge that their statements were false when made. The corporation thus knew, through its vice-principals, that the defamatory remarks were false when made and its knowledge, as a named insured, was sufficient to invoke the known-falsity exclusion. We accordingly disagree with the court of appeals' application of the known-falsity exclusion and conclude that the policy did not provide liability coverage for the underlying defamation claim in this case.

The defamation claim arose from remarks and accusations directed at Noe Martinez, the inventory control manager at Greenspoint Dodge of Houston, Inc. Greenspoint's general manager, comptroller, and used car sales manager defamed and disparaged Martinez, referring to him as a "thieving spic beaner" and a "thieving Mexican," and accusing him of stealing cars and other criminal activity. Martinez was eventually fired and replaced by the general manager's nephew.

Martinez thereafter sued Greenspoint, the three managers, and Greenspoint's chief executive officer, Jack Apple, Jr., alleging defamation and intentional infliction of emotional distress. The dispute was submitted to binding arbitration, which resulted in an award of approximately $1.5 million in compensatory and punitive damages to Martinez. The arbitrators found that the individuals who engaged in the campaign to defame and injure Martinez were Greenspoint vice-principals.[1]

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[1] In *Hammerly Oaks, Inc. v. Edwards*, we defined a "vice-principal" as encompassing four classes of corporate agents:

> (a) Corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom a master has confided the management of the whole or a department or division of his business.

958 S.W.2d 387, 391 (Tex. 1997) (quoting *Fort Worth Elevators Co. v. Russell,* 78 S.W.2d 397, 406 (Tex. 1934) overruled on other grounds by *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987)).

At the time of this occurrence, Greenspoint was a named insured under two liability policies, a Texas Commercial Multi-Peril Policy (Primary Policy) and a Commercial Umbrella Liability Policy (Umbrella Policy), both issued by Chrysler Insurance Co.[2] The Primary Policy contained several different coverages, including the Commercial General Liability Part (CGL Policy) and the Broadened Coverage-Garages Part (Broadened Garage Endorsement). Both the Primary Policy and the Umbrella Policy provided coverage for "personal injury" defined to include "[o]ral or written publication of material that slanders or libels a person or organization or disparages a person's or organizations's goods, products or services." The Primary Policy's liability limit for personal injury was $1 million and the Umbrella Policy's limit was $5 million. Both policies contained an exclusion for personal injury "arising out of oral or written publication if done by or at the direction of the insured with knowledge of its falsity."

After being notified of Martinez's claims, Chrysler defended its insureds under a reservation of rights. Shortly after the arbitration award, however, Chrysler withdrew its defense and refused Greenspoint's demands for indemnity.

The district court subsequently confirmed the arbitration award against Greenspoint and the other defendants, except for Apple. The court vacated the award against Apple, finding no evidence that he knew about the campaign to defame Martinez. Greenspoint appealed, but abandoned the appeal after settling Martinez's claims for $1.75 million.

Greenspoint and Apple then sued Chrysler for breach of contract and bad faith. The trial court concluded in a summary judgment proceeding that Chrysler breached its duties under the policy by withdrawing its defense and not indemnifying Greenspoint for the settlement. The trial court submitted the remaining fact issues to a jury, which found Greenspoint's settlement with

[2] Chrysler Insurance Co. was known as DaimlerChrysler Insurance Co. when these policies were issued.

Martinez was reasonable and it was entitled to attorneys' fees and extra-contractual damages. The trial court rendered judgment for Greenspoint on the jury's verdict, and Chrysler appealed. Apple recovered no damages in the judgment and sought no relief on appeal.

The court of appeals affirmed the trial court's judgment, in part, and reversed it, in part. 265 S.W.3d 52. The court affirmed Greenspoint's recovery under the Primary Policy, concluding that it obligated Chrysler to continue its defense and to indemnify Greenspoint, notwithstanding the known-falsity exclusions and the knowledge of Greenspoint's vice-principals. *Id.* at 56, 68, 70. The court of appeals, however, reversed that part of the trial court's judgment awarding damages in excess of the Primary Policy's limits, rendering judgment that Greenspoint take nothing under the Umbrella Policy and its claims for extra-contractual liability under the Insurance Code. *Id*. at 68-70. Both Chrysler and Greenspoint filed petitions for review with this Court.

Chrysler argues that the court of appeals erred in affirming Greenspoint's recovery under the Primary Policy because the known-falsity exclusion expressly eliminated coverage for the defamation committed by Greenspoint's vice-principals. While recognizing that Greenspoint was liable under tort law for the defamatory statements of its vice-pricipals, the court of appeals nevertheless reasoned that the issue here was not Greenspoint's liability in tort but rather the meaning of the insurance contract, specifically whether "the acts committed by the vice-principals are the very acts of the 'organization,' as that term was used by the parties to the insurance policy." *Id*. at 65. The court then concluded that because the policies did not mention vice-principals but rather defined the organization (Greenspoint) to include only its officers, directors, or shareholders, that only their knowledge, not the vice-principals', could be imputed to the corporation. *Id*. at 66.

The court of appeals gleaned its definition of Greenspoint from the policy's definition of who qualified as an insured. *Id.* at 65-66. The Primary Policy's declarations page named "Greenspoint

Dodge, Inc." as an insured.[3] The CGL Policy further identified additional entities who might claim the status of an insured because of their relationship to a named insured. The policy provided in pertinent part:

> SECTION II - WHO IS AN INSURED
>
> 1. If you are designated in the Declarations as:
>
> a. An individual . . . .
>
> b. A partnership or joint venture . . . .
>
> c. An organization other than a partnership or joint venture, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

The Broadened Garage Endorsement also named "Greenspoint Dodge, Inc." as an insured, similarly providing under its own "WHO IS AN INSURED" provision that Greenspoint's executive officers, directors, and stockholders are also insureds while acting within the scope of their duties.

Relying on these provisions to define Greenspoint for purposes of the known-falsity exclusion, the court of appeals reasoned:

> *Under the terms of the policy, Greenspoint is Apple*, the officers, the directors and the shareholders, and it does not include [vice-principals]. . . . Put simply, under tort law Greenspoint is responsible for the actions of certain people in supervisory positions because their actions are determined to be the actions of the corporation, and liability is imposed even though the supervisors are not officers, directors or shareholders of the corporation. But the policy excludes from coverage only a false statement by Greenspoint, as it is defined under the policy, as officers, directors or shareholders of the corporation. We conclude that the terms of the policy itself control the definition of which people make up the corporation, for purposes of the insurance coverage.

[3] Two other entities, L & A Leasing and Apple Motor Cars of Houston, are also listed as named insureds.

265 S.W.3d at 65-66 (emphasis added). The court thus concluded that under the policy "Greenspoint [was] Apple" and knew only as much as Apple, which is to say nothing about defaming Martinez. *Id.* at 65.

The interpretation of an insurance contract is generally subject to the same rules of construction as other contracts. *Nat'l Union Fire Ins. Co. of Pittsburg, PA v. Crocker,* 246 S.W.3d 603, 606 (Tex. 2008). Contract language that can be given a certain or definite meaning is not ambiguous and is construed as a matter of law. *DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999). The primary objective is to determine the parties' intent as reflected in the policy's terms, *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008), and our review of an unambiguous contract, like any other legal question, is de novo. *Heritage Res., Inc. v. NationsBank,* 939 S.W.2d 118, 121 (Tex. 1996).

Contrary to the court of appeals' view, nothing in the policy supports the conclusion that "Greenspoint is Apple" for purposes of this insurance. Greenspoint and Apple are separate legal entities, and the definition of "insured" does not alter this fact. Moreover, the insured definition does not purport to define Greenspoint, the named insured, but merely identifies other persons or entities who may qualify as additional insureds under the policy. Jack Apple is such a person because of his status as an officer, director, and shareholder of Greenspoint, but Apple's qualification as an additional insured does not make him Greenspoint or vice versa. In fact, the policy provides that Greenspoint, Apple, and any other insured under the policy are to be considered separately for purposes of coverage.

The policy states that coverage applies "separately to each insured who is seeking coverage" or "separately to each insured against whom claim is made or 'suit' is brought."[4] The purpose of these separation-of-insureds clauses is to provide each insured with separate coverage, as if each were separately insured with a distinct policy. *Commercial Std. Ins. Co. v. Am. Gen. Ins. Co.*, 455 S.W.2d 714, 721 (Tex. 1970). Under such a provision, intent and knowledge for purposes of coverage are determined from the standpoint of the particular insured, uninfluenced by the knowledge of any additional insured. *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 188-89 (Tex. 2002).

The court of appeals' view that Greenspoint's knowledge is defined solely by that of another insured, Apple, creates a conflict with the separation-of-insureds clauses. When construing a contract, a court should consider the entire writing, giving effect to all its provisions so that none are rendered meaningless. *Seagull Energy E&P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006). By conflating the insureds in derogation of the separation-of-insureds clause, the court deprives these clauses of meaning under the erroneous assumption that the policy's definition of "insured" was also meant to define "Greenspoint."

---

[4] Both the CGL policy and the garage endorsement contained separation-of-insureds clauses. The CGL policy provides:

> 7. Separation of Insureds.
>
> Except with respect to the limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
>
> a. As if each Named Insured were the only Named Insured; and
>
> b. Separately to each insured against whom claim is made or "suit" is brought.

The garage endorsement similarly provides that "[e]xcept with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or suit is brought."

The arbitrators found that Greenpoint's general manager, comptroller, and used car sales manager were Greenspoint's vice-principals and that they intentionally and maliciously defamed Martinez "without even the pretense of a belief in the truth of their accusations." "A vice-principal represents the corporation in its corporate capacity, and includes persons who have authority to employ, direct, and discharge servants of the master, and those to whom a master has confided the management of the whole or a department or division of his business." *GTE Sw., Inc. v. Bruce,* 998 S.W.2d 605, 618 (Tex. 1999). As vice-principals, their acts are the acts of the corporation itself, and corporate liability in this situation is direct rather than vicarious. *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997).

Under the policy's known-falsity exclusion, coverage for defamation was excluded for statements made or directed by the insured with knowledge of their falsity. The policy expressly named Greenspoint as an insured, and the arbitration proceeding effectively determined that Greenspoint made the defamatory remarks, through its vice-principals, and knew them to be false when made. Accordingly, there is no coverage under the Primary Policy for Greenspoint's defamation, and the court of appeals erred in holding otherwise.

Greenspoint also filed a petition for review urging that the court of appeals erred in taking away its award of punitive and extra-contractual damages. "As a general rule there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered." *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995). Having concluded that Chrysler did not breach the insurance contract, no basis supports these awards. *Progressive County Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005) (per curiam). The court of appeals accordingly did not err in vacating them.

The court of appeals' judgment is affirmed, in part, and reversed, in part, and, without hearing oral argument, TEX. R. APP. P. 59.1, we render judgment that Greenspoint take nothing.

Opinion Delivered: October 30, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-0799

STATE FARM LLOYDS AND ERIN STRACHAN, PETITIONERS,

v.

WANDA M. PAGE, RESPONDENT

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

Argued November 19, 2009

JUSTICE O'NEILL delivered the opinion of the Court.

Once again we are called upon to interpret the Texas Standard Homeowner's Policy—Form B, in this instance to decide whether it affords coverage for mold contamination resulting from plumbing leaks. We hold that when a plumbing leak results in mold contamination, the policy covers mold damage to personal property but not to the dwelling. Accordingly, we reverse the court of appeals' judgment in part, affirm in part, and remand to the trial court for further proceedings.

I. Background

State Farm Lloyds issued Wanda Page a Texas Standardized Homeowners Policy—Form B ("HO-B") to insure her dwelling and its contents. In June 2001, Page discovered mold and water

damage to her home and some of her personal property. She filed a claim with State Farm pursuant to her homeowner's policy. Erin Strachan, a State Farm claims specialist, was assigned Page's claim. At Strachan's behest, a plumber tested Page's plumbing system and discovered leaks in the sanitary sewer lines. Strachan then hired Industrial Hygiene & Safety Technology, Inc. ("IHST") to perform an indoor environmental quality assessment. The assessment revealed a variety of different molds growing in the home. To abate the mold, IHST recommended that Page remediate the structure and some of its contents.

Following IHST's recommendation, Page sought and received an estimate for remediation. In January 2002, State Farm provided Page with drafts in the amount of $12,644 to cover remediation and repair of the structure, and $13,631 to cover personal property remediation and three months of living expenses while the work was performed. In May 2002, Page sought additional funds to repair damage to her carpet, which State Farm refused to pay. A dispute ensued over the amounts needed to fully remediate and repair the home and its contents.

In September 2004, Page filed suit against State Farm alleging breach of contract, breach of the duty of good faith and fair dealing, fraudulent misrepresentation, and DTPA and Insurance Code violations. She also sued Strachan, alleging violations of the DTPA and the Insurance Code. About a year after the suit was filed, Page provided State Farm with an estimate for remediating her attic, and State Farm sent her $13,042 to cover the cost.

State Farm and Strachan (hereafter collectively "State Farm") filed no-evidence and traditional summary judgment motions, claiming entitlement to judgment as a matter of law on Page's breach of contract claim. State Farm argued that the HO-B policy expressly excludes coverage for all mold damage, there was no evidence that the mold damage resulted from a covered peril, and there was no evidence that Page was owed additional money. Because Page's breach of contract claim was not viable, State Farm contended, summary judgment was proper on her extra-contractual claims as well. The trial court initially denied State Farm's motions. After our decision in *Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006), however, the trial court reconsidered and granted summary judgment in State Farm's favor disposing of Page's mold-related claims. The court of appeals reversed, holding that Page's HO-B policy covered mold damage to the dwelling and its contents. 259 S.W.3d 257. We granted State Farm's petition to consider the extent of coverage Page's HO-B policy affords for mold contamination resulting from plumbing leaks.

II. Discussion

When analyzing an insurance contract, we are guided by the well-established principles of contract construction. *See State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995). Our primary goal is to determine the contracting parties' intent through the policy's written language. *See id; Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). We must read all parts of the contract together, giving effect to each word, clause, and sentence, and avoid making any provision within the policy inoperative. *See Beaston*, 907 S.W.2d at 433; *Forbau*, 876 S.W.2d at

133. Our analysis of the policy is confined within the four corners of the policy itself. *See Houston Lighting & Power Co. v. Tenn–Tex Alloy & Chem. Corp.*, 400 S.W.2d 296, 300 (Tex. 1966). Whether a particular provision or the interaction among multiple provisions creates an ambiguity is a question of law. *See Nat'l Union Fire Ins. Co. v. CBI Indus.*, 907 S.W.2d 517, 520 (Tex. 1995). The fact that the parties may disagree about the policy's meaning does not create an ambiguity. *See Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 465 (Tex. 1998). Only if the policy is subject to two or more reasonable interpretations may it be considered ambiguous. *See id*. With these principles in mind, we turn to the policy language in issue.

A. The Policy

The standard HO-B policy before us separately provides coverage for the dwelling (Coverage A) and its contents (Coverage B). Specifically, the policy provides:

> **SECTION I - PERILS INSURED AGAINST**
>
> **COVERAGE A (DWELLING)**
>
> We insure against all risks of physical loss to the property described in Section I Property Coverage, Coverage A (Dwelling) unless the loss is excluded in Section I Exclusions.
>
> **COVERAGE B (PERSONAL PROPERTY)**
>
> We insure against physical loss to the property described in Section I Property Coverage, Coverage B (Personal Coverage) caused by a peril listed below, unless the loss is excluded in Section I Exclusions.

* * *

9. **Accidental Discharge, Leaking or Overflow of Water or Steam** from within a plumbing, heating or air conditioning system or household appliance.

   A loss resulting from this peril includes the cost of tearing out and replacing any part of the building necessary to repair or replace the system or appliance. But this does not include loss to the system or appliance from which the water or steam escaped.

   Exclusions 1.a. through 1.h. under Section I Exclusions do not apply to loss caused by this peril.

* * *

(Bold in original, italics added). The last sentence excepting Exclusions 1.a. through 1.h. from the Section I Exclusions is commonly known as the "exclusion repeal provision."

Under Coverage A, the dwelling is insured against "all risks" except those excluded in Section I Exclusions. Under Coverage B, on the other hand, personal property is only insured against twelve enumerated perils, plumbing leaks being one. As with Coverage A, Coverage B is limited by the exclusions listed in Section I Exclusions. Those exclusions are as follows:

SECTION I EXCLUSIONS

1. The following exclusions apply to loss to property described under Coverage A (Dwelling) or Coverage B (Personal Property) . . . .

* * *

   f. We do not cover loss caused by:
   . . .

> (2) rust, rot, mold or other fungi.
> . . .
>
> We do cover ensuing loss caused by collapse of building or any part of the building, water damage or breakage of glass which is part of the building if the loss would otherwise be covered under this policy.
>
> * * *

In interpreting the foregoing provisions, the parties before us start at different points. State Farm begins with our decision in *Fiess*, contending we unequivocally construed the same policy there to exclude all mold damage to a dwelling irrespective of its cause. Page responds that our holding in *Fiess* only concerned mold from roof and window leaks, not mold damage caused by plumbing leaks, and points to our holding in *Balandran v. Safeco Insurance Company*, 972 S.W.2d 738 (Tex. 1998), as controlling. As Page reads *Balandran*, the mold exclusion and the exclusion repeal provision, when read together, expressly cover mold damage caused by plumbing leaks or at the very least create an ambiguity, affording coverage under the policy in either event. Although we agree with State Farm that Page's policy does not afford coverage for mold damage to her dwelling, neither *Balandran* nor *Fiess* is directly on point.

B. *Fiess*

In *Fiess*, Tropical Storm Allison caused flood damage to the Fiesses' home. 202 S.W.3d 754. An inspection revealed that the flooding had caused some mold contamination, but the bulk of the mold was caused by roof leaks, plumbing leaks, leaks in the HVAC system, exterior door leaks, and window leaks, all of which had occurred before the storm. *Id.* In the course of the ensuing litigation over the scope of the Fiesses' mold coverage, the United States Court of Appeals

for the Fifth Circuit certified to us the question whether the ensuing-loss provision in part 1.f of the HO-B policy's Section I-Exclusions provided coverage for mold contamination caused by water damage that is otherwise covered under the policy. *Id.* at 745–46. Concluding there was no ambiguity in the policy language, we answered that it did not. First, we reasoned that the ensuing-loss provision reinstates coverage only as to "losses caused by an intervening cause (like water damage) that in turn follow from an exclusion listed in paragraph 1(f)." *Id*. at 749 (citing *Lambros v. Standard Fire Ins. Co.*, 530 S.W.2d 138 (Tex. Civ. App.—San Antonio 1975, writ. ref'd)). In other words, the water damage must be the *result*, not the cause, of the types of damage that the coverage exclusions enumerate. *Id*. We also reasoned that the ensuing loss must be caused by water *damage*, not merely water, else the insurance policy would become a maintenance agreement. *Id*. at 750. We thus concluded that the ensuing-loss clause did not reinstate coverage for otherwise excluded mold damage.

While our decision in *Fiess* was unquestionably broad, we cannot say that it unequivocally vitiated coverage for all mold damage no matter the cause, as State Farm claims. We specifically noted that the Fiesses "failed to preserve a claim for mold caused by air-conditioning and plumbing leaks." *Id*. at 750 n.26. And we expressly declined to address personal property coverage for mold damage that resulted from plumbing leaks because the Fiesses failed to appeal that issue. *Id*. at 746 n.3. Nevertheless, our policy interpretation in *Fiess* is more consistent with State Farm's position today than with Page's reading of the policy language. *See Carrizales v. State Farm Lloyds*, 518 F.3d 343, 348 (5th Cir. 2008).

C. *Balandran*

Page contends our decision in *Balandran* controls interpretation of her HO-B policy, and the court of appeals agreed. There, the Balandrans sued to recover damage to their dwelling caused by foundation movement resulting from an underground plumbing leak. 972 S.W.2d at 739. We examined exclusion 1.h concerning foundation damage in light of the exclusion repeal provision. *Id*. For two reasons, we concluded that the policy's language and structure were subject to different, but reasonable, interpretations and thus created an ambiguity. *Id*. at 741. First, we noted that the repeal of exclusion 1.h expressly applied to "loss" caused by a plumbing leak, and was not by its terms limited to "personal property loss." *Id*. That the repeal provision is contained in Coverage B, we said, did not necessarily limit its application to Coverage B, as the provision could have been placed where it was "simply because that is the only place in the policy that the 'accidental discharge' risk is specifically described." *Id*. Second, we determined that the insurer's construction of the policy would render part of the policy language meaningless. *Id*. If the repeal provision applied only to personal property under Coverage B, exclusion 1.h would mean nothing as that exclusion, on its face, only applies to damage to the dwelling under Coverage A. *Id*. Finally, we noted the reasonableness of the Balandrans' interpretation in light of the circumstances surrounding the policy's drafting, which indicated that placement of the exclusion repeal provision in Coverage B was intended merely to simplify the policy and not to restrict then-available coverage for foundation damage resulting from a plumbing leak. *Id*. at 742. Concluding that both the insurer's and the insured's interpretation of the policy language were reasonable, we held that the policy was ambiguous. *Id*. Because the ambiguity involved an exclusionary provision of an insurance policy,

we adopted the construction urged by the Balandrans and held that the policy provided coverage for the damage to their foundation. *Id*. at 742.

The court of appeals, broadly applying *Balandran* to this case, held that the entire exclusion repeal provision is ambiguous even though our *Balandran* analysis was confined to the foundation damage exclusion contained in 1.h. 259 S.W.3d at 263. Page contends the court of appeals' sweeping application was proper because our analysis was based, at least in part, upon the repeal provision's reference to "loss" rather than "personal property loss," and on the drafters' intent that there be no substantive change in coverage under the redrafted policy. As to the latter point, our decision in *Fiess* made clear that an ambiguity may not be created by extrinsic evidence concerning the prior HO-B policy. 202 S.W.3d at 747. Moreover, there is nothing to indicate that the prior version of the policy unambiguously covered mold damage resulting from plumbing leaks as it did for foundation damage. *Balandran*, 972 S.W.2d at 742. As to the former point, that the exclusion repeal provision expressly applies to "loss" caused by a plumbing leak and is not by its terms limited to "personal property loss," we are not persuaded that this policy wording, in isolation, can bear the weight of rendering the entire repeal provision ambiguous. Instead, we must examine the policy language in light of the particular policy exclusion in issue, reading all parts of the policy together and "giving meaning to every sentence, clause, and word to avoid rendering any portion inoperative." *Fiess*, 202 S.W.3d at 748 (citing *Balandran*, 972 S.W.2d at 741; *Liberty Mut. Ins. Co. v. Am. Emp. Ins. Co.*, 556 S.W.2d 242, 245 (Tex. 1977); *Pan Am. Life Ins. Co. v. Andrews*, 161 Tex. 391, 340 S.W.2d 787, 790 (1960)).

D. Mold Damage to the Dwelling

In *Balandran*, we held that the exclusion repeal provision was ambiguous with respect to exclusion 1.h because the exclusion for foundation damage was specifically limited to Coverage A. In other words, because the losses excluded under 1.h — losses caused by "settling, cracking, bulging, shrinkage, or expansion of foundations, walls, floors, ceilings, roof structures, walks, drives, curbs, fences, retaining walls or swimming pools" — applied only to the dwelling under Coverage A, to hold that repeal of the 1.h exclusion only applied to personal property under Coverage B would make no sense. *Balandran*, 972 S.W.2d at 741. That is not the case with the 1.f mold exclusion, because the exclusion's plain language stating that it applies to property loss under Coverage A (Dwelling) and Coverage B (Personal Property) can be given full effect. To hold that the exclusion repeal provision reinstates coverage for mold damage under both Coverage A and Coverage B would render the mold exclusion entirely nugatory. On the other hand, limiting the 1.f repeal provision to coverage B where it appears in the policy does not render the repeal provision wholly inoperative as it did in *Balandran*.

Our interpretation of Page's policy comports with the Fifth Circuit Court of Appeals' reasoning in *Carrizales v. State Farm Lloyds*, 518 F.3d at 348. There, the Carrizaleses sued State Farm contending their homeowners' policy — the same policy at issue here — provided coverage for mold contamination in their garage caused by plumbing leaks. *Id*. at 344. Making an *Erie*-guess about how we would decide the question now before us, *id.* at 345 (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 420, 26 (5th Cir. 2004)), the Fifth Circuit concluded that the interaction between the mold exclusion provision and the exclusion repeal

provision under Coverage B did not create an ambiguity. *Id*. at 346. Although the repeal provision is located in the section of the policy that deals with plumbing leaks, the court said, "it does not follow that every exclusion is repealed with respect to plumbing leaks." *Id*. at 348. Looking at each policy provision and determining its effect in light of the repeal provision, the court concluded: "we cannot envision the role the mold exclusion would play if Coverage A (implicitly) as well as Coverage B (explicitly) covered mold damage resulting from plumbing leaks." *Id*. Neither can we. There is no reason apparent from the policy language that would indicate the exclusion repeal provision applies to the mold exclusion under Coverage A; to construe the repeal provision to reinstate mold coverage for Page's dwelling would wholly ignore the structure of the policy. *See id*. at 352 (Reavley, J., concurring).

E. Mold Damage to Personal Property

While the exclusion repeal provision does not reinstate coverage for mold damage to the dwelling under Coverage A, it does apply to remove personal property damage from the 1.f mold exclusion, as the court of appeals held.[1] 259 S.W.3d at 264. As the Fifth Circuit in *Carrizales* reasoned with respect to Section 9's coverage of personal property loss caused by plumbing leaks, "[its] operation on exclusion 1(f) gives effect precisely to what its location in the text of Form B implies: Mold damage to personal property caused by accidental discharge is covered." 518 F.3d at 347. We agree. Section 9's unambiguous language states that "[e]xclusions 1.a. through 1.h. under Section I Exclusions do not apply to loss caused by this peril." "This peril" refers to plumbing leaks

[1] State Farm argued against coverage for personal property damage in the court of appeals, but apparently has since abandoned that argument in this Court.

which affect the insured's personal property. Accordingly, Page's claims for mold damage to her personal property resulting from plumbing leaks are covered under the HO-B policy.

F. State Farm's Summary Judgment Points

State Farm moved for summary judgment on both traditional and no-evidence grounds. Arguing in its traditional summary judgment motion that Page's HO-B policy affords no coverage for mold damage to her home or its contents, State Farm argued alternatively that Page had presented no evidence that a covered peril caused the mold contamination or that State Farm owed more than it had already paid under the policy. State Farm reurges those same grounds here with respect to Page's personal property, and contends the court of appeals made a number of errors in reviewing the evidence Page presented to defeat State Farm's no-evidence motion. Because the trial court's summary judgment was sustainable on no-evidence grounds, State Farm contends, the court of appeals erred in reversing it. We need not address State Farm's challenges to the evidence the court of appeals considered, however, because State Farm's no-evidence points were not properly preserved.

The trial court originally denied both State Farm's traditional and no-evidence summary judgment motions. After our decision in *Fiess*, State Farm filed a motion requesting that the trial court reconsider its ruling. State Farm argued that our decision in *Fiess* clearly disposed of Page's claims because the HO-B policy does not cover mold damage to either the dwelling or its contents caused by a plumbing leak. State Farm's motion for reconsideration did not reurge its no-evidence

challenge, as Page pointed out in her objection to the motion[2] and throughout her appeal. Summary judgment may not be affirmed on appeal on a ground not presented to the trial court in the motion. *See Stiles v. Resolution Trust Corp*., 867 S.W.2d 24, 26 (Tex. 1993). Because State Farm's motion for reconsideration was limited to the coverage issue, the points pertaining to State Farm's no-evidence motion were not properly before the court of appeals and we do not address them.

G. Page's Extra-contractual Claims

In addition to her breach of contract claims, Page also brought extra-contractual claims against State Farm and Strachan. When the issue of coverage is resolved in the insurer's favor, extra-contractual claims do not survive. *See Progressive County Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 921 (Tex. 1995) (per curiam). There can be no liability under either Article 21.55 or Article 21.21 of the Insurance Code.[3] if there is no coverage under the policy. Similarly, to the extent the policy affords coverage, extra-contractual claims remain viable. Accordingly, to the extent Page's extra-contractual claims are based on State Farm's denial of coverage for mold damage to her dwelling, they cannot survive. To the extent Page's extra-contractual claims are based upon denial

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[2] Page's response to State Farm's motion to reconsider stated:

> As Defendants' Motion for Reconsideration appears to only address *Fiess v. State Farm Lloyds* (see below) ruling and its effect on coverage afforded Ms. Page under her HOB policy with State Farm, Plaintiff's response will address this issue.

[3] Page filed suit against State Farm and Strachan in 2004. At that time, Article 21.21 and Article 21.55 of the Insurance Code were in effect. Each has since been repealed and recodified. Article 21.21 was repealed in 2003, effective March 31, 2005. Act of May 10,2001, 77th Leg., R.S., ch. 290, § 1, 2001 Tex. Gen. Laws 548, *repealed by* Act of May 20, 2003, 78th Leg., R.S., ch. 1274, § 26(a)(1), 2003 Tex. Gen. Laws 4138. It was recodified under sections 551.001–.454 and section 543.001 of the Insurance Code. Similarly, Article 21.55 was repealed in 2003, effective March 31, 2005. Act of May 27, 1991, 72nd Leg., R.S., ch. 242, § 11.03(a),1991 Tex. Gen. Laws 1045, *repealed by* Act of May 20, 2003, 78th Leg., R.S., ch. 1274, § 26(a)(1), 2003 Tex. Gen. Laws 4138. It was recodified under sections 542.051–.061 of the Insurance Code.

of her claim for mold damage to the contents of her home, we remand them to the trial court for further proceedings.

H. Strachan's Remaining Points

Strachan further contends the court of appeals erred in reversing the trial court's summary judgment in her favor because (1) Page's summary judgment response did not preserve error as to Strachan, (2) Page's appellate brief did not properly assign error as to her, and (3) Page's "general point of error" is insufficiently specific to preserve her argument that the trial court erred in granting Strachan summary judgment. In rejecting these arguments, the court of appeals concluded that Page had sufficiently challenged the trial court's summary judgment in Strachan's favor in both her summary judgment response and her appellate briefing. 259 S.W.3d at 271–72. We agree with the court of appeals and reject Strachan's remaining points.

III. Conclusion

For the foregoing reasons, we reverse the court of appeals' judgment in part, affirm in part, and remand to the trial court for further proceedings.

_____

Harriet O'Neill
Justice

OPINION DELIVERED: June 11, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0800

IN RE HOUSTON PIPE LINE COMPANY, ET AL., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

On Motion for Rehearing

O'Connor complains on rehearing that our opinion may be misinterpreted to foreclose all pre-arbitration discovery in the underlying case because we have vacated the underlying discovery order and directed the trial court to rule on the pending motion to compel arbitration. O'Connor submits that such an interpretation would conflict with the Court's recognition here that pre-arbitration discovery is permissible when a trial court needs additional information to make its determination regarding the scope of the arbitration provision or other issues of arbitrability. We reiterate that the discovery order below was overbroad and must be vacated, but that the trial court retains discretion to order limited discovery on issues of scope or arbitrability, if necessary. We further reiterate that motions to compel arbitration and any reasonable discovery should be resolved without delay.

O'Connor's motion for rehearing is overruled.

OPINION DELIVERED: October 23, 2009.

IN THE SUPREME COURT OF TEXAS

NO. 08-0829

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, PETITIONER,

v.

EDWARD LEJEUNE, RESPONDENT

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

PER CURIAM

In this case we consider whether a default judgment must be overturned because the clerk's endorsement of the return of citation lacked the time of service, as required by Rules 16 and 105 of the Texas Rules of Civil Procedure. "For well over a century, this court has required that strict compliance with the rules for service of citation affirmatively appear on the record in order for a default judgment to withstand direct attack." *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam) (citing *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990); *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 886 (Tex. 1985); *McKanna v. Edgar*, 388 S.W.2d 927, 929 (Tex. 1965); *Flynt v. Kingsville*, 82 S.W.2d 934, 934 (Tex. 1935); *Sloan v. Batte*, 46 Tex. 215, 216 (1876); *Roberts v. Stockslager*, 4 Tex. 307, 309 (1849)). Because we hold that the endorsement in this case did not satisfy Rules 16 and 105, we reverse the court of appeals' judgment and remand the case to the trial court.

Edward Lejeune filed a workers' compensation claim with his employer's carrier, Insurance Company of the State of Pennsylvania, for an injury he stated he suffered on the job. Insurance Co. denied his claim, and the parties participated in a contested case hearing before the Division of Workers' Compensation. The hearing officer found that Lejeune's injury was not compensable. The Appeals Panel of the Division subsequently affirmed that decision. Lejeune then sought review in district court. After Insurance Co. failed to respond to the suit, Lejeune moved for, and was granted, a default judgment. Approximately five months later, Insurance Co. filed a notice of restricted appeal, alleging that Lejeune failed to comply with the venue and service of citation rules governing his claim. The court of appeals disagreed and affirmed the default judgment. 261 S.W.3d 852, 861 (Tex. App.—Texarkana 2008). Insurance Co. then petitioned for review in this Court. 52 Tex. Sup. Ct. J. 8 (Oct. 3, 2008).

A party can prevail in a restricted appeal only if:

> (1) it filed notice of the restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it did not participate in the hearing that resulted in the judgment complained of and did not timely file any postjudgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record.

Alexander v. Lynda's Boutique, 134 S.W.3d 845, 848 (Tex. 2004) (citing TEX. R. APP. P. 26.1(c), 30, and *Quaestor Inv., Inc. v. State of Chiapas*, 997 S.W.2d 226, 227 (Tex. 1999)). The only element at issue in this case is the fourth: whether there is error apparent on the face of the record.

Insurance Co. argues that the clerk's defective endorsement of the return of citation, which failed to include the hour of receipt of citation as required by the Texas Rules of Civil Procedure,

constitutes error on the face of the record.[1] Texas Rule of Civil Procedure 16, which governs service of process in general, provides that "[e]very officer or authorized person shall endorse on all process and precepts coming to his hand the day and hour on which he received them." TEX. R. CIV. P. 16. Rule 105, which governs service of citation, states that "[t]he officer or authorized person to whom process is delivered shall endorse thereon the day and hour on which he received it, and shall execute and return the same without delay." TEX. R. CIV. P. 105.

Strict compliance with the rules governing service of citation is mandatory if a default judgment is to withstand an attack on appeal. *Primate Constr.*, 884 S.W.2d at 152. Failure to comply with these rules constitutes error on the face of the record. *Id.* at 153 ("Proper service not being affirmatively shown, there is error on the face of the record, and the court of appeals erred in holding otherwise."). Here, although Lejeune served Insurance Co. by certified mail, the record shows that the return of citation lacks the required notation showing the hour of receipt of citation. Lejeune's default judgment, therefore, cannot stand. Accordingly, without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings consistent with this opinion.

OPINION DELIVERED: October 30, 2009

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[1] Insurance Co. also argues that Lejeune's failure to bring suit in his county of residence at the time of his injury violated the Workers' Compensation Act, *see* TEX. LAB. CODE § 410.252(b), and that the record lacks proof that Lejeune complied with the Act's requirement that copies of the petition and judgment be served on the Division, *see id.* §§ 410.253(a), 410.258(a). Because we decide this case on the service of citation issue, we need not address these other arguments.

IN THE SUPREME COURT OF TEXAS

NO. 08-0832

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, PETITIONER,

v.

KIRK WAYNE MCBRIDE, SR., RESPONDENT

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

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

Kirk Wayne McBride, Sr. is an inmate at a Texas Department of Criminal Justice facility. Several years ago, the Department charged McBride with possession of an alcoholic beverage and entered findings against him in an administrative disciplinary hearing. McBride filed a Step 1 Grievance pursuant to the Department's appeals process. McBride later learned that his Step 1 Grievance had been closed. He then initiated a new Step 1 Grievance, arguing that the Department never notified him of its decision in the first grievance, which prevented him from timely appealing it. The Department responded that the decision had been sent to McBride. McBride next filed a Step 2 Grievance, arguing that he was denied the right to challenge and exhaust his administrative remedies, and that the fifteen-day limitation period should begin anew from the date that he receives the original decision. Noting that McBride's record revealed numerous grievances filed on a regular basis, the Department closed the case and took no further action.

McBride filed this lawsuit complaining, among other things, that the Department violated his due process rights by failing to give him a copy of the administrative decision. McBride sought a judgment declaring that the Department failed to comply with its own grievance procedures, and injunctive relief ordering the Department to provide him notice of its Step 1 decision so that he might proceed with his administrative remedies.

The Department denied McBride's allegations, asserted sovereign immunity, and requested attorney's fees. The trial court granted the Department's plea and dismissed the case, but the court of appeals reversed, holding that "the Department's claim for attorney's fees is considered a claim for affirmative relief that waives sovereign immunity."[1] ___ S.W.3d ___. We disagree.

Sovereign immunity protects the State (and various divisions of state government) from lawsuits for money damages. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). In *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006), we recognized, however, that certain actions taken by governmental entities could affect their immunity: "[I]f the governmental entity interjects itself into or chooses to engage in litigation to assert affirmative claims for monetary damages, the entity will presumably have made a decision to expend resources to pay litigation costs." In such cases, the governmental entity has decided to "leave its sphere of immunity from suit for claims against it which are germane to, connected with and properly defensive to claims the [governmental entity] asserts." *Reata*, 197 S.W.3d at 377. Thus, we held that "[o]nce it asserts

[1] In light of its decision that the Department's fee request waived immunity, the court of appeals did not reach McBride's arguments that his constitutional claims for declaratory and injunctive relief were not barred by immunity.

affirmative claims for monetary recovery, the [governmental entity] must participate in the litigation process as an ordinary litigant, save for the limitation that the [entity] continues to have immunity from affirmative damage claims against it for monetary relief exceeding amounts necessary to offset the [entity's] claims." *Id*.

Since *Reata*, several courts of appeals have examined whether a defendant-governmental entity's request for attorney's fees waives immunity. Most have held that it does not. *See, e.g., Edwards Aquifer Auth. v. Horton*, No. 04-09-00375-CV, 2010 Tex. App. LEXIS 736, at *6-*7 (Tex. App.—San Antonio Feb. 3, 2010, pet. denied) ("We join several of our sister courts . . . in holding that the assertion of a claim for attorney's fees in defending a lawsuit is not the assertion of a claim for monetary relief under the holding in *Reata* . . . ."); *City of Dallas v. VRC LLC*, 260 S.W.3d 60, 64 (Tex. App.—Dallas 2008, no pet.) (holding that City's request for attorney's fees in defending a constitutional takings suit did not waive immunity under *Reata*); *Lamesa Indep. Sch. Dist. v. Booe*, 251 S.W.3d 831, 833 (Tex. App.—Eastland 2008, no pet.) (holding that school district's request for attorney's fees did not constitute waiver of immunity under Education Code, also relying on *Reata*); *Harris County Toll Rd. Auth. v. Sw. Bell Tel., L.P.*, 263 S.W.3d 48, 65 (Tex. App.—Houston [1st Dist.] 2006) (holding that County did not waive immunity by seeking attorney's fees in an inverse condemnation suit), *aff'd on other grounds*, 282 S.W.3d 59 (Tex. 2009). *But see Powell v. Tex. Dep't of Criminal Justice*, 251 S.W.3d 783, 791-92 (Tex. App.—Corpus Christi 2008, pet. filed) (holding that the Department's request for attorney's fees waived immunity).

In this case, McBride, not the Department, filed suit. In its answer, the Department denied McBride's allegations and prayed for attorney's fees and costs incurred in defending the case. Other

than fees and costs, the Department asserted no claims for relief. Unlike *Reata*, in which the City injected itself into the litigation process and sought damages, the Department's request for attorney's fees was purely defensive in nature, unconnected to any claim for monetary relief. When that is the case, a request for attorney's fees incurred in defending a claim does not waive immunity under *Reata*, and the court of appeals incorrectly held otherwise.

Without hearing oral argument, we reverse the court of appeals' judgment and remand the case to that court for consideration of McBride's remaining issues. TEX. R. APP. P. 59.1, 60.2(d).

_____
Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 11, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0941

THE TRAVELERS INSURANCE COMPANY (THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD CONNECTICUT), PETITIONER,

v.

BARRY JOACHIM, RESPONDENT

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

Argued February 17, 2010

JUSTICE GREEN delivered the opinion of the Court.

In this procedural dispute, we must decide whether a trial court's erroneous dismissal of a suit with prejudice, following the plaintiff's filing of a nonsuit, operates to bar a later suit because of res judicata. We conclude that it does. Therefore, we reverse the court of appeals' judgment and order the case dismissed.

I

Barry Joachim sued his insurer, The Travelers Insurance Company,[1] alleging he was entitled

[1] The parties agree that The Automobile Insurance Company of Hartford, Connecticut issued Joachim's policy. For convenience, however, we refer to the respondent in this case as Travelers because The Travelers Insurance Company is the entity Joachim named first in his trial court petitions.

to benefits from Travelers for damages caused by Joachim's accident with an underinsured driver. On the day before trial, Joachim filed a "Notice of Non-Suit" stating that he "no longer wishes to pursue his claims against Defendants,"[2] and therefore "gives notice to all parties that his claims against the same are hereby dismissed without prejudice." No motions or counterclaims were pending at that time. Several months later, the trial court sent notice that if a final order was not filed within 10 days of the notice, the court would dismiss the case for want of prosecution. Joachim asserts he did not receive this notice. The trial court then entered an order that the case "is hereby dismissed in full with prejudice for want of prosecution." Joachim claims he did not receive a copy of that order either. Unaware of the dismissal order, Joachim neither contested it while the court retained plenary power, *see* TEX. R. CIV. P. 329b, nor perfected an appeal.

Joachim later refiled the same cause of action, and the case was assigned to a different trial court. Travelers filed a motion for summary judgment based on res judicata. The second trial court granted Travelers' motion and ordered that Joachim take nothing by his suit. Joachim appealed that judgment. The court of appeals reversed, holding that a nonsuit removes a trial court's jurisdiction to enter a dismissal with prejudice. 279 S.W.3d 812, 817 (Tex. App.—Amarillo 2008). The court of appeals therefore determined that the first trial court's order was void, not merely voidable. *Id.* at 818. Thus, it concluded that Travelers failed to establish the defense of res judicata. *Id.*

II

We review a trial court's summary judgment de novo. *Provident Life & Accident Ins. Co.*

[2] Joachim's first petition included several insurance companies as defendants.

v. Knott, 128 S.W.3d 211, 215 (Tex. 2003). The party relying on the affirmative defense of res judicata must prove (1) a prior final determination on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were or could have been raised in the first action. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996); *see* TEX. R. CIV. P. 94 (identifying res judicata as an affirmative defense). "The judgment in the first suit precludes a second action by the parties and their privies on matters actually litigated and on causes of action or defenses arising out of the same subject matter that might have been litigated in the first suit." *Gracia v. RC Cola-7-UP Bottling Co.*, 667 S.W.2d 517, 519 (Tex. 1984). Only the first element—prior final determination on the merits—is contested in this appeal.

"At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may . . . take a non-suit, which shall be entered in the minutes. Notice of the . . . non-suit shall be served . . . on any party who has answered or who has been served with process without necessity of court order." TEX. R. CIV. P. 162. A party has an absolute right to file a nonsuit, and a trial court is without discretion to refuse an order dismissing a case because of a nonsuit unless collateral matters remain. *See Villafani v. Trejo*, 251 S.W.3d 466, 468–69 (Tex. 2008); *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997) (per curiam); *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 59 (Tex. 1991). A nonsuit "extinguishes a case or controversy from 'the moment the motion is filed' or an oral motion is made in open court; the only requirement is 'the mere filing of the motion with the clerk of the court.'" *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 100 (Tex. 2006) (per curiam) (quoting *Shadowbrook Apts. v. Abu-Ahmad*, 783 S.W.2d 210, 211 (Tex. 1990) (per curiam)). It renders the

merits of the nonsuited case moot. *See Villafani*, 251 S.W.3d at 469 ("One unique effect of a nonsuit is that it can vitiate certain interlocutory orders, rendering them moot and unappealable."); *Shultz*, 195 S.W.3d at 101 ("Although [Rule 162] permits motions for costs, attorney's fees, and sanctions to remain viable in the trial court, it does not forestall the nonsuit's effect of rendering the merits of the case moot."); *Gen. Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990) ("As a consequence of the trial court's granting the nonsuit, the temporary injunction ceased to exist and the appeal became moot. . . . It was not necessary for the trial court to enter such a separate order because when the underlying action was dismissed, the temporary injunction dissolved automatically.") (citation omitted).

The parties agree that the first trial court's order, which dismissed the case with prejudice, was erroneous because Joachim's nonsuit was without prejudice to refiling. *See generally* 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, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity."). The question of whether Travelers established its res judicata defense turns on the issue of whether the trial court's erroneous order was void, or merely voidable. "A judgment is void only when it is apparent that the court rendering judgment had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act." *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005) (internal quotation omitted). A void order is subject to collateral attack in a new lawsuit, while a voidable order must be corrected by direct attack; unless successfully attacked, a voidable judgment becomes final. *See Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985). After a nonsuit, a trial court

retains jurisdiction to address collateral matters, such as motions for sanctions, even when such motions are filed after the nonsuit, as well as jurisdiction over any remaining counterclaims. *See Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996) (per curiam) (holding that a trial court has authority to decide a motion for sanctions while it retains plenary power, even after a nonsuit is taken); TEX. R. CIV. P. 162 ("Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk."). We must determine, then, whether filing a nonsuit strips a trial court of jurisdiction to dismiss a case with prejudice.

We have held that an order dismissing a case with prejudice for want of prosecution, though mistaken, is merely voidable and must be attacked directly in order to prevent the order from becoming final for purposes of establishing res judicata. *See El Paso Pipe & Supply Co. v. Mountain States Leasing, Inc.*, 617 S.W.2d 189, 190 (Tex. 1981) (per curiam). That the order happens to follow a nonsuit does not make it void. Many litigants use a nonsuit as a procedural device to effectuate a settlement agreement, intentionally dismissing claims with prejudice. Indeed, in this case Joachim had taken a nonsuit with the first trial court "dismissing with prejudice all of Plaintiff's claims" against another defendant with whom Joachim had settled, before he filed the nonsuit as to Travelers. Just as the trial court has jurisdiction to enter a dismissal with prejudice upon the filing of a nonsuit to effectuate a settlement agreement, it must also have jurisdiction to enter a dismissal with prejudice in other nonsuit situations. *See Wilmer-Hutchins Indep. Sch. Dist. v. Sullivan*, 51 S.W.3d 293, 294–95 (Tex. 2001) (per curiam) ("A party cannot by his own conduct confer jurisdiction on a court when none exists otherwise."). Such an order, even if erroneous, is not

necessarily void. *See Berry v. Berry*, 786 S.W.2d 672, 673 (Tex. 1990) (per curiam) ("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."). Accordingly, we conclude that the trial court's order in this case was voidable, not void. Therefore, the order was subject only to direct attack to avoid becoming a final judgment. *See Placke*, 698 S.W.2d at 363.

The court of appeals held that because a nonsuit renders the merits of the case moot, the second trial court lacked jurisdiction to render judgment for lack of justiciability. 279 S.W.3d at 816–17. The court stated that a nonsuit "returns the litigants to the positions they occupied before the plaintiff invoked the court's jurisdiction." *Id.* at 816.[3] This conclusion is in tension with the trial court's authority to address proper matters after a nonsuit is entered, as the court of appeals recognized. *See id.* at 818 (observing that the trial court "retained the power to address the 'collateral' matters listed in Rule 162"); TEX. R. CIV. P. 162 (allowing the trial court to consider motions for sanctions, attorney's fees, or other costs "pending at the time of dismissal"). In *Scott & White*, we explored this tension further, considering circumstances beyond those contemplated by Rule 162. *See* 940 S.W.2d at 596. We held that in the case of collateral motions, such as a motion

[3] We have used similar language in discussing a dismissal. *See Crofts v. Court of Civil Appeals*, 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."). However, *Crofts* did not involve a nonsuit. The court in *Crofts* dismissed a divorce petition, while a related suit was pending in Maryland. *See id.* at 103. *Crofts* held that a trial court could not be ordered by writ of mandamus to give possession of children to a mother after the trial court had dismissed the case. *See id.* at 104–05. Even if the circumstances of that dismissal could be considered analogous to a nonsuit, however, we do not read the *Crofts* language so strictly as to deprive the trial court of all authority after it dismisses a case—or after it should dismiss a case, as in a typical nonsuit scenario.

for sanctions, a trial court may consider them even if they are filed after a nonsuit. *See id.*[4] In *Scott & White*, a medical malpractice case, only some defendants were dismissed by nonsuit. *See id.* at 595. After the trial court granted summary judgment for the remaining defendants, all of the defendants—including the nonsuited defendants—filed a motion for sanctions under Texas Rule of Civil Procedure 13, alleging that the suit against them was groundless and brought in bad faith. *See id.* The trial court's authority to consider such a motion was proper in part because it advanced well-recognized policy goals. *See id.* at 596–97 ("Courts impose sanctions against parties filing frivolous claims to deter similar conduct in the future and to compensate the aggrieved party by reimbursing the costs incurred in responding to baseless pleadings. Rule 162 would frustrate these purposes if it allowed a party to escape sanctions by simply nonsuiting the aggrieved party."). Here, too, the power to dismiss a case with prejudice after a nonsuit advances an express policy, as given by the Legislature: to hold a dismissal with prejudice void because it was entered after a nonsuit would undercut the finality of many cases that were dismissed with prejudice after a nonsuit was filed because the parties settled. *See* TEX. CIV. PRAC. & REM. CODE § 154.002 ("It is the policy of this state to encourage the peaceable resolution of disputes . . . and the early settlement of pending litigation through voluntary settlement procedures.").

[4] In *Scott & White*, our holding was limited to the situation where the trial court granted a collateral motion for sanctions during the period when it retained plenary power. *See* 940 S.W.2d at 596. In this case, however, the trial court's plenary power is not at issue because after Joachim filed his nonsuit, the record shows that the trial court never entered a judgment until it entered its dismissal with prejudice. *See* TEX. R. CIV. P. 329b(d) ("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 within thirty days after the judgment is signed."); *Shultz*, 195 S.W.3d at 100 (observing that although a nonsuit is effective upon its filing, expiration of plenary power is determined from the date on which a trial court signs an order dismissing the suit).

In addition, the court of appeals' conclusion that the dismissal order was void confuses the subtle differences between mootness and related justiciability concepts, such as ripeness and standing. The court of appeals cited *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994), for the proposition that jurisdiction depends on justiciability. 279 S.W.3d at 816. It cited *Patterson v. Planned Parenthood of Houston*, 971 S.W.2d 439, 442 (Tex. 1998), for the proposition that a moot case lacks justiciability. 279 S.W.3d at 816. Thus, it concluded that a court lacks jurisdiction over a nonsuited case, since the merits of such a case are moot. 279 S.W.3d at 816–17. However, by concluding that a nonsuit deprives the court of jurisdiction to dismiss a case with prejudice, the court of appeals applied these cases too broadly.

In *Gomez*, we said: "Subject matter jurisdiction requires that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable." 891 S.W.2d at 245. Similarly, in *Patterson*, we observed that "[t]he constitutional roots of justiciability doctrines such as ripeness, as well as standing and mootness, lie in the prohibition on advisory opinions, which in turn stems from the separation of powers doctrine." 971 S.W.2d at 442. However, neither case addressed mootness in general, or a nonsuit in particular. *Gomez* addressed a case that lacked justiciability from the outset, as certain plaintiffs sought to compel free legal services from the State Bar of Texas, "an entity that is powerless, acting alone, to implement" a mandatory pro bono program for Texas lawyers. 891 S.W.2d at 245 ("[F]or a controversy to be justiciable, there must be a real controversy between the parties that will be actually resolved by the judicial relief sought."). Likewise, *Patterson* addressed a matter that was unripe, as it was still unclear whether Planned Parenthood would be deprived of federal funds if the Texas Department

of Health implemented a state law that required parental consent to dispense prescription drugs to minors. 971 S.W.2d at 444 ("Without knowing what the federal government will do, Planned Parenthood cannot show a conflict between federal and state demands or that the state's proposed action will cause it any injury."). Unlike those cases, which lacked justiciability from the moment of pleading, here the nonsuit extinguished what was initially a live controversy, a justiciable case between proper parties. *See Shultz*, 195 S.W.3d at 100; *accord Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2000) ("If a case becomes moot, the parties lose standing to maintain their claims."). When a court initially has jurisdiction to grant relief to resolve a live controversy between parties with proper standing, a party's filing a nonsuit—while rendering the merits of the case moot—cannot deprive the court of its entire jurisdiction. Rather, the court must retain certain limited authority to dispose of the case following a nonsuit, and today we hold that this includes the necessary authority to enter a dismissal with prejudice.

The question remains whether the trial court's voidable order of dismissal is sufficient to establish Travelers' affirmative defense of res judicata. We conclude it is. Because Joachim failed to attack the trial court's order directly, it became a final judgment for purposes of res judicata.[5] Joachim alleges that he never received notice of the judgment dismissing his cause of action with prejudice. Certainly, if this is true, the lack of notice would not bind him to the effects of the first

[5] We note that none of Joachim's allegations in the trial court, even when construed liberally, can plausibly be considered as being in the nature of a claim for bill of review or similar relief.

trial court's erroneous judgment without some potential remedy.[6] However, there is a remedy: an equitable bill of review is a direct attack on a judgment. *See* TEX. R. CIV. P. 329b(f) (providing that a judgment may be set aside by the trial court by bill of review for sufficient cause); *McEwen v. Harrison*, 345 S.W.2d 706, 709 (Tex. 1961) ("A bill of review filed in the proper court and against proper parties is one authorized method of making a direct attack on a judgment."); *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979) ("A bill of review is an independent equitable action brought by a party to a former action seeking to set aside a judgment, which is no longer appealable or subject to motion for new trial."); *see also Levit v. Adams*, 850 S.W.2d 469, 470 (Tex. 1993) (per curiam) (allowing a bill of review to proceed because when a party first receives notice of a final judgment more than 90 days after the order is signed, the time limit under Texas Rule of Civil Procedure 306a(4), a bill of review is a proper method of seeking relief); *Wolfe v. Grant Prideco, Inc.*, 53 S.W.3d 771, 775 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (reversing summary judgment dismissing a bill of review claim filed after the plaintiff's earlier case was dismissed for want of prosecution). Had the trial court set aside the judgment, either by timely motion for new trial or by bill of review, Joachim's underlying claim would no longer be barred by res judicata, as there would no longer be a final determination on the merits.[7] Yet, because the first trial court's order

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[6] The United States Supreme Court recently observed, for instance, that comparable relief under Federal Rule of Civil Procedure 60(b)(4) (relief from a final judgment that is void) "applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. ___, ___, 130 S. Ct. 1367, 1377 (2010). Here, however, although Joachim mentions his lack of notice, Joachim asserted only jurisdictional error as a legal argument.

[7] We offer no opinion as to whether Joachim might have succeeded in having the trial court set aside its judgment by pursuing an equitable bill of review or any other remedy in the trial court.

stands, Joachim's claim is barred. Accordingly, we reverse the court of appeals' judgment and render judgment dismissing Joachim's cause of action with prejudice based on Travelers' defense of res judicata.

III

We hold that because a trial court has jurisdiction to enter orders dismissing a case with prejudice upon filing of a nonsuit, the trial court's order here was voidable, not void, and subject only to direct attack. Because Joachim failed to attack the trial court's order directly, it became a final determination on the merits for purposes of res judicata. Therefore, we reverse the court of appeals' judgment and render judgment dismissing the case with prejudice.

_____
Paul W. Green
Justice

OPINION DELIVERED: May 14, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0958

PRESIDIO INDEPENDENT SCHOOL DISTRICT, PETITIONER,

v.

ROBERT SCOTT, AS COMMISSIONER OF EDUCATION, RESPONDENT

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

Argued January 19, 2010

JUSTICE GUZMAN delivered the opinion of the Court.

At issue in this case is whether Texas Education Code § 21.307 requires the Commissioner of Education's consent before an appeal of his decision in a dispute between a teacher and a school district can proceed in a Travis County district court. After the Commissioner adjudicates the dispute between a teacher and a school district, § 21.307(a) allows "[e]ither party" to appeal the Commissioner's decision in one of two possible venues: (1) a district court in the school district's county; or (2) "if agreed by all parties, a district court in Travis County." Here, both Presidio Independent School District (Presidio) and the teacher agreed to venue in Travis County, but the Commissioner, who must be joined to the appeal under § 21.307(c), did not agree. We must determine whether the Commissioner's consent is required under the statute, and we conclude that

it is not. Accordingly, we reverse the judgment of the court of appeals and remand to the trial court for further proceedings.[1]

I. Background

Presidio does not allow its teachers to use corporal punishment on students. Following an incident in which a teacher violated this policy, Presidio provided the teacher with a notice of termination and the matter was referred to a hearing examiner, thereby initiating the statutory administrative process. After a full evidentiary hearing, the examiner recommended to the Presidio board of trustees that the teacher be terminated for cause, and the board agreed, adopting the recommendation. The teacher then filed a petition for review with the Commissioner of Education, who reversed the board's decision and determined that the teacher should be reinstated or paid one year's salary in lieu of reinstatement.

Presidio appealed, choosing Travis County district court as its venue, a choice in which the teacher concurred. The Commissioner, however, objected to review in Travis County, contending that because he is a party to the appeal, his consent is a jurisdictional prerequisite to venue in Travis County under Texas Government Code § 311.034. The Commissioner filed a plea to the jurisdiction on that basis, which the trial court denied.

The court of appeals affirmed, but on rehearing, a divided panel agreed with the Commissioner. The majority determined that "the legislature saw fit to grant the Commissioner (like school districts and teachers) effectively a veto power against having to defend judicial appeals in

[1] Because the Commissioner's consent is not required to appeal in Travis County, we do not reach the second issue presented: whether the Commissioner's consent is a statutory prerequisite to jurisdiction under Texas Government Code § 311.034.

Travis County district court." 266 S.W.3d at 539. The dissent reasoned that the Commissioner does not come within the definition of "party" in § 21.307(a)(2) because "the 'party' would be appealing the Commissioner's decision, and the Commissioner presumably would not appeal his own decision." 266 S.W.3d at 542 (Patterson, J., dissenting).

Presidio petitioned this Court for review, which we granted. 52 Tex. Sup. Ct. J. 1134 (Aug. 21, 2009). We have jurisdiction over this interlocutory appeal because there is a dissent in the court of appeals. *See* TEX. GOV'T CODE § 22.225(c); *see also* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (permitting appeal from an interlocutory order that denies a plea to the jurisdiction filed by a governmental unit). We review a trial court's order granting or denying a plea to the jurisdiction de novo. *See Houston Mun. Employees Pension Sys. v. Ferrell*, 248 S.W.3d 151, 156 (Tex. 2007); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004).

II. Analysis

Section 21.307 grants teachers and school districts the right to seek judicial review of the Commissioner's decision. The question presented is whether § 21.307(a)(2) requires the Commissioner's consent before the appeal can proceed in a Travis County district court.

A. Statutory Framework

Before parsing the language of § 21.307, a brief survey of the surrounding statutory landscape provides a helpful context for that section's use of the term "party" by outlining how this type of case proceeds through the various levels of review. If a school district seeks to terminate a teacher, the teacher may request a hearing before a certified hearing examiner who develops the record, conducts a bench trial, and ultimately makes a written recommendation that includes proposed findings of fact,

conclusions of law, and if the examiner so chooses, a proposal for granting relief. *See* TEX. EDUC. CODE §§ 21.251–.257. Next, the school district's board of trustees or board subcommittee considers the recommendation and may adopt, reject, or change the hearing examiner's conclusions of law or proposal for granting relief. *Id.* § 21.259.

If dissatisfied with the board's decision, the teacher may appeal to the Commissioner of Education. *Id.* § 21.301(a). The Commissioner "shall review the record of the hearing before the hearing examiner and the oral argument before the board of trustees or board subcommittee." *Id.* § 21.301(c). And, with exceptions not relevant here,[2] the Commissioner shall consider the appeal "solely on the basis of the local record and may not consider any additional evidence or issue." *Id.* If the board terminates a teacher's contract, the Commissioner may not substitute his judgment for the board's unless its decision was "arbitrary, capricious, or unlawful or is not supported by substantial evidence." *Id.* § 21.303(b). Once the teacher and school district receive notice of the Commissioner's decision, *id.* § 21.304, a party may file a request for rehearing, *id.* § 21.3041(a). "Either party" may then appeal the Commissioner's decision to a district court. *Id.* § 21.307(a).

From this statutory scheme, it is reasonable to conclude that the teacher and the school district are adverse "parties" as that term is normally used. *See* BLACK'S LAW DICTIONARY 1232 (9th ed. 2009) (defining "party" as "[o]ne by or against whom a lawsuit is brought"). The Commissioner is a neutral arbiter performing a limited review of the board's decision and does not have a direct stake in the outcome.

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[2] *See* TEX. EDUC. CODE § 21.302(a) ("If a party alleges that procedural irregularities that are not reflected in the local record occurred at the hearing before the hearing examiner, the commissioner may hold a hearing . . . .").

B. Statutory Construction

With that context in mind, we turn to § 21.307. In construing statutes, we ascertain and give effect to the Legislature's intent as expressed by the statute's language. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). Where text is clear, it is determinative of that intent, *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009), and we give meaning to the language consistent with other provisions in the statute, *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004). Our practice when construing a statute is to recognize that "the words [the Legislature] chooses should be the surest guide to legislative intent." *Entergy*, 282 S.W.3d at 437 (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999)). We thus construe the text according to its plain and common meaning unless a contrary intention is apparent from the context or unless such a construction leads to absurd results. *City of Rockwall*, 246 S.W.3d at 625–26. We also presume that the Legislature intended a just and reasonable result by enacting the statute. *Id.* at 626 (citing TEX. GOV'T CODE § 311.021(3)).

Section 21.307(a) grants parties the right to appeal the Commissioner's decision and identifies two possible venues:

> (a) Either party may appeal the commissioner's decision to:
> (1) a district court in the county in which the district's central administrative offices are located; or
> (2) if agreed by all parties, a district court in Travis County.

TEX. EDUC. CODE § 21.307(a). Subsection (a) begins by allowing "either party" to appeal the Commissioner's decision. While this subsection does not define the term "party," no one disputes that the word refers to the teacher and the school district, who were the parties before the

Commissioner and are affected by the Commissioner's decision. The Commissioner is logically excluded from the scope of "either party" because he would not appeal his own decision. Similarly, throughout the subchapter of which § 21.307 is a part, the Commissioner is distinguished from a "party."[3] It follows that in subsection (a)(2), which is subordinated to the introductory "either party" clause, the scope of "all parties" who must consent to venue in Travis County is limited to those parties who have the ability to initiate further review of the Commissioner's decision—teachers and

[3] *See* TEX. EDUC. CODE § 21.301(c) ("The commissioner, on the motion of a party or on the commissioner's motion, may hear oral argument."); *id.* § 21.302(a) ("If a party alleges . . . procedural irregularities . . . , the commissioner may hold a hearing for the presentation of evidence on that issue. The party alleging . . . procedural irregularities . . . shall identify the specific alleged defect and its claimed effect . . . ."); *id.* § 21.304(c) ("The commissioner shall send a copy of the decision to each party or the party's representative by certified mail. . . . A party is presumed to be notified of the decision on the date the decision is received . . . ."); *id.* § 21.3041 ("Not later than the 20th day after the date the party or the party's representative receives notice of the commissioner's decision . . . , the party may file a request for rehearing. . . . A request for rehearing is not required for a party to appeal the commissioner's decision . . . . A request for rehearing is denied by operation of law if the commissioner does not issue an order before the 45th day after the date the party or the party's representative receives notice of the commissioner's decision."); *id.* § 21.305(b) ("Each party shall bear the cost of any copy of the transcript requested by that party."); *id.* § 21.306 ("The commissioner and the staff of the agency may not communicate with any party or any party's representative in connection with any issue of fact or law except on notice and opportunity for each party to participate."); *id.* § 21.307(b)(1) ("An appeal under this section must be perfected not later than the 30th day after the date the party or the party's representative receives notice of the commissioner's decision . . . ."); *id.* § 21.307(c) ("The commissioner and each party to the appeal to the commissioner must be made a party to an appeal under this section."). In all but one of these uses of "party," the Commissioner is clearly excluded from its meaning. The single time that the Commissioner is included as a "party," in § 21.307(c), does not change the Legislature's general use of the term to refer to everyone involved in the proceeding except the Commissioner. *See Brown v. Darden*, 50 S.W.2d 261, 263 (Tex. 1932) ("Whenever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby. The rule applies when the phrases are substantially the same." (citation omitted)).

school districts.[4] Accordingly, we hold that the Commissioner's consent is not required under § 21.307(a)(2) for a judicial appeal of the Commissioner's decision in Travis County.

The Commissioner's primary textual argument to the contrary focuses on subsection (c), in which the Commissioner, along with the parties in the administrative hearing before the Commissioner, are made parties to the judicial appeal: "The commissioner and each party to the appeal to the commissioner must be made a party to an appeal under this section." TEX. EDUC. CODE § 21.307(c). Because the Commissioner is made a party, he argues that this newly conferred status reaches back to include him in the "all parties" that must consent to venue in Travis County. We disagree. The Legislature's decision to designate the Commissioner as a party to the appeal does not automatically import that meaning to every other use of the term "party" regardless of the immediate context. The Commissioner cannot selectively choose a particular use of "party" into which his chosen definition is poured while at the same time distinguishing every other use of the term where that meaning is contextually impossible. Courts must not give the words used by the Legislature an "exaggerated, forced, or constrained meaning." *City of Austin v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442 (Tex. 2002). Disregarding twenty-one uses of "party" in the surrounding context, all of which do not include the Commissioner, in favor of the single use that does is precisely the sort of "exaggerated, forced, or constrained meaning" that we eschew. *See supra* note 3.

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[4] The Commissioner argues that the Legislature explicitly conditioned suit in Travis County on the consent of "*all* parties," not "either party," "both parties," "the parties to the appeal to the Commissioner," or other similar terms that would clearly exclude the Commissioner. But that contention ignores the possibility that more than two parties could be involved in the proceedings. For example, if a school district fired two teachers who then brought an appeal to the Commissioner, then the term "both parties" would not properly encompass two teachers and a school district. The language of subsection (a), when taken as a whole, indicates that "party" should have a consistent meaning, the change from singular to plural notwithstanding.

In addition, subsections 21.307(a) and (c) contemplate different objectives. Subsection 21.307(a) gives the teacher or school district the right to appeal and two venue options, one of which is conditioned on securing the consent of the opposing party. Subsection 21.307(c), on the other hand, merely describes who must appear in the district court. While the Commissioner is "made a party" in subsection (c), nothing in that subsection or the statute as a whole suggests a legislative intent to allow the Commissioner to determine whether an appeal may be filed in the county of his residence. *See Burton v. Rogers*, 504 S.W.2d 404, 406 (Tex. 1973) (noting that statewide officials are deemed to reside in Travis County, the seat of the state government, for venue purposes).

The Commissioner also offers a policy reason to justify his purported veto power: preventing forum-shopping by the losing party. Generally, forum-shopping occurs when a party attempts to obtain a perceived advantage over its adversary by choosing the most favorable venue. *See, e.g.*, *Walker v. Packer*, 827 S.W.2d 833, 849 n.3 (Tex. 1992) (noting that forum-shopping includes trying "to obtain a trial judge more likely to provide a more favorable ruling"); BLACK'S LAW DICTIONARY 726 (9th ed. 2009) (defining forum-shopping as "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard"). But we fail to envision a scenario in which forum-shopping occurs when both parties to the dispute agree to pursue the appeal in Travis County.[5] And when the Commissioner withholds consent from Travis County to obtain an advantage (e.g., a more favorable precedent in the local forum), he too arguably engages in forum-shopping. As a neutral arbiter of the decision being appealed, the Commissioner should be indifferent to the venue

[5] The Commissioner argues that one consenting party might not be aware of the disadvantage of an appeal in Travis County, thus requiring the Commissioner to withhold consent and steer the unwitting party away from an unfavorable panel or precedent. Even if true, the parties are in the best position to make their own strategic decisions.

in which the appeal is filed. We are not persuaded that the Legislature intended to combat forum-shopping by giving the Commissioner the power to block review in Travis County.

Finally, the Commissioner argues that his adjudicatory role in this context has a policy-making function by ensuring uniform and predictable interpretations of state law, and thus he has an active role in litigation before the courts. But the Commissioner reviews the school board's decision "solely on the basis of the local record and may not consider any additional evidence or issue," TEX. EDUC. CODE § 21.301(c), and he may not substitute his judgment "unless [the board's] decision was arbitrary, capricious, or unlawful or is not supported by substantial evidence," *id.* § 21.303(a). Further, the district court employs much the same standard. *Id.* § 21.307(e)–(f). The Commissioner's limited role coupled with the deferential review by the district court belies any attempt to classify the Commissioner's task as making policy. In this type of judicial appeal, the Commissioner is no more interested in having his decision upheld than is any lower court when reviewed by a higher court.

III. Conclusion

We interpret § 21.307(a) according to its plain language, language that excludes the Commissioner from those parties who must consent to a judicial appeal in Travis County. Accordingly, we reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

Eva M. Guzman, Justice

OPINION DELIVERED: April 23, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0961

MARIA DEL CARMEN GUILBOT SERROS DE GONZALEZ, ET AL., PETITIONERS,

v.

MIGUEL ANGEL GONZALEZ GUILBOT, CARLOS A. GONZALEZ GUILBOT, AND MARIA ROSA DEL ARENAL DE GONZALEZ, RESPONDENTS

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

Argued January 21, 2010

JUSTICE WILLETT delivered the opinion of the Court.

JUSTICE GUZMAN did not participate in the decision.

This appeal concerns two issues: (1) the procedure required to revest a state court with jurisdiction after remand from federal court, and (2) the definition of "tertiary recusal motion" in Texas Civil Practice and Remedies Code section 30.016. We agree with the court of appeals that the hand-filing of a remand order in state court is sufficient to transfer jurisdiction back to state court. However, the court of appeals erred in holding that section 30.016's reference to a "tertiary recusal motion" is limited to a third motion filed by the same party against the same judge. Accordingly, we affirm the court of appeals' judgment in part and reverse it in part, and remand to that court with instructions.

I. Background

This intra-family dispute concerns the ownership and control of several food and beverage businesses formerly owned by Miguel Angel Luis Gonzalez y Vallejo, now deceased. Miguel was married to Maria del Carmen Guilbot Serros de Gonzalez, and together they had nine children. When Miguel died in 2003, his will was probated in Harris County. In May 2004, Maria, individually and as independent administrator of Miguel's estate, along with several of the children (Plaintiffs)[1] filed suit in probate court against several defendants including two of Miguel and Maria's sons, Carlos and Miguel (Defendants), for stealing from the family businesses. In June 2006, Judge Mike Wood determined that Defendants had produced forged stock certificates during discovery in order to claim majority ownership of certain family businesses. Judge Wood issued sanctions prohibiting Defendants from further claiming or disputing ownership of the corporations, and set a trial on damages for January 8, 2007.

A. Remand

On November 14, 2006, Judge Wood gave notice of a hearing to be held November 27. Before the hearing, Defendants removed the case to federal district court alleging there was complete diversity of citizenship. Nevertheless, Plaintiffs' counsel, Hector Longoria, appeared at the hearing and spoke with Judge Wood in open court and on the record. When Judge Wood asked about the

[1] Defendants note that the "Estate of Miguel Angel Luis Gonzalez y Vallejo" named itself as appellee in the court of appeals and as a petitioner/cross-respondent in this Court. Arguing that an "estate" is not a legal entity and cannot sue or be sued, Defendants contend that this Court lacks jurisdiction. However, there is no dispute that Maria and the other Plaintiffs were parties to the trial court's judgment, that they were designated as persons aligned with the Estate in the court of appeals, and that they have been identified as parties in filings with this Court. In any event, the Court on November 20, 2009 granted Plaintiffs' "Motion to Substitute Maria del Carmen Guilbot Serros de Gonzalez et al. for the Estate as Petitioners/Cross-Respondents."

status of the case, Longoria replied that the case had been removed, and that he was "going to do what I need to do to try to get it remanded back to here." Judge Wood stated, "I've had a lot of experience in removals. . . . I can't do anything." Judge Wood cautioned Longoria to "read carefully the statutes," and told him that "if the Order of Remand comes, then I would suggest that you bring a certified copy of it and give it to the clerk of this Court."

On December 14, 2006, the federal district court signed and entered an order of remand and ordered Defendants to pay $7,500 in attorney fees because Defendants had "no objectively reasonable basis to believe removal of this case was proper." That same day, the court provided to Longoria certified copies of the federal court docket sheet, memorandum on remand, and order of remand. The docket sheet indicates that these were given to "plaintiff's counsel so that they can be expedited by hand delivery to Harris County Court no. 2." Longoria hand-delivered those documents to the state court clerk the next morning.

Defendants appealed the remand order to the Fifth Circuit. The Fifth Circuit affirmed, holding: (1) Defendants had waived any objection to the remand procedure by failing to object; (2) the Fifth Circuit lacked jurisdiction to review the clerk's compliance with remand procedures under 28 U.S.C. § 1447(c); and (3) the district court did not abuse its discretion in assessing $7,500 in sanctions.[2]

[2] *Gonzalez v. Guilbot*, 255 F. App'x 770, 771-72 (5th Cir. 2007).

B. Recusal

Approximately two-and-a-half hours prior to Longoria's hand-delivery of the remand order to the state court clerk, Defendants filed a motion to recuse Judge Wood. Judge Wood declined to recuse himself and forwarded the motion to Judge Guy Herman, the Presiding Judge of the Statutory Probate Courts. Judge Herman appointed Judge Gladys Burwell to hear the motion and set a hearing date. Prior to the hearing, Defendants' counsel filed a second motion to recuse, this one against Judge Burwell. Defendants' counsel then filed a third recusal motion, this one against Judge Herman. Judge Burwell forwarded the motions to Judge Herman, who reset all pending recusal motions for hearing on January 8, 2007. Defendants did not appear at that hearing.

Judge Herman first dismissed the motion to recuse Judge Burwell because it was filed by the attorney for the Defendants on his own behalf, not by the Defendants themselves, and Texas law requires that motions to recuse be "filed by parties, not by attorneys." Judge Herman then dismissed the motion to recuse himself because it was also filed on behalf of Defendants' counsel, not on behalf of the Defendants. Judge Herman went on to note that the motions improperly invoked Texas Rule of Civil Procedure 18a rather than Texas Government Code section 25.00255, which governs recusal procedure in statutory probate courts. Finally, Judge Herman heard the motion to recuse Judge Wood. Because Defendants did not put on any evidence or argument in support of their motion, Judge Herman denied the motion and awarded sanctions in the amount of $12,000 for "frivolous pleading[s]".

After the recusal hearing, Judge Wood began a bench trial. Again, Defendants did not appear. Judge Wood signed a final judgment for Plaintiffs on January 12, 2007, awarding roughly $205 million in damages.[3]

C. Appeal

Defendants raised two discrete procedural points, the first governed by federal remand law, the second by state recusal law. Defendants argued the trial-court judgment and sanctions order were void because they were entered (1) before jurisdiction had revested in state court, and (2) while recusal motions were pending.

The court of appeals rejected the first argument but accepted the second.[4] It held that jurisdiction had revested in Judge Wood's probate court, but his judgment and Judge Herman's sanctions order were nevertheless void given the three pending recusal motions.[5] The court of appeals relied on its prior interpretation of Texas Civil Practice and Remedies Code section 30.016 in *In re Whatley*[6] and held that the provision for tertiary recusal motions only applies when a third

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[3] Defendants have filed a Request to Take Judicial Notice concerning a March 19, 2010 final judgment rendered against Plaintiffs by a Mexican federal court, purportedly holding that a "Family Agreement" among the parties is null and void. Defendants do not persuade us that the Mexican judgment, rendered years after the trial-court judgment in the case before us, should have any effect on this appeal. They concede that a trial court's judgment is final for purposes of res judicata or collateral estoppel even while the case is on appeal. *See Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).

[4] 267 S.W.3d 556, 558.

[5] *Id.*

[6] No. 14-05-01222-CV, 2006 WL 2257399 (Tex. App.—Houston [14th Dist.] Aug. 8, 2006, orig. proceeding) (mem. op.), *opinion withdrawn and superceded by In re Whatley*, 2006 WL 2948230 (Tex. App.—Houston [14th Dist.] Oct. 13, 2006, orig. proceeding) (mem. op.).

recusal motion has been filed by the same party against "the same judge."[7] The parties filed cross-petitions for review.

II. Discussion

A. Remand

The revesting-of-jurisdiction question turns on this portion of 28 U.S.C. § 1447(c): "A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case." Defendants argue that section 1447(c) contemplates mailing and only mailing, so Plaintiffs' hand-delivery did not revest jurisdiction in the probate court but rather circumvented and violated the remand procedures we mandated in *Quaestor Investments, Inc. v. State of Chiapas*.[8] We disagree. When determining jurisdiction under section 1447(c), what matters more is what the federal court ordered, not what the federal clerk mailed.

In *Quaestor*, a state district court granted a default judgment to Quaestor Investments, a Texas corporation, against the State of Chiapas on April 19, 1995.[9] On October 5, 1995, five months and sixteen days after the default judgment was signed, Chiapas removed the suit.[10] The federal district court remanded the case on December 28, 1995.[11] On August 29, 1996, Chiapas filed a

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[7] 267 S.W.3d at 562-63.

[8] 997 S.W.2d 226 (Tex. 1999) (per curiam).

[9] *Id.* at 227.

[10] *Id.*

[11] *Id.*

petition for writ of error in the court of appeals,[12] and Quaestor moved to dismiss the petition as untimely, arguing the petition must have been brought within six months of the date of judgment.[13] The court of appeals overruled Quaestor's motion to dismiss and remanded to the trial court, holding that the appellate timetable recommenced when Quaestor gave notice to Chiapas of remand.[14] Quaestor then filed a petition for review in this Court.

The central question in *Quaestor* was when the appellate timetable recommenced after remand.[15] We held it recommenced upon the revesting of jurisdiction in state court, which happened "when the federal district court executes the remand order and mails a certified copy to the state court. To the extent that earlier Texas court of appeals cases indicate that jurisdiction revests when the federal court executes the remand order, we disapprove of that language."[16] Defendants thus claim *Quaestor*'s broad language definitively established that the pivotal event for revesting is the mailing of the remand order by the federal-court clerk to the state-court clerk. Defendants misconstrue our holding.

Importantly, *Quaestor* did not involve the question presented here: whether jurisdiction revests when an executed remand order is hand-delivered to the state court in lieu of mailing.

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[12] Writ of error appeals under former Rule of Appellate Procedure 45 were replaced in 1997 with restricted appeals under Rule 30. *See* TEX. R. APP. P. 30 & cmt.

[13] *Quaestor*, 997 S.W.2d at 227.

[14] *Id.* at 227-28.

[15] *Id.* at 227.

[16] *Id.* at 229. Chiapas argued that the appellate timetable recommenced either when the Fifth Circuit dismissed the appeal of the remand order or when Chiapas mailed a copy of the remand order to the state district clerk. *Id.* at 228.

Today's case raises an alternative delivery method, something we had no occasion to examine in *Quaestor*. In short, *Quaestor* simply cannot bear the unduly rigid reading urged by Defendants.

Pressing their argument that hand-delivery of the remand order did not revest jurisdiction in state court, Defendants argue that neither the federal district court nor the state court can be vested with jurisdiction, so the case has become moot. According to Defendants, the federal district court has been divested of jurisdiction, including the jurisdiction to reconsider or modify its remand order. Next, jurisdiction never revested in the state court because hand-delivery was defective. Finally, the mailing of a certified copy of the remand order to the state clerk can never occur because "[t]he federal court lacks jurisdiction to correct [Plaintiffs'] error." Defendants therefore contend that jurisdiction has been destroyed in both courts because the "key jurisdictional event" did not, and can never, occur.

We reject Defendants' argument that both federal and state courts have been divested of jurisdiction and the case now exists in a strange procedural twilight zone.[17] Consistent with section 1447(c) and its aim to smooth state-federal interactions, we hold that hand-delivery of the remand order in this case successfully effected the transfer of jurisdiction from federal to state court. It is beyond dispute that the federal district court expressed its unmistakable intention to divest itself of jurisdiction and return jurisdiction to the state court, by (1) signing and entering an order of remand,

[17] *See Health for Life Brands, Inc. v. Powley*, 57 P.3d 726, 731 (Ariz. Ct. App. 2002) ("A conclusion that the superior court regains the power to proceed upon entry of the remand order in federal court prevents a case from floundering in some sort of legal limbo while awaiting the ministerial task of mailing a copy of the remand order. Excessive delay in the resolution of disputes is thereby avoided. This approach also furthers the intent of Congress that any doubts about the existence of removal jurisdiction in the federal courts should be resolved in favor of remand and state court jurisdiction."); *see also City of Orange City v. Lot 10*, No. 98-1389, 2002 WL 100674, at *2 (Iowa Ct. App. Jan. 28, 2002) ("We reject [the defendant's] contention that the district court lacked jurisdiction when it acted prior to having received a *certified* copy of the remand order from the Federal District Court.").

(2) creating a certified copy of the remand order, and (3) providing that certified copy to counsel for expedited delivery to the state court, all of which occurred before the state court took any action in the case.

We also reject Defendants' argument that allowing hand-delivery of the remand order to effect jurisdictional transfer in this case would destroy transparency and uniformity in the remand procedures. To the contrary, Texas Rule of Civil Procedure 237a expressly provides for the *plaintiff* to file a certified copy of the remand order with the state court clerk.[18] Efforts to quickly recommence proceedings in the state court following an unsuccessful and apparently frivolous removal actually further the policy of avoiding excessive delay in resolving disputes.[19]

Defendants here resumed litigation in the probate court with full knowledge of the remand. Further, it is undisputed that the probate court took no action until after the remand order had been

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[18] TEX. R. CIV. P. 237a states:

> When any cause is removed to the Federal Court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state court and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer. No default judgment shall be rendered against a party in a removed action remanded from federal court if that party filed an answer in federal court during removal.

[19] *See Health for Life Brands, Inc.*, 57 P.3d at 731 ("To hold under these circumstances that the [federal] court retains jurisdiction and the [state] court lacks the power to proceed would violate the principle that removal and remand procedures should not be construed to allow undue delay in the resolution of cases or to waste judicial resources."); s*ee also* FED. R. CIV. P. 1 (instructing courts to construe and administer the federal rules "to secure the just, speedy, and inexpensive determination of every action and proceeding"); *Balestriere Lanza PLLC v. Silver Point Capital, LP*, No. 08 Civ. 4731 (GEL), 2008 WL 2557424, at *2 (S.D.N.Y. June 26, 2008) ("Though [Rule 1] does not, strictly speaking, govern the interpretation of § 1447(c), it should be the touchstone not only of judicial action, but of the behavior of members of the bar as well.").

hand-delivered there. In light of these circumstances, Plaintiffs' hand-delivery of the remand order was sufficient to revest jurisdiction in the probate court.[20]

B. Recusal

Plaintiffs argue in their cross-petition for review that the motion to recuse Judge Herman was a tertiary recusal motion, and therefore the court of appeals erred in holding that Judge Herman's sanctions order and Judge Wood's final judgment were void. We agree with Plaintiffs.

The court of appeals held that under the general "recuse or refer" rule in Government Code section 25.00255(f), a judge against whom a recusal motion has been filed "has only two options: grant the motion to recuse or refer the motion to another judge for a ruling."[21] Thus, the court concluded, "Judge Herman erred when he ruled on his own motion to recuse" rather than referring the motion to the Chief Justice of the Supreme Court pursuant to Government Code section 74.057(a) and Texas Rule of Civil Procedure 18a(g).[22] "Because Judge Herman did not have the power to rule on his own recusal motion," the court reasoned, "all subsequent orders he entered are void."[23]

Plaintiffs argue that Judge Herman's sanctions order and Judge Wood's final judgment are not void for two reasons. First, the motion to recuse Judge Herman was the third recusal motion

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[20] Regardless of whether the court of appeals should have relied on the law-of-the-case doctrine, *see* 267 S.W.3d at 560, the court properly recognized that "*Quaestor* did not address the issue we have here" and held that "the post-remand jurisdictional transfer to the state court was complete at all relevant times." *Id.* at 560, 561.

[21] *Id.* at 561.

[22] *Id.*

[23] *Id.*

filed in the case and thus a tertiary recusal motion under Civil Practice and Remedies Code section 30.016, allowing Judge Herman to continue presiding over the case. Second, Plaintiffs contend that the exception for procedurally defective motions applies to the motion to recuse Judge Herman.

We first consider whether the motion to recuse Judge Herman was a tertiary recusal motion. Section 30.016 allows "a judge who declines recusal after a tertiary recusal motion is filed" to "preside over the case," "sign orders in the case," and "move the case to final disposition as though a tertiary recusal motion had not been filed."[24] Former section 30.016(a), applicable to this case, defined a "tertiary recusal motion" as "a third or subsequent motion for recusal or disqualification filed against a district court, statutory probate court, or statutory county court judge by the same party in a case."[25] The court of appeals followed its previous decision in *In re Whatley*,[26] where the court interpreted section 30.016 as applying only to "a third recusal motion . . . filed by the same party against the same judge."[27] We disagree with that reading and hold that section 30.016 applies to a third recusal motion filed by the same party against *any* judge.

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[24] TEX. CIV. PRAC. & REM. CODE § 30.016(b)(1)-(3).

[25] Act of May 26, 1999, 76th Leg., R.S., ch. 608, § 1, 1999 Tex. Gen. Laws 3148.

[26] No. 14-05-01222-CV, 2006 WL 2257399 (Tex. App.—Houston [14th Dist.] Aug. 8, 2006, orig. proceeding) (mem. op.), *opinion withdrawn and superceded by In re Whatley*, 2006 WL 2948230 (Tex. App.—Houston [14th Dist.] Oct. 13, 2006, orig. proceeding) (mem. op.).

[27] 267 S.W.3d at 562.

When construing statutes, courts must look first to the plain and common meaning of the words chosen.[28] If the statutory language is unambiguous, the judge's inquiry is at an end.[29]

The earlier version of section 30.106(a) provided:

> In this section, "tertiary recusal motion" means a third or subsequent motion for recusal or disqualification filed against a district court, statutory probate court, or statutory county court judge by the same party in a case.[30]

Effective September 1, 2007, the Legislature removed statutory probate judges from section 30.016(a), so the current statute only applies to district or statutory county court judges. Simultaneously, the Legislature added section 25.00256(a):

> In this section, "tertiary recusal motion" means a third or subsequent motion for recusal or disqualification filed in a case against any statutory probate court judge by the same party. The term includes any third or subsequent motion filed in the case by the same party, regardless of whether that motion is filed against a different judge than the judge or judges against whom the previous motions for recusal or disqualification were filed.[31]

The prior version of section 30.016(a) applies to this case. Defendants argue that, in keeping with the canon of construction that the Legislature is presumed not to have done a useless act, the Legislature's 2007 amendments demonstrate that lawmakers believed they were changing the law regarding statutory probate courts. In order to change the law, "tertiary recusal motion" in the prior

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[28] *See FKM P'ship, Ltd. v. Bd. of Regents of the Univ. of Houston Sys.*, 255 S.W.3d 619, 633 (Tex. 2008) ("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 absurd results.").

[29] *See Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006).

[30] Act of May 26, 1999, 76th Leg., R.S., ch. 608, § 1, 1999 Tex. Gen. Laws 3148.

[31] TEX. GOV'T CODE § 25.00256(a).

version of section 30.016 must have meant the third recusal motion filed by the same party against the same judge. However, our analysis begins not with canons of construction or extrinsic aids, but with statutory text.[32] Former section 30.016(a) states that a tertiary recusal motion is a "third or subsequent motion for recusal . . . filed against *a* . . . statutory probate court . . . judge by the same party . . . ." The Legislature chose the word "a," presumably on purpose, not the words "the same." And lawmakers certainly knew when to use the latter, having done so to precede "party" in the same sentence. Neither text nor context suggests that "a" means "the same" rather than "any." Defendants' interpretation, adopted by the court of appeals, invites us to embellish the statute. We decline, mindful too that Defendants' interpretation would produce absurd results, with litigants able to delay resolution of their cases by clogging courts with a seemingly limitless number of recusal motions.

Our chief aim is to determine and give effect to the Legislature's intent,[33] and where the statutory language is straightforward, it is determinative.[34] Because the recusal motion filed against Judge Herman was the third recusal motion filed by Defendants (and therefore a tertiary recusal motion), Judge Herman was permitted to continue to "preside over the case," "sign orders in the case," and "move the case to final disposition as though a tertiary recusal motion had not been

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[32] *See In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex. 2007) ("If a statute is clear and unambiguous, we apply its words according to their common meaning without resort to rules of construction or extrinsic aids.").

[33] *Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009).

[34] *See Alex Sheshunoff Mgmt. Servs.*, 209 S.W.3d at 651–52.

filed."[35] Accordingly, the court of appeals erred in reversing the sanctions order entered by Judge Herman and the final judgment entered by Judge Wood.[36]

III. Conclusion

The court of appeals was right on remand but wrong on recusal. Plaintiffs' hand-delivery of the certified remand order from the federal district court to the clerk of the state court was sufficient to revest jurisdiction in the state court. We decline Defendants' invitation to add a measure of rigidity into section 1447(c) that simply is not there. As for recusal, a tertiary recusal motion is a third motion filed by the same party against any judge. That is, the word "third" in section 30.016(a) refers to the motion, not to the judge. Accordingly, we affirm the court of appeals' judgment in part, reverse it in part, and remand to the court of appeals. The court of appeals shall abate pending a ruling on the motion to recuse Judge Herman. If the motion is denied, the court of appeals shall

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[35] We agree with the court of appeals that under section 30.016(b) Judge Herman should not have ruled on the recusal motion filed against him. Plaintiffs make the blanket assertion that because the motion to recuse Judge Herman was a tertiary recusal motion, Judge Herman was allowed to rule on his own recusal motion. However, nothing in section 30.016 contemplates allowing judges to deny recusal motions pending against them, and in fact instructs judges "who decline[] recusal after a tertiary recusal motion is filed [to] comply with applicable rules of procedure for recusal and disqualification . . . ." Judge Herman eventually referred that motion to CHIEF JUSTICE JEFFERSON, and we find no prejudice stemming from Judge Herman's belated referral. Also, as this was a tertiary recusal motion, Judge Herman retained authority under section 30.016(b) to take other actions, such as signing the sanctions order against Defendants and denying the recusal motion against Judge Wood.

[36] Plaintiffs alternatively argue an exception to the "recuse or refer" rule applies: the exception for procedurally defective motions. Plaintiffs contend that Defendants waived the right to complain about Judge Herman's failure to refer the motion filed against him because the motion failed to comply with the procedural requirements of Government Code section 25.00255. The court of appeals rejected this argument based on its holding in a prior case that "[e]ven though a motion to recuse may be defective, the challenged judge must either recuse or refer the motion, so that another judge can determine the procedural adequacy and merits of the motion to recuse." 267 S.W.3d at 563 (quoting *In re Norman*, 191 S.W.3d 858, 861 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding)). As the first argument advanced by Plaintiffs decides today's case, we need not reach the question of whether a procedurally defective motion provides an exception to the "recuse or refer" rule.

affirm the trial court's judgment. If the motion is granted, the court of appeals shall reverse the trial court's judgment and remand to that court for further proceedings consistent with this opinion.

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Don R. Willett
Justice

OPINION DELIVERED: June 11, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0970

SCOTT AND WHITE MEMORIAL HOSPITAL AND SCOTT, SHERWOOD AND BRINDLEY FOUNDATION, PETITIONERS,

v.

GARY FAIR AND LINDA FAIR, RESPONDENTS

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

Argued December 15, 2009

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

In this premises liability case, we must decide whether ice that accumulates naturally outside a business due to a winter storm poses an unreasonable risk of harm. Because we hold that it does not, we reverse in part the court of appeals' judgment and render judgment that the respondents take nothing.

I
Factual and Procedural Background

Gary Fair drove his wife to a doctor's appointment at Scott and White Memorial Hospital the morning after a winter storm. The Fairs walked through the parking lot, across the roadway separating the parking lot from the hospital, and next to a set of stairs leading to the building. There was ice in the parking lot, on the road, and on the steps. After the appointment, Fair left the building

to retrieve his car while his wife waited inside. Fair slipped and fell on the road that separated the hospital from the parking lot. The Fairs sued Scott and White Memorial Hospital and Scott, Sherwood and Brindley Foundation[1] (Scott and White) for damages arising from injuries Fair sustained in the fall.

Scott and White moved for summary judgment, asserting that the accumulated ice did not pose an unreasonable risk of harm. The trial court granted Scott and White's motion and rendered judgment that the Fairs take nothing.[2]

The court of appeals reversed, holding that Scott and White failed to "conclusively establish that the ice accumulation was in its natural state and was not an unreasonably dangerous condition." 2008 Tex. App. LEXIS 4277, at *11. We granted Scott and White's petition for review, 52 Tex. Sup. Ct. J. 1133, 1140 (Aug. 21, 2009), and now reverse.

[1] Scott and White states that "[w]hile the name of the Petitioner gives the appearance that it is two entities, it is actually a single entity." The Fairs also sued "Scott and White Memorial Hospital" and Scott and White Properties, Inc.; however, the Fairs have not challenged the portion of the court of appeals' judgment affirming summary judgment as to those parties.

[2] The Fairs also moved for summary judgment, which the trial court denied. The Fairs did not challenge that ruling.

II
Discussion

A. Naturally accumulated ice does not pose an unreasonable risk of harm.

In a premises liability action, the duty owed by a premises owner depends on the plaintiff's status. In this case, the parties agree that the Fairs were invitees. 2008 Tex. App. LEXIS 4277, at *5. Thus, Scott and White owed a duty "to exercise reasonable care to protect against danger from a condition on the land that creates an unreasonable risk of harm of which the owner or occupier knew or by the exercise of reasonable care would discover." *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000). Scott and White asserts that the naturally accumulated ice on its premises did not pose an unreasonable risk of harm to invitees. We agree.

On several prior occasions, we have addressed whether certain naturally occurring conditions create unreasonable risks of harm. We have held that dirt in its natural state does not pose such a risk. *See Johnson County Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 287 (Tex. 1996) ("The natural state of dirt, that it may be slippery when wet or may contain small rocks, can present a hazard under the right conditions, but not unreasonably so. . . . [D]irt containing small rocks is not an unreasonably dangerous condition for which a landlord may be held liable . . . ."); *Brownsville Navigation Dist. v. Izaguirre*, 829 S.W.2d 159, 160-61 (Tex. 1992) ("Plain dirt which ordinarily becomes soft and muddy when wet is not a dangerous condition of property for which a landlord may be liable."). More recently, we held that "[o]rdinary mud that accumulates naturally on an outdoor concrete slab without the assistance or involvement of unnatural contact is, in normal circumstances, nothing more than dirt in its natural state and, therefore, is not a condition posing an

unreasonable risk of harm." *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 676 (Tex. 2004) (per curiam). We recognized that holding a landowner accountable for naturally accumulated mud would impose a heavy burden because rain, a cause of mud, is beyond a premises owner's control. *Id.* Further, mud-induced accidents are likely to occur regardless of precautions taken by landowners, and invitees are often better positioned to avoid the dangers associated with muddy walkways. *Id.* Thus, because the mud in *M.O. Dental* accumulated due to rain and remained in its natural state, it was not a condition that posed an unreasonable risk of harm. *Id.*

Numerous courts of appeals have applied *M.O. Dental*'s holding to premises liability cases involving other naturally occurring conditions, including ice,[3] and have consistently concluded that naturally formed ice is not an unreasonably dangerous condition for premises liability purposes. *See, e.g.*, *Almazon v. Amli Residential Props. Ltd. P'ship*, No. 03-08-00297-CV, 2009 Tex. App. LEXIS 9266, at *7-*8 (Tex. App.–Austin Dec. 3, 2009, no pet.) (mem. op.). And, many have found no

[3] *See Almazon v. Amli Residential Props. Ltd. P'ship*, No. 03-08-00297-CV, 2009 Tex. App. LEXIS 9266, at *3-*4, *7 (Tex. App.–Austin Dec. 3, 2009, no pet.) (mem. op.) ("[T]he natural accumulation of ice–is not unreasonably dangerous for purposes of premises liability."); *Smith v. Shofner Auto Repair, Inc.*, No. 02-08-285-CV, 2009 Tex. App. LEXIS 2658, at *4 n.8, *5 (Tex. App.–Fort Worth Apr. 9, 2009, no pet.) (mem. op.) ("[N]aturally-occurring ice in a parking lot does not constitute an unreasonably dangerous condition under the law . . . ."); *Haney v. Jerry's GM, Ltd.*, No. 08-07-00183-CV, 2009 Tex. App. LEXIS 1056, at *6-*7 (Tex. App.–El Paso Feb. 12, 2009, no pet.) ("[N]aturally forming ice is not an unreasonably dangerous condition that would impose liability on a premises owner/operator."); *Eubanks v. Pappas Rests., Inc.*, 212 S.W.3d 838, 840 (Tex. App.–Houston [1st Dist.] 2006, no pet.) (holding that slime, composed of topsoil, leaves, and grass, is not an unreasonably dangerous condition); *Gagne v. Sears, Roebuck & Co.*, 201 S.W.3d 856, 858 (Tex. App.–Waco 2006, no pet.) ("[W]e hold that the natural accumulation of ice on a sidewalk near the entrance of a business does not pose an unreasonable risk of harm to invitees."); *Tex. Dep't of Transp. v. Martinez*, No. 04-04-00867-CV, 2006 Tex. App. LEXIS 4420, at *18-*19 (Tex. App.–San Antonio May 24, 2006, pet. denied) (deciding that the slippery road condition caused by rain is not a condition posing an unreasonable risk of harm); *Griffin v. 1438, Ltd.*, No. 02-03-255-CV, 2004 Tex. App. LEXIS 6403, at *9-*10 (Tex. App.–Fort Worth July 15, 2004, no pet.) (mem. op.) (a premises owner does not owe a duty to protect an invitee "from the natural accumulation of frozen precipitation on its parking lot"); *see also Wal-Mart Stores, Inc. v. Surratt*, 102 S.W.3d 437, 445 (Tex. App.–Eastland 2003, pet. denied) (decided before *M.O. Dental*, holding naturally frozen precipitation does not constitute an unreasonably dangerous condition).

significant distinction between naturally occurring ice and naturally occurring mud. *See Gagne v. Sears, Roebuck & Co.*, 201 S.W.3d 856, 858 (Tex. App.–Waco 2006, no pet.); *Griffin v. 1438, Ltd.*, No. 02-03-255-CV, 2004 Tex. App. LEXIS 6403, at *9 (Tex. App.–Fort Worth July 15, 2004, no pet.) (mem. op.); *see also Almazon*, 2009 Tex. App. LEXIS 9266, at *3-*4 (finding the rule for naturally occurring substances, such as mud, ice, and slime, to be the same); *Haney v. Jerry's GM, Ltd.*, No. 08-07-00183-CV, 2009 Tex. App. LEXIS 1056, at *6-*7 (Tex. App.–El Paso Feb. 12, 2009, no pet.) (emphasizing the *Gagne* court's analysis); *Wal-Mart Stores, Inc. v. Surratt*, 102 S.W.3d 437, 443-44 (Tex. App.–Eastland 2003, pet. denied) (citing the dirt cases as support). Before today, we have never addressed whether naturally occurring ice poses an unreasonable risk of harm.

The Fairs argue that ice should be treated differently from mud because, unlike mud, icy conditions occur rarely in Texas. We see no basis for such a distinction. Both conditions pose the same risk of harm, and ice, like mud, results from precipitation beyond a premises owner's control. Further, invitees "are at least as aware as landowners of the existence of [ice] that has accumulated naturally outdoors and will often be in a better position to take immediate precautions against injury." *M.O. Dental*, 139 S.W.3d at 676; *see also State Dep't of Highways & Pub. Transp. v. Kitchen*, 867 S.W.2d 784, 786 (Tex. 1993) (per curiam) ("When there is precipitation accompanied by near-freezing temperatures . . . [ice] is neither unexpected nor unusual, but rather entirely predictable. . . . [A]n icy bridge is something motorists can and should anticipate when the weather is conducive to such a condition."). As other jurisdictions have recognized:

> The magnitude of the burden on [the] defendant to prevent injuries from snow or ice is great. . . . [N]atural winter conditions make it impossible to prevent all accidents.

> The plaintiff is in a much better position to prevent injuries from ice or snow because the plaintiff can take precautions at the very moment the conditions are encountered.

Eiselein v. K-Mart, Inc., 868 P.2d 893, 898 (Wyo. 1994).[4]

Ice in Texas may occur less frequently than mud, but frequency is only one of many factors relevant to our analysis. And, the relative irregularity of icy conditions in this state may weigh against imposing liability. Requiring premises owners to guard against wintery conditions would inflict a heavy burden because of the limited resources landowners likely have on hand to combat occasional ice accumulations. *See Surratt*, 102 S.W.3d at 443 ("[A] premises owner/operator [will be required] to expend a great deal of physical and financial effort to protect its invitees from a naturally occurring condition which usually disappears on its own in a short period of time."); *cf. Geise v. Lee*, 529 P.2d 1054, 1056 (Wash. 1975) (imposing liability in a state accustomed to snow and ice because landlords are already "'armed with an ample supply of salt, sand, scrapers, shovels and even perhaps a snow blower'" (quoting *Fuller v. Hous. Auth. of Providence*, 279 A.2d 438, 440 (R.I. 1971)). Because we find no reason to distinguish between the mud in *M.O. Dental* and the ice in this case, we hold that naturally occurring ice that accumulates without the assistance or

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[4] *See also Kellerman v. Car City Chevrolet-Nissan*, 713 N.E.2d 1285, 1289 (Ill. App. Ct. 1999) ("[S]now and ice is a hazard . . . known to all. . . . [I]t [is] an unreasonable burden for a business to keep . . . parking lots, sidewalks, and entryways safe from naturally accumulated snow and ice . . . ."); *Standard Oil Co. v. Manis*, 433 S.W.2d 856, 859 (Ky. 1968) ("[T]he hazard faced by [invitee] was created by natural elements. It was outside, and exposed in broad daylight. . . . [Invitee] was fully aware of the accumulation of ice and snow in the area."); *Sidle v. Humphrey*, 233 N.E.2d 589, 592 (Ohio 1968) ("The danger from ice and snow is an obvious danger and an occupier of premises should expect that an invitee on his premises will discover and realize that danger and protect himself against it."); *Cooper v. Valvoline Instant Oil Change*, No. 07AP-392, 2007 Ohio App. LEXIS 5189, at *23-*24 (Ohio Ct. App. Nov. 6, 2007) ("'[I]t is assumed that reasonable individuals will understand that winter conditions can create dangers from ice and snow, and individuals will take the necessary precautions.'"); 62A AM. JUR. 2D *Premises Liability* § 656 (2005) ("[T]he danger from ice and snow . . . is an obvious one, and the occupier of the premises may expect that an invitee on his or her premises will discover and realize the danger and protect himself or herself.").

involvement of unnatural contact is not an unreasonably dangerous condition sufficient to support a premises liability claim.

B. Scott and White established that the ice was in its natural state.

Generally, "a natural accumulation of ice . . . is one which accumulates as a result of an act of nature," *Coletta v. Univ. of Akron*, 550 N.E.2d 510, 512 (Ohio Ct. App. 1988), whereas an "'[u]nnatural' accumulation . . . refer[s] to causes and factors *other than* the inclement weather conditions . . . *i.e.*, to causes other than the meteorological forces of nature," *Porter v. Miller*, 468 N.E.2d 134, 136 (Ohio Ct. App. 1983).[5] Here, the court of appeals reversed the trial court's judgment because it concluded that Scott and White did not "conclusively establish that the ice accumulation was in its natural state." 2008 Tex. App. LEXIS 4277, at *11. We disagree.

The summary judgment evidence, which includes affidavits from a local meteorologist and the Scott and White grounds supervisor and deposition testimony from Fair, shows that an ice storm hit the Temple area causing ice to accumulate on the Scott and White grounds, including the road where Fair fell. The court of appeals discounted the testimony of Scott and White's grounds supervisor, Melissa Frei, which detailed the impact of the winter storm on the hospital property. Specifically, the court of appeals determined that "Frei's affidavit [could not] support summary

[5] Texas court of appeals draw this distinction as well. *See Almazon*, 2009 Tex. App. LEXIS 9266, at *7 (ice accumulating from frozen precipitation was natural, not man-made); *Smith*, 2009 Tex. App. LEXIS 2658, at *4-*5 (ice resulting from a winter storm is naturally occurring); *Haney*, 2009 Tex. App. LEXIS 1056, at *6-*7 (same); *Gagne*, 201 S.W.3d at 856, 858 (same); *Griffin*, 2004 Tex. App. LEXIS 6403, at *9-*10 (distinguishing a case involving ice created by a leaking vending machine because it was not a natural accumulation); *Surratt*, 102 S.W.3d at 439 (ice is a natural accumulation when caused by an ice storm); *Furr's, Inc. v. Logan*, 893 S.W.2d 187, 189, 191-92 (Tex. App.–El Paso 1995, no writ.) (unnatural ice accumulation caused by leaking vending machine could support a premises liability action); *see also Brookshire Grocery Co. v. Taylor*, 222 S.W.3d 406, 409 (Tex. 2006) (ice on the floor from a soft drink dispenser was not naturally occurring and could be an unreasonably dangerous condition); *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 676 (Tex. 2004) (mud created by falling precipitation was natural).

judgment with regard to whether the ice accumulations . . . were in their natural state" because Frei's deposition testimony revealed that she was not at the scene when Fair's accident occurred nor called to the scene following the accident. *Id.* at *10. But such testimony does not controvert Frei's personal knowledge of ice accumulations on the hospital grounds. Frei personally observed the winter storm and the resultant ice accumulations on the Scott and White grounds, including on the road in front of the Special Treatment Center (where Fair fell). This, together with the local meteorologist's testimony and Fair's deposition testimony stating that an ice storm occurred in the area the night prior to his fall and that ice was present on the road where he fell, satisfies Scott and White's summary judgment burden. Furthermore, the Fairs did not present any controverting evidence (or even suggest) that the ice resulted from something other than the winter storm. Thus, the ice in this case accumulated naturally and did not pose an unreasonable risk of harm necessary to sustain the Fairs' premises liability action.

C. Neither exception asserted by the Fairs applies.

The Fairs propose two exceptions to the natural accumulation rule and assert there is evidence to support both. They first contend that a premises owner should be liable when it has "actual or implied notice that a natural accumulation of ice or snow on his property created a condition substantially more dangerous than a business invitee should have anticipated by reason of knowledge of the conditions generally prevailing in the area." *Cooper v. Valvoline Instant Oil Change*, No. 07AP-392, 2007 Ohio App. LEXIS 5189, at *14 (Ohio Ct. App. Nov. 6, 2007). Second, the Fairs assert that the natural accumulation rule does not apply when a landowner is "actively negligent in permitting or creating an unnatural accumulation of ice or snow." *Id.* at *15.

Assuming, without deciding, that these exceptions are cognizable under Texas law, there is no evidence to support either one.[6]

Regarding the first exception, the Fairs argue that Scott and White's use of a deicer, "Meltz," made the ice slipperier, thereby creating "a condition substantially more dangerous than a business invitee should have anticipated." *Id.* at *14. We reject this argument. In *Cooper*, the case relied on by the Fairs, the court explained that this exception applies only in situations where the ice or snow conceals a defect or hazard that an invitee should not anticipate from his general knowledge of wintery conditions in the area. *Id.* at *19-*21. For instance, the exception would arise when accumulated snow or ice covers a normally open and obvious danger, such as a deep hole in a

[6] Other jurisdictions, which have adopted a similar liability rule with respect to natural accumulations of ice and snow, recognize additional exceptions to the ones asserted by the Fairs in this case. *See, e.g.*, *Reed v. Galaxy Holdings, Inc.*, 914 N.E.2d 632, 636-37 (Ill. App. Ct. 2009) ("[P]roperty owners and business operators may be liable for injuries resulting from an accumulation of ice, water, or snow if a plaintiff establishes that the means of ingress or egress was unsafe for any reason other than a natural accumulation of ice, water, or snow."); *Judge-Zeit v. Gen. Parking Corp.*, 875 N.E.2d 1209, 1216 (Ill. App. Ct. 2007) ("[A] contract to remove snow creates a duty to remove even natural accumulations of snow."); *Wells v. Great Atl. & Pac. Tea Co.*, 525 N.E.2d 1127, 1131 (Ill. App. Ct. 1988) ("[A] voluntary undertaking to remove snow and ice may subject the landowner to liability if the removal is performed negligently."); *Stapleton v. Citizens Nat'l Corp.*, No. 2009-CA-000264-MR, 2010 Ky. App. Unpub. LEXIS 81, at *5-*6 (Ky. Ct. App. Jan. 29, 2010) (an exception exists "when the owner undertakes protective measures that *heighten or conceal* the nature of the naturally-occurring condition, thus making it worse"); *Willis v. Springfield Gen. Osteopathic Hosp.*, 804 S.W.2d 416, 421-22 (Mo. Ct. App. 1991) (a landlord or an invitor "may become obligated either by agreement or a course of conduct over a period of time to remove snow and ice from common areas, thereby assuming a duty to exercise ordinary care to remove the snow and ice to make the common area reasonably safe." (internal quotations omitted)); *Maschoff v. Koedding*, 439 S.W.2d 234, 236 (Mo. Ct. App. 1969) (an exception arises when "it [is] shown that although the landlord did not expressly agree to perform the duty of removal, he obligated himself to do so by his course of conduct over a period of time"); *see also* 62A AM. JUR. 2D *Premises Liability* § 657 ("In some jurisdictions, the traditional rule . . . has been modified to some extent, the courts holding that the owner of a business has a duty to remove natural accumulations of ice and snow which he or she knows or should know created a condition substantially more dangerous to his or her business invitees than they could reasonably have anticipated from their knowledge of weather conditions prevailing generally in the area, or from their knowledge of the terrain, or that the property owner or tenant has a duty to act within a reasonable time after notice to remove snow and ice when it accumulates in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians traveling thereon." (footnotes omitted)). However, because none of these exceptions are at issue here, we express no opinion on their viability under Texas law.

parking lot or an eight-inch raised concrete bumper. *Id.* at *19-*20 (citing *Mikula v. Tailors*, 263 N.E.2d 316, 322 (Ohio 1970) and *Koss v. Cleveland Holding Corp.*, No. 34111, 1975 Ohio App. LEXIS 6565, at *5 (Ohio Ct. App. July 10, 1975)); *see also Weaver v. Standard Oil Co.*, 572 N.E.2d 205, 207 (Ohio Ct. App. 1989) (whether ice that covered a recessed steel plate in a gas station lot created a condition substantially more dangerous was a question for the jury). Here, however, there is no evidence that the ice concealed any dangerous condition beneath it. In fact, the hazard complained of by the Fairs is the slipperiness of the ice itself. Such a danger is one that is normally associated with ice, one that Fair was clearly aware of, and one not substantially more dangerous than should be anticipated. *See Cooper*, 2007 Ohio App. LEXIS 5189, at *21 (when the hazard is "simply the slippery nature of the ice on the sidewalk," a substantially more dangerous condition than is normally associated with ice and snow is not created); *Nolan v. Kroger Co.*, No. 93OT026, 1993 Ohio App. LEXIS 5722, at *3-*4 (Ohio Ct. App. Dec. 3, 1993) ("Injuries resulting from the failure to remove the snow and ice are not compensable when the injury resulted from the slippery nature of snow and ice. When the injuries result from . . . [ice's] propensity to conceal that which lies beneath it, then an exception to the general rule of non-liability occurs.").

Further, the application of a deicer does not create a substantially more dangerous condition. In this case, the grounds supervisor testified that Meltz was used once the evening before Fair's accident when conditions first became icy, but does not indicate where on the hospital grounds Meltz was applied. Scott and White's written procedures manual for handling ice accumulations states that employees should "[a]pply the material Meltz to sidewalks and steps at [certain] locations," including the "[f]ront entrance" of the Special Treatment Center. Assuming that deicer was applied

to the ice on the street where Fair slipped, a concealed danger still was not created. "'The spreading of de-icing materials on certain portions of a parking lot will, as a matter of law, neither create a hidden danger nor impute superior knowledge thereof to a property owner.'" *Klein v. Ryan's Family Steak House*, No. 20683, 2002 Ohio App. LEXIS 2335, at *10 (Ohio Ct. App. May 15, 2002) (quoting *Goodwill Indus. of Akron, Ohio, Inc. v. Sutcliffe*, No. 19972, 2000 Ohio App. LEXIS 4131, at *11-*12 (Ohio Ct. App. Sept. 13, 2000)). Thus, the Fairs have not raised a fact issue as to whether the naturally accumulated ice on which Fair slipped created a substantially more dangerous condition than an invitee should reasonably have anticipated from his knowledge of the inclement winter weather in the area.[7]

There is no fact issue with respect to the second exception either. As to this exception, the Fairs assert that Scott and White negligently applied the Meltz, causing the ice to refreeze, and thereby creating an unnatural accumulation. The Ohio cases on which the Fairs rely for support distinguish between natural and unnatural accumulations of ice by defining an unnatural accumulation as one that entails "causes and factors *other than* the inclement weather conditions of low temperature, strong winds and drifting snow." *Porter*, 468 N.E.2d at 136. Here, it is uncontested that the source of the ice was a winter storm. Therefore, for the Fairs to prevail under this exception, application of the deicer would have to convert the natural accumulation into an unnatural one. Because the deicer is composed of a salt-like compound, we look to other

[7] Because we find that the ice did not create a substantially more dangerous condition than an invitee would normally anticipate, we do not reach whether Scott and White had actual or implied notice of such a condition. *See Cooper*, 2007 Ohio App. LEXIS 5189, at *14 (setting forth the elements of the exception).

jurisdictions for guidance regarding whether application of salt to a natural accumulation of ice renders the ice no longer natural.

To support their position, the Fairs direct the Court to *Estep v. B.F. Saul Real Estate Investment Trust*, 843 S.W.2d 911 (Ky. Ct. App. 1992), a Kentucky case in which the plaintiff fell on ice and snow outside a shopping mall. *Estep*, 843 S.W.2d at 912. In that case, the evidence showed that the parking lot had been scraped and the snow piled, but it was unclear whether salt had been applied. *Id.* at 912-14. Although the Kentucky Supreme Court had previously held that "*natural outdoor hazards* which are as obvious to an invitee as to the owner of the premises do not constitute *unreasonable* risks to the former which the landowner has a duty to remove or warn against," *Standard Oil Co. v. Manis*, 433 S.W.2d 856, 858 (Ky. 1968), the *Estep* court concluded that when a premises owner attempts to clear its lot of ice and snow, it must do so reasonably or be subject to liability. *Estep*, 843 S.W.2d at 914-15. And, whether the premises owner acted reasonably is a question for the jury. *Id.*

The Fairs' reliance on *Estep* is misplaced. In *Estep*, there was no evidence that salt was applied to the snow and ice during clearing of the parking lot, and the plaintiff did not argue that the premises owner was liable because the ice on which the plaintiff fell was unnatural. Instead, the plaintiff contended that the ice was not an obvious natural hazard; the issue of whether the ice was unnatural was never discussed. Here, the question before us is whether natural ice becomes unnatural when deicer is applied. Consequently, we are unpersuaded that *Estep* is relevant to our analysis.

Notably, an examination of Ohio jurisprudence, which developed the exception on which the Fairs rely, reveals that "[s]alting or shoveling [ice or snow] does not turn a natural accumulation into an unnatural accumulation," and even the application of a chemical deicer to a natural accumulation of ice does not render the ice unnatural. *Cunningham v. Thacker Servs., Inc.*, No. 03AP-455, 2003 Ohio App. LEXIS 5398, at *10 (Ohio Ct. App. Nov. 13, 2003); *Gyulay v. Rolling Acres Mgmt. Inc.*, No. 10356, 1982 Ohio App. LEXIS 11507, at *4-*5 (Ohio Ct. App. June 2, 1982). Furthermore, ice that melts and later refreezes is still deemed a natural accumulation. *See Kaeppner v. Leading Mgmt., Inc.*, No. 05AP-1324, 2006 Ohio App. LEXIS 3523, at *14 (Ohio Ct. App. July 13, 2006).

Again, assuming that deicer was applied to the ice on the road where Fair slipped,[8] the Fairs still cannot prevail under this proposed exception. The Fairs assert that Scott and White's negligent deicing caused the ice to refreeze, rendering it unnatural. But, "the mere fact that [a premises owner] salted the sidewalk and then allowed the sidewalk to freeze again does not turn the natural accumulation of snow and ice into an accumulation that is unnatural." *Lehman v. Cracker Barrel Old Country*, No. 2004-CA-0048, 2005 Ohio App. LEXIS 351, at *11 (Ohio Ct. App. Jan. 28, 2005). In other words, salting, shoveling, or applying deicer to a natural ice accumulation does not transform it into an unnatural one. To find otherwise would punish business owners who, as a courtesy to invitees, attempt to make their premises safe. *See Cunningham*, 2003 Ohio App. LEXIS, at *10. Because there is no evidence that Scott and White's actions made the ice accumulation unnatural, the second exception urged by the Fairs does not apply.

[8] There is some evidence that Scott and White applied sand to the road where Fair fell, however, the Fairs do not complain that Scott and White was negligent in sanding the road or that the sanding created an unnatural accumulation of ice.

III
Conclusion

A condition on a premises owner's property, like a natural accumulation of ice or mud, certainly poses a risk but, as a matter of law, does not present an unreasonable risk of harm. We reverse in part the court of appeals' judgment and render judgment that the Fairs take nothing. TEX. R. APP. P. 60.2(c).

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: May 7, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-0995

IN RE COLUMBIA VALLEY HEALTHCARE SYSTEM, L.P. D/B/A VALLEY REGIONAL MEDICAL CENTER, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued February 18, 2010

JUSTICE MEDINA delivered the opinion of the Court.

In this original mandamus proceeding, we must determine whether a law firm should be disqualified from the underlying suit on the basis of a legal assistant's work on the matter after previously having worked on the same matter while employed by opposing counsel. We have previously held that a firm can usually avoid disqualification when hiring an assistant who previously worked on a matter for opposing counsel if the firm (1) instructs the assistant not to work on the matter, and (2) takes other reasonable steps to shield the assistant from working in connection with the matter. *In re Am. Home Prods. Corp.*, 985 S.W.2d 68, 75 (Tex. 1998). We have not, however, set forth the types of "other reasonable steps" that are required, nor have we addressed whether disqualification is required when an assistant actually works on the matter for the second firm.

Because the legal assistant's employer did not take effective reasonable steps to shield the assistant from working on the case, and the assistant actually worked on the case at her employer's directive, we hold that disqualification is required and direct the trial court to grant the defendant's motion to disqualify and recuse plaintiffs' counsel.

I

In the underlying case, the plaintiffs, Yvonne and Alberto Leal ("the Leals"), brought a medical malpractice suit against Columbia Valley Healthcare System, L.P., doing business under the name Valley Regional Medical Center ("Valley Regional"). Valley Regional filed a motion to disqualify the Leal's counsel, Magallanes & Hinojosa, P.C., because of its employment of legal assistant Margarita Rodriguez.

Rodriguez had previously worked on the Leal case while employed by Valley Regional's counsel, William Gault, at Brin & Brin, P.C.,[1] assisting Gault from the inception of the suit. While employed by Brin & Brin, Rodriguez was a custodian of records and was responsible for filing many privileged documents concerning the suit, including investigative material, discussions with consulting experts, defense strategy, settlement negotiations, strategy for adding other parties to the suit, and attorney notes. Rodriguez also prepared correspondence to Valley Regional and its insurer. Before leaving Brin & Brin, Rodriguez signed a confidentiality agreement obligating Rodriguez not to work on any matter that she had previously worked on for Brin & Brin.

[1] Attorneys from Brin & Brin, P.C. subsequently formed a new law firm called Vidaurri, Lyde, Gault & Quintana, L.L.P., where Gault now practices and represents Valley Regional in the underlying suit.

Approximately eleven months after leaving Brin & Brin, Rodriguez was hired by Magallanes & Hinojosa, a three-attorney firm, as a legal assistant for attorney J.A. Magallanes. Magallanes hired Rodriguez with knowledge that she had worked on the Leal case for Brin & Brin. At the time Rodriguez was hired, Magallanes orally instructed her not to work on any case with which she had prior involvement, specifically including the cases she had worked on while at Brin & Brin. The firm did not have any written screening policies in effect at the time of Rodriguez's hiring. The firm's other legal assistant, Luz Castro, was assigned to handle the Leal file. Magallanes later suffered a brain aneurysm, requiring hospitalization. Magallanes & Hinojosa associated with another firm to take over as lead attorneys, while Magallanes' role in the matter was significantly reduced. However, Magallanes testified that he had continuing participation in the case after his hospitalization, such as attending a settlement hearing and that he anticipated involvement during trial.

Despite the oral instructions from Magallanes, Rodriguez had contact with the Leal file on a few occasions while working at Magallanes & Hinojosa. According to Rodriguez, her contact consisted of the following: (1) filing correspondence related to the Leal case; (2) rescheduling a docket control conference; (3) preparing an order and sending correspondence to counsel concerning a docket control conference; (4) calling Gault's legal assistant regarding the docket control conference; (5) calendaring dates regarding the case on Magallanes' calendar; and (6) making a copy of a birth certificate and social security card in the case at Magallanes' directive on one occasion. When Magallanes learned that Rodriguez had scheduled the docket control conference, he again

orally instructed her not to work on the case, and held a meeting where he informed both Rodriguez and Castro that they would be dismissed if this happened again.

After this admonition, Rodriguez had continued contact with the file, albeit marginally, filing correspondence for Magallanes and handling Magallanes' calendar. Magallanes also directed Rodriguez to make a copy of a birth certificate and social security card in the Leal case in his presence on one occasion.

When Gault learned that opposing counsel employed Rodriguez, he filed a motion on Valley Regional's behalf to disqualify and recuse Magallanes & Hinojosa as counsel for the Leals. The trial court held an evidentiary hearing at which both Magallanes and Rodriguez testified. After the hearing, the trial court denied Valley Regional's motion to recuse and disqualify Magallanes & Hinojosa, while ordering Rodriguez not to be involved in any of the cases on which she worked while at Brin & Brin. Valley Regional sought mandamus relief in the court of appeals, complaining that the trial court abused its discretion in denying the motion. The court of appeals denied the petition, concluding that Magallanes & Hinojosa "took sufficient precautions to guard against any disclosure of confidences by [Rodriguez]. . . ." 2008 Tex. App. Lexis 9887 at *2, 2008 WL 4822219 at *1 (Tex. App.—Corpus Christi-Edinburg Nov. 6, 2008).

Valley Regional now petitions this Court for mandamus relief, urging that the trial court abused its discretion in denying the motion and that it has no adequate remedy on appeal.[2] Valley Regional argues that Magallanes & Hinojosa has failed to overcome the rebuttable presumption that

[2] Mandamus is available where a motion to disqualify is inappropriately denied as there is no adequate remedy on appeal. *See NCNB Texas Nat'l Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989).

confidences were shared, insisting that the informal screening done at the firm was ineffective to ensure Rodriguez did not work on the matter. Valley Regional also argues that Rodriguez's actual work on the case at Magallanes & Hinojosa should make the presumption of shared confidences conclusive.

Magallanes & Hinojosa counters that (1) its screening measures were sufficient, and (2) the confidentiality agreement Rodriguez signed before leaving Brin & Brin adds an additional layer of protection against the sharing of confidential information. Magallanes & Hinojosa further suggests that Magallanes' limited participation in the Leal matter, and Rodriguez's minimal work on the case at Magallanes & Hinojosa, renders Rodriguez's actual contact with the Leal file de minimis.

II

An attorney who has previously represented a client may not represent another person in a matter adverse to the former client if the matters are the same or substantially related. *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 833 (Tex. 1994) (citing *NCNB Texas Nat'l Bank v. Coker*, 765 S.W.2d 398, 399-400 (Tex. 1989); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09(a), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A, (STATE BAR R. art. X, § 9). If the lawyer works on a matter, there is an irrebuttable presumption that the lawyer obtained confidential information during representation. *Phoenix Founders*, 887 S.W.2d at 833 (citing *Coker*, 765 S.W.2d at 400). When the lawyer moves to another firm and the second firm is representing an opposing party in ongoing litigation, a second irrebuttable presumption arises; it is presumed that the lawyer will share the confidences with members of the second firm, requiring imputed disqualification of the firm. *Phoenix Founders*, 887 S.W.2d at 834 (citing *Petroleum Wholesale, Inc. v. Marshall*, 751

S.W.2d 295, 299 (Tex. App.—Dallas 1988, orig. proceeding)); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09(b).

A nonlawyer employee who worked on a matter at a prior firm is also subject to an irrebuttable presumption "that confidences and secrets were imparted" to the employee at the firm. *Am. Home*, 985 S.W.2d at 74; *Phoenix Founders*, 887 S.W.2d at 834. The reason this presumption is conclusive is the need "to prevent the moving party from being forced to reveal the very confidences sought to be protected." *Am. Home*, 985 S.W.2d at 74 (quoting *Phoenix Founders,* 887 S.W.2d at 834). However, unlike with attorneys, a nonlawyer is not generally subject to an irrebuttable presumption of having shared confidential information with members of the new firm. *Phoenix Founders*, 887 S.W.2d at 834. Instead, this second presumption can be overcome, but *only* by a showing that: (1) the assistant was instructed not to perform work on any matter on which she worked during her prior employment, or regarding which the assistant has information related to her former employer's representation, and (2) the firm took "other reasonable steps to ensure that the [assistant] does not work in connection with matters on which the [assistant] worked during the prior employment, absent client consent." *Am. Home*, 985 S.W.2d at 75 (quoting *Phoenix Founders*, 887 S.W.2d at 835). Thus, the hiring firm may employ *effective* screening measures to shield the employee from the matter in order to avoid disqualification. *See Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 468 (Tex. 1994) (orig. proceeding); *Phoenix Founders,* 887 S.W.2d at 833.

To determine whether the screening used by a firm is effective, we have said that the following factors may be considered: (1) the substantiality of the relationship between the former

and current matters; (2) the time elapsing between the matters; (3) the size of the firm; (4) the number of individuals presumed to have confidential information; (5) the nature of their involvement in the former matter; and (6) the timing and features of any measures taken to reduce the danger of disclosure. *Phoenix Founders*, 887 S.W.2d at 836. Even if the new firm uses a screening process, however, absent consent from the former employer's client:

> disqualification will always be required under some circumstances, such as (1) when information relating to the representation of an adverse client has in fact been disclosed, or (2) when screening would be ineffective or the nonlawyer necessarily would be required to work on the other side of a matter that is the same as or substantially related to a matter on which the nonlawyer has previously worked. *See* ABA Op. 1526 at 3. Ordinarily, however, disqualification is not required as long as "the practical effect of formal screening has been achieved."

Id. at 835 (quoting *In re Complex Asbestos Litig.*, 283 Cal. Rptr. 732, 746-47 (1991)).

Here, there is no dispute that Magallanes & Hinojosa instructed Rodriguez not to perform work on any matter on which she worked during her former employment, including the Leal case. Thus, Magallanes & Hinojosa satisfied the first prong in our disqualification analysis since it gave this instruction. Instead, the parties dispute whether Magallanes & Hinojosa took "other reasonable steps" to ensure Rodriguez did not work on the Leal case. Because we have not previously determined the types of "reasonable steps" necessary to avoid disqualification, we today take the opportunity to clarify the measures a law firm or lawyer must take to effectively screen a nonlawyer employee from a matter.

III

Disqualification of a party's counsel is a severe remedy, *see Coker*, 765 S.W.2d at 400, and there are many reasons against granting such a motion liberally, especially when a nonlawyer is the

reason behind the motion to disqualify. We have stated that, as compared with lawyers, there is greater concern that the mobility of nonlawyers could be "unduly restricted." *Am. Home*, 985 S.W.2d at 75; *see also Phoenix Founders*, 887 S.W.2d at 835. Other factors also arise, including the ability of a client to have the lawyer of its choice, concerns about the prejudice and economic harm that could result to a client when the disqualification of its counsel is ordered, and concerns about motions to disqualify being abused as a dilatory tactic. *See Leibowitz v. The Eighth Jud. Dist. Ct. of the State of Nev.*, 78 P.3d 515, 521 (Nev. 2003); *see also* Erik Wittman, *A Discussion of Nonconsensual Screens as the ABA Votes to Amend Model Rule 1.10*, 22 GEO. J. LEGAL ETHICS 1211, 1218-19 (2009). Further, a nonlawyer employee may not have the same financial interest in the results of a case, nor the same understanding of confidential information as a lawyer. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. f (2000) ("nonlawyers ordinarily understand less about the legal significance of information they learn in a law firm than lawyers do, and they are often not in a position to articulate to a new employer the nature of the information gained in the previous employment. If strict imputation were applied, employers could protect themselves against unanticipated disqualification only by refusing to hire experienced people."). It is because of these concerns that a hiring firm can present evidence to rebut a presumption that the nonlawyer has shared confidences with members of the firm.

But where a serious conflict of interest is present because of a nonlawyer's work on a matter that the nonlawyer previously worked on for opposing counsel, important public policies may balance in favor of disqualification. It is axiomatic that an attorney may not switch sides in the same matter, not only to protect the confidential information of a client but also to protect the integrity of

the trial process and judicial system as a whole. Similar concerns about client confidentiality and the integrity of the legal system may arise where a nonlawyer employee is concerned. We have stated that "[t]he test for disqualification is met by demonstrating a genuine *threat* of disclosure, not an actual materialized disclosure." *Grant*, 888 S.W.2d at 467; *see also Am. Home*, 985 S.W.2d at 74. While a nonlawyer employee may not have the same knowledge of confidential information as a lawyer, the employee can certainly understand enough of the confidential materials to present a threat of disclosure at the hiring firm. *See* Jonathan Putnam, *Catering to Our Clients: How In re Cater Exposes the Flaws in Model Rule 5.3—and How They Can Be Solved*, 19 GEO. J. LEGAL ETHICS 925, 925 (2006) (noting that "the drive to offer quality legal representation at competitive costs to clients has led to an explosive growth in the use of nonlawyer employees to perform functions that have traditionally been the responsibility of attorneys"). Moreover, it is certainly understandable that a client would have concerns upon learning that a nonlawyer employee is now working for opposing counsel, if the employee previously had access to confidential information in the client's case.

With these principles in mind, we conclude that a simple informal admonition to a nonlawyer employee not to work on a matter on which the employee previously worked for opposing counsel, even if repeated twice and with threat of termination, does not satisfy the "other reasonable measures" a firm must take to properly shield an employee from the litigation. Instead the other reasonable measures must include, at a minimum, formal, institutionalized screening measures that render the possibility of the nonlawyer having contact with the file less likely.

This measure is necessary to ensure that the employee is fully and effectively screened from the matter and does not have contact with the forbidden file. If a firm has formal, institutional screening measures in place, all employees of the firm will have greater understanding of the firm's expectations for guarding against conflicts of interest. We have previously suggested the necessity of formal, institutional measures, *see Grant*, 888 S.W.2d at 467-68, but we hold today that a firm must implement such measures to rebut the presumption of shared confidences. When a government attorney moves to a private firm, our rules generally allow the screening of the attorney from cases that might involve a conflict of interest with the attorney's former employment. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT § 1.10. The comments to this rule specify that the screening provisions "contemplate that the screened lawyer has not furnished and will not furnish other lawyers with information relating to the matter, will not have access to the files pertaining to the matter, and will not participate in any way as a lawyer or adviser in the matter." *Id.* cmt. 3. We envision that each firm will implement a formal screening process that effectively accomplishes these goals when hiring a nonlawyer as well. If a firm hires a nonlawyer who has previously worked for opposing counsel on a matter and then fails to have formal, institutional screening measures in place to shield the nonlawyer from the matter, concerns about the threat of disclosure are unduly high, requiring disqualification. *See Am. Home*, 985 S.W.2d at 74-75; *Grant*, 888 S.W.2d at 467-68.

Despite the screening measures used, if the employee actually works on the case at her employer's directive, as happened here, and the employer reasonably should know about the conflict of interest, then the presumption of shared confidences must become conclusive. The Disciplinary Rules require a lawyer having direct supervision over a nonlawyer to make reasonable efforts to

ensure that the assistant's conduct is compatible with the professional obligations of a lawyer. *Phoenix Founders*, 887 S.W.2d at 834; TEX. DISCIPLINARY R. PROF'L CONDUCT 5.03(a). As such, a supervising lawyer may not order, encourage, or permit a nonlawyer to engage in any conduct that, if engaged in by the lawyer, would subject the lawyer to discipline. *Phoenix Founders*, 887 S.W.2d at 834; R. 5.03(b). Thus, if the Disciplinary Rules prohibit a lawyer from revealing confidential information, "they also prohibit a supervising lawyer from ordering, encouraging, or permitting a nonlawyer to reveal such information." *Phoenix Founders*, 887 S.W.2d at 834; R. 1.05(b)(1). We went on to note in *Phoenix Founders* that the Rules do not require disqualification of the new firm, "provided that the supervising lawyer at that firm complies with the Rules so as to ensure that the nonlawyer's conduct is compatible with the professional obligations of a lawyer." *Phoenix Founders*, 887 S.W.2d at 834 (citing Tex. Comm. on Prof'l Ethics, Op. 472, 55 TEX. B.J. 520, 521 (1992)). But we suggested that disqualification is required if the firm and nonlawyer fail to "*strictly adhere*" to an effective screening process. *Phoenix Founders*, 887 S.W.2d at 834 (citing ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1526 (1988)) (emphasis added).

A law firm that directs a nonlawyer employee to work on a forbidden case and that reasonably should know about the conflict of interest is not strictly adhering to a screening process. When this happens, the threat that confidences will be shared becomes unduly high, and disqualification is required. *See Grant*, 888 S.W.2d at 467-68. This holding is in line with our previous opinions. *See Grant*, 888 S.W.2d at 468 (holding that disclosure was required where the current employer permitted the paralegal to work on the same litigation she had worked for at her prior firm, even after becoming aware that she had previously worked on the case); *Am. Home*, 985

S.W.2d at 76 (holding that disqualification was required where lawyer failed to instruct an assistant not to work on a case, nor strictly adhered to an effective screening process).

Similarly, the Restatement of the Law Governing Lawyers notes that "strict imputation" does not apply to nonlawyers who are employed by opposing counsel's firm, but that the lack of imputation is inapplicable in a situation in which a nonlawyer employee is assigned at the new firm to work directly on the same matter on which the employee had worked at a prior firm. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. f (2000). While in the instant case Rodriguez was not actually "assigned" to work on the Leal matter, she was, on at least one occasion, directly given a task to perform on the matter. We fail to see a meaningful distinction between "assigning" a nonlawyer to a case versus having the nonlawyer perform work on the case without a formal assignment. When a nonlawyer employee is given any work to perform on a forbidden matter, and the employer reasonably should know about the conflict of interest, disqualification is required.

In summary, when considering a motion to disqualify on the basis of a firm's employment of a nonlegal employee who previously worked on the same or a substantially related matter for opposing counsel, the trial court must consider whether the hiring firm has rebutted the presumption of shared confidences. To rebut this presumption, the hiring firm must demonstrate that (1) the employee was instructed not to work on any matter which she worked on during her prior employment, or regarding which the employee has information related to her former employer's representation, and (2) the firm took other reasonable steps to ensure that the employee does no work in connection with matters on which the employee worked during the prior employment, absent

client consent. These other reasonable steps must include, at a minimum, formal, institutional measures to screen the employee from the case.

Despite the screening measures used, the presumption of shared confidences becomes conclusive if: (1) information relating to the representation of an adverse client has in fact been disclosed, (2) screening would be ineffective or the nonlawyer necessarily would be required to work on the other side of a matter that is the same as or substantially related to a matter on which the nonlawyer has previously worked, or (3) the nonlawyer has actually performed work, including clerical work, on the matter at the lawyer's directive if the lawyer reasonably should know about the conflict of interest.

We do not believe these requirements will prove unduly burdensome for lawyers and their employees, even in the case of a small firm or sole practitioner. In the case of a small law office with only one employee, it may be that the lawyer will be required to perform some clerical functions on a matter from which the employee is screened. Yet this is a small burden when balanced against the threat of confidences being revealed and the protection of a client's confidential information. In a small firm like Magallanes & Hinojosa that has more than one assistant, it will be a fairly simple matter to transfer all work on a forbidden case to the other employee and shield the screened employee from the case.

We finally note that these requirements apply only to nonlawyer employees who have access to material information relating to the representation of clients, as well as agents who technically may be independent contractors, such as investigators. *See* ABA Op. 1526.

IV

We agree with Valley Regional that Magallanes & Hinojosa failed to rebut the presumption of shared confidences since: (1) they did not effectively screen Rodriguez from the Leal matter; and (2) even if they had done so, Rodriguez actually worked on the Leal matter at Magallanes' directive when Magallanes knew of Rodriguez's previous work on the Leal matter. Magallanes instructed Rodriguez not to work on the Leal file, but did not take other institutional, formal measures to ensure Rodriguez did not work on the matter. For example, Magallanes & Hinojosa did not remove the file from Rodriguez's access or provide Rodriguez with any written policy about conflicts of interest, relying instead on oral instructions that proved ineffective. Indeed, Rodriguez apparently had ready access to the file and performed work on it even after the admonition.

Finally, Magallanes asked Rodriguez to make copies for the Leal case on one occasion. Making copies is perhaps a simple, clerical matter, yet the message sent not only to Rodriguez but other employees at the firm was that Magallanes & Hinojosa was not serious about guarding against conflicts of interest.

V

Magallanes & Hinojosa also contends that the confidentiality agreement Rodriguez signed on leaving Brin & Brin satisfies the additional reasonable measures needed to ensure confidentiality. We disagree. As we made clear in *Phoenix Founders*, it is incumbent on the hiring attorney to "take other reasonable steps to ensure that the [employee] does not work in connection with matters on which the [employee] worked during the prior employment, absent client consent." 887 S.W.2d at 835. Because the confidentiality agreement was not a step taken by the hiring attorney, it is not

relevant to the disqualification analysis. *See id.* ("client confidences may be adequately safeguarded if a firm hiring a paralegal from another firm takes appropriate steps in compliance with the Disciplinary Rules"). We refuse to shift the screening responsibility to the former client or its counsel. Instead, it is the responsibility of the hiring firm to take effective, formal, institutional measures to shield the employee from the litigation.

* * *

Because the trial court abused its discretion in refusing to disqualify Magallanes & Hinojosa, we conditionally grant mandamus relief and direct the trial court to grant Valley Regional's motion to disqualify and recuse Magallanes & Hinojosa from the Leal matter. We are confident the court will comply, and the writ will issue only if it does not.

_____
David M. Medina
Justice

OPINION DELIVERED: August 27, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-1001

THE UNIVERSITY OF HOUSTON, PETITIONER,

v.

STEPHEN BARTH, RESPONDENT

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

PER CURIAM

Stephen Barth, a tenured professor at the University of Houston, sued the University under the Texas Whistleblower Act. Barth claimed his dean at the University retaliated against him after Barth reported contracting and accounting irregularities to University officials. A jury agreed and awarded Barth damages. The University appealed, arguing the verdict was not supported by legally sufficient evidence that Barth made a good-faith report of a violation of law to an appropriate law-enforcement authority as required under the Texas Whistleblower Act. *See* TEX. GOV'T CODE § 554.002(a). The court of appeals affirmed in part, upholding the verdict finding liability against the University as to all but one untimely claim. Holding that the University had waived its legal sufficiency challenge to certain evidence supporting the verdict, the court of appeals undertook no

further inquiry into some of the elements of Barth's Whistleblower Act claims. *See* 265 S.W.3d 607, 616 (Tex. App.—Houston [1st Dist.] 2008).

However, in *State v. Lueck*, 290 S.W.3d 876, 883 (Tex. 2009), we held that "the elements of section 554.002(a) can be considered to determine both jurisdiction and liability." Accordingly, whether Barth's reports to University officials are good-faith reports of a violation of law to an appropriate law-enforcement authority is a jurisdictional question. Jurisdiction may be raised for the first time on appeal and may not be waived by the parties. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). The University challenges whether the trial court had jurisdiction. Therefore, without hearing oral argument, TEX. R. APP. P. 59.1, we reverse and remand to the court of appeals to determine whether, under the analysis set forth in *Lueck*, Barth's claims meet the Whistleblower Act's jurisdictional requirements for suit against a governmental entity and, thus, whether the trial court had jurisdiction over Barth's suit.

OPINION DELIVERED: June 11, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-1003

KIRBY LAKE DEVELOPMENT, LTD., MITER DEVELOPMENT CO., L.L.C., TAYLOR LAKE, LTD., AND FRIENDSWOOD DEVELOPMENT CO., LTD., PETITIONERS,

v.

CLEAR LAKE CITY WATER AUTHORITY, RESPONDENT

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

Argued January 19, 2010

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE LEHRMANN joined, and in which JUSTICE WILLETT joined as to all parts except footnote 7.

JUSTICE GUZMAN did not participate in the decision.

Water lies beneath the surface of today's case, yet our holding is based on a rule of grammar, not capture. The Water Authority must seek voter approval, "in any bond election" it conducts, to sell bonds so that developers—who fronted the cost of the city's water and sewer lines—can be reimbursed. Does "any" bond election mean "every" bond election? Or has the Authority satisfied its obligation by approving the reimbursement proposal in at least one election, even if voters reject

the measure? We hold that, in the context of these Agreements, "any" means "every." Our answer to that question, however, matters little unless the Authority is amenable to suit. We hold that it is. When a Water Authority enters into a contract like the one here, it may be sued for failing to fulfill the contract's terms. *See* TEX. LOC. GOV'T CODE § 271.152. The Authority's refusal to include a reimbursement measure in every bond election constituted a breach of its contracts with the Developers. Because the Legislature has waived the Authority's immunity from suit for that breach, we reverse in part the court of appeals' judgment and remand the case to that court to consider the Authority's remaining issues. Because we agree with the court of appeals that the Authority's actions did not rise to the level of a taking, we affirm that part of the court of appeals' judgment.

I. Background

Petitioners are residential developers in the Clear Lake area of greater Houston.[1] Each entered into contracts entitled "Sales Agreement and Lease of Facilities" with the Clear Lake City Water Authority.[2] The Agreements stipulated that the Developers would build water and sewer facilities according to the Authority's specifications, and that the Developers would lease the facilities to the Authority free of charge until the Authority purchased them. The Authority agreed to reimburse the Developers for 70% of their construction costs once it received voter-approved bond funds. The Authority was not obligated to reimburse the Developers until a bond sale was approved in an election.

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[1] They are: Kirby Lake Development, Ltd., Miter Development Company, L.L.C., Taylor Lake, Ltd., and Friendswood Development Company, Ltd. ("Developers").

[2] Taylor Lake, Ltd. entered into two of these contracts, four years apart, because the Authority was not immediately able to annex a portion of the property that Taylor Lake sought to develop. *Clear Lake City Water Auth. v. Kirby Lake Dev., Ltd.*, 123 S.W.3d 735, 740 n.1 (Tex. App.–Houston [14th Dist.] 2003, pet. denied).

The Agreements contain the following pertinent clauses:

> Subject to other terms and provisions hereof, the Developer agrees to sell and the Authority agrees to purchase all completed portions of the Facilities . . . as soon as possible, but not more than 30 days after receipt of bond proceeds legally available and allocated by the Authority for payment therefore . . . .
>
> ***It is expressly acknowledged and agreed by the parties hereto, that the Authority has no existing voter authorization to issue any bonds to pay for the cost of the Facilities, and does not anticipate that funds will be available for such costs without a voter approved bond sale for such purchase. The Authority intends to call a bond election in the near future but is not obligated to do so, and the Authority cannot predict when, if ever, such an election and bond sale will occur, or when, if ever, the Authority will have other funds available and allocated for the purchase of the Facilities. The Authority shall have the right to purchase the Facilities with funds available from a source other than a bond sale for such purpose, but shall have no obligation to do so. The Authority does agree, however, that it shall include in any bond election it does hold subsequent to the effective date of this Agreement bond authorization in an amount sufficient to pay the purchase price of the Facilities***.[3]
> . . . .
>
> The Authority shall have no obligation to obtain approval from the voters of bonds to finance purchase of the Facilities, but if such voter approval is obtained, the Authority shall sell Authority bonds for the purpose of purchasing the Facilities. . . . The Authority agrees to proceed with due diligence to consummate the issuance of such bonds and the acquisition of the Facilities under such circumstances.

In May 1998, as stipulated by the Agreements, the Authority placed a bond authorization measure on the next election ballot. Voters rejected the measure. In October 1998, the Authority again placed a bond measure on the ballot, this time separating it into two parts: a proposal to reimburse the Developers, and another to fund the maintenance of a separate water treatment plant the Authority owned. The voters passed the second proposal but rejected the first. Three of the four

[3] This section appears in bold and italics in all but one of the Agreements.

Developers (Kirby Lake, Miter, and Taylor Lake) then sued the Authority, alleging that it was obligated to reimburse them anyway. A jury found for the Developers, and the trial court rendered judgment in accordance with that verdict. *Clear Lake City Water Auth. v. Kirby Lake Dev., Ltd.*, 123 S.W.3d 735, 741-42 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) ("*Kirby Lake I*"). The court of appeals reversed, holding that voter approval was a condition precedent to the Authority's purchase obligation. *Id.* at 756.

The Authority held another bond election in September 2004. This time it omitted the Developers' reimbursement proposition altogether, citing the

> language of the opinion rendered by the Fourteenth Court of Appeals . . . , which expressly stated that certain of the Developers' contracts merely required "that the developers be included in any subsequent election, and they were"— confirming that any obligation to seek voter approval to issue bonds to reimburse [the Developers] has already been satisfied.

The Developers sued again, alleging that the Authority breached its agreement to include a reimbursement provision in each bond election.[4] On motion for summary judgment, the trial court concluded that the Authority breached the agreement and awarded damages. 274 S.W.3d at 42 ("*Kirby Lake II*"). The court of appeals rejected the Authority's argument that it was immune from suit, holding that Local Government Code section 271.152 waived the Authority's immunity. *Id.* at 44 (citing *Friendswood I*, 256 S.W.3d at 751). Nonetheless, the court of appeals reversed the trial court's judgment, holding that the Authority complied with the contract because "the balance of the paragraph [in the Agreements] clearly indicates that only one election was contemplated. . . . We

[4] Friendswood Development sued separately from the other developers. 2008 Tex. App. LEXIS 9127, at *1 (*"Friendswood II*").

therefore find the agreement to be unambiguous in obligating the Water Authority to place the measure only on the next ballot after the effective date of the agreement." *Id*. at 46.

Kirby, Miter, and Taylor also alleged that the Authority's continued possession of the facilities constituted a taking. 2008 Tex. App. LEXIS 5887, at *1 ("Kirby Lake III").[5] The Authority then filed a plea to the jurisdiction, arguing, among other things, that Kirby, Miter, and Taylor consented to the alleged taking. *Id*. at *2. The trial court granted the plea and dismissed the takings claim for lack of jurisdiction. *Id*. The court of appeals agreed, finding that the Developers had consented to the Authority's possession of the facilities—barring an inverse condemnation claim. *Id*. at *13. Each of these cases was decided by a different panel of the same court of appeals.

In November 2006, while the above cases were pending in the trial court, the Authority held another bond election that called for reimbursing the Developers. The 2006 election proved more contentious than its predecessors. The Authority's board members—including members who had signed the original contracts—actively discouraged passage of the measures. A front-page article in the local paper quoted board members as opposing the bonds. An Authority Newsletter denied any obligation to conduct future bond elections, but said "[n]evertheless, the Board finds it appropriate at this time to submit the issue to the voters for a third time, so that the will of the people, which is an express condition of the contracts, can be heard." The bond measures failed—an outcome that the Developers claim would not have occurred absent the Authority's intermeddling.

[5] That claim, initially part of *Kirby Lake II*, had to be refiled in the Harris County Civil Court at Law. *See* TEX. GOV'T CODE § 25.1032(c) ("A county civil court at law has exclusive jurisdiction in Harris County of eminent domain proceedings, both statutory and inverse, regardless of the amount in controversy.").

We consolidated *Friendswood II*, *Kirby Lake II*, and *Kirby Lake III*, *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 52 Tex. Sup. Ct. J. 788, 788-89 (May 29, 2009), and granted the petition for review, *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 53 Tex. Sup. Ct. J. 15, 15 (Oct. 23, 2009). The Developers maintain that the court of appeals erred in holding that "any bond election" meant only one election. They also allege that the Authority's perpetual use of the property without compensation constitutes inverse condemnation. The Authority argues, among other things, that neither section 49.066 of the Water Code nor section 271.152 of the Local Government Code waives its immunity, and that it has fully satisfied its obligations under the Agreements.

II. An Overview of Water Management in Texas

A. History

Texas' first venture into water regulation stemmed from the state's need to irrigate its driest regions. *See generally* F. Joyce Cox, *The Texas Board of Water Engineers*, 7 TEX. L. REV. 86, 86 (1928-1929) ("In Texas, as elsewhere, administrative control of water resources came in answer to a need."). In 1889, the Legislature enacted a bill for "the arid districts of Texas." *See* Act of March 19, 1889, 21st Leg., ch. 88, 1889 Tex. Gen. Laws 100, 100. The goal was to charter corporations that would build an infrastructure to furnish "water to all persons . . . for irrigation and domestic uses." *Id.*; *see also Ward County Irrigation Dist. No. 1 v. Red Bluff Water Power Control Dist.*, 170 S.W.3d 696, 700 (Tex. App.–El Paso 2005, no pet.). Fifteen years later, Texans approved a constitutional amendment permitting local governments to issue bonds for water development. TEX. CONST. art. III, § 52(b)(2).

Texas voters ratified another water-related amendment in 1917. *See* TEX. CONST. art. XVI, § 59. The amendment created "conservation and reclamation districts" as units of local government, and made the preservation of natural resources a public right and duty. *Id*. § 59(a),(b); *see also Dallas County Levee Dist. No. 2 v. Looney*, 207 S.W. 310, 310 (Tex. 1918). As with prior amendments, financing was instrumental to water-resource management. In that respect, the amendment permitted "all such indebtedness as may be necessary to provide all improvements and the maintenance thereof requisite to the achievement of the purposes of this amendment," as long as "such proposition shall first be submitted to the qualified . . . voters of such district and the proposition adopted." TEX. CONST. art. XVI, § 59(c).

Along with the development of conservation districts came the Legislature's codification of state water law. *See* TEX. WATER CODE § 1.003 (declaring "the public policy of the state to provide for the conservation and development of the state's natural resources"). Chapters 49 and 51 of the Water Code govern "water control and improvement districts" ("WCIDs"), like Clear Lake City Water Authority. Chapter 49 provides a blueprint for creating and operating general law water districts, and for financing the significant work required to conserve water resources. *See id*. § 49.211(b). Chapter 51 deals with WCIDs. *See id*. § 51.121. WCIDs have broad authority to "supply and store water for domestic, commercial, and industrial use; to operate sanitary wastewater systems; and to provide irrigation, drainage, and water quality services." TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, TEXAS WATER DISTRICTS: A GENERAL GUIDE 2 (2004), available at http://www.tceq.state.tx.us/files/gi-043.pdf_4419598.pdf (all Internet materials as visited August 25, 2010 and available in Clerk of Court's file).

WCIDs are one of thirteen different types of general law water districts acting as state political subdivisions. *See* TEX. WATER CODE §§ 50-68; Bonnie M. Stepleton, Note, *Texas Groundwater Legislation: Conservation of Groundwater or Drought by Process*, 26 NAT. RESOURCES J. 871, 874 (1986). WCIDs may consist of a single county or multiple counties. *See* Dick Smith, *Water Control and Improvement Districts*, 6 THE NEW HANDBOOK OF TEXAS 840 (1996). Because WCIDs have extensive power to regulate domestic and commercial water supply, they have become "the main financing mechanism for development in urban areas." Stepleton, 26 NAT. RESOURCES J. at 875.

B. Clear Lake City Water Authority

The Clear Lake City Water Authority was created in 1963. *See* Act of May 6, 1963, 58th Leg., H.B. No. 1003, R.S., ch. 101, 1963 Tex. Gen. Laws 164, 173. The Authority occupies the Clear Lake area in Harris County, approximately 20 miles southeast of downtown Houston. CLEAR LAKE CITY WATER AUTHORITY, GENERAL INFORMATION (2010), http://clcwa.org/generalinfo.htm. It is currently Texas' largest water district, encompassing over 16,000 acres, with around 84,000 residents. *Id*.

Water districts frequently contract with private developers to build and maintain water facilities. "Prefunding agreements," like the ones at issue here, are governed by the Texas Commission on Environmental Quality's ("TCEQ") rules. *See Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 274 n.11 (Tex. App.–Houston [1st Dist.] 2005, pet. denied); 30 TEX. ADMIN. CODE § 293.46. These agreements allow developers to finance facilities "contemplated for purchase by the district" before TCEQ has approved the bond issue, provided certain conditions are

met. 30 TEX. ADMIN. CODE § 293.46. The TCEQ rules require developers to pay at least 30% of the costs under such contracts, "to insure the feasibility of the construction projects of such districts." 30 TEX. ADMIN. CODE § 293.47. The rules further provide that "[a] person proceeding with construction of a project prior to its formal approval by the commission shall do so with no assurance that public funds will be authorized for acquiring the facilities." *Id*. § 293.46(6). Thus, the developer who builds the infrastructure assumes the risk that funding will never materialize, and voters determine whether to commit funds for the project.

We turn now to the issues before us.

III. Government Immunity

Water Control and Improvement Districts are "valid and existing governmental agencies and bodies politic." *Willacy Cnty. Water Control & Improv. Dist. No. 1 v. Abendroth*, 177 S.W.2d 936, 937 (Tex. 1944) (quotations omitted). As such, they enjoy governmental immunity from suit, unless immunity is expressly waived. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). The Developers argue that both Texas Water Code section 49.066 and Texas Local Government Code section 271.152 waive the Authority's immunity. The court of appeals in the Developers' two contract-based cases held that, while section 49.066 does not waive immunity, section 271.152 does. 2008 Tex. App. LEXIS 9127, at *2 n.2 (citing *Friendswood I*, 256 S.W.3d at 747 n.14)[6]; 274 S.W.3d at 44. We agree for the following reasons.

[6] The *Friendswood II* court deferred to its prior holding in *Friendswood I* with regard to the issue of immunity. *See* 2008 Tex. App. LEXIS 9127, at *2 ("The issues regarding governmental immunity are the same as those in the prior interlocutory appeal in this case. Absent (1) a decision from a higher court or this court sitting en banc that is on point and contrary to the prior panel decision or (2) an intervening and material change in the statutory law, this court is bound by the prior holding of another panel of this court.") (citations omitted). Assuming without deciding that the issue is before us in *Friendswood II*, we agree with the *Friendswood I* court's determination that immunity is waived.

A. Water Code section 49.066

Section 49.066(a) provides that "[a] district may sue and be sued in the courts of this state in the name of the district by and through its board. A suit for contract damages may be brought against a district only on a written contract of the district approved by the district's board." TEX. WATER CODE § 49.066(a). As we explained in *Tooke v. City of Mexia*,

> the effect of a "sue and be sued" clause in an organic statute depends on the context in which it is used. The words can mean that immunity is waived, but they can also mean only that a governmental entity, like others, has the capacity to sue and be sued in its own name.

Tooke v. City of Mexia, 197 S.W.3d 325, 337 (Tex. 2006). Standing alone, then, "sue and be sued" does not plainly waive the Authority's immunity.

The Developers argue that section 49.066 "plainly waives a district's immunity" because it specifies how a district may be served with a lawsuit for contract damages, and delineates the mechanisms for enforcing a judgment against it. *See* TEX. WATER CODE § 49.066(a)-(c). In *Harris County Hospital District v. Tomball Regional Hospital*, we held that a "sue and be sued" statute that specified who would represent the district in civil proceedings was not an indication of legislative intent to waive immunity: instead, the phrase merely "anticipates the district's involvement in civil proceedings of some nature at some point, but it does not address immunity from suit." *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 843 (Tex. 2009).

As the court of appeals in *Friendswood II* reasoned, "the Legislature states that a suit for contract damages may be brought against a district only on a written contract of the district approved by the district's board; however, it does not state that all parties to such contracts may sue the district

for breach of these contracts or that immunity from suit as to all such claims is waived." 256 S.W.3d at 743. This interpretation conforms with our holding in *Tooke*, in which we scrutinized similar statutory language providing that the City "may contract and be contracted with, implead and be impleaded in all courts and places and in all matters whatsoever . . . ." *Tooke*, 197 S.W.3d at 344. We explained that "the provision appears to address the capacity of the City to act as a corporate body, not its immunity from suit. All it *clearly* says is that the City can be sued and impleaded in court *when* suit is permitted, not that immunity is waived for all suits." *Id*. Hence, a statute that contemplates a government entity's involvement in litigation does not "clearly and unambiguously waive" the entity's immunity from suit. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003) ("[A] statute that waives the State's immunity must do so beyond doubt . . . .").

The Developers also point to the provision in section 49.066(a) setting forth the "only" conditions under which a contract against a district will be enforceable. *See* TEX. WATER CODE § 49.066(a) ("A suit for contract damages may be brought against a district only on a written contract of the district approved by the district's board."). But such language "does not go as far as waiving immunity from suit, but merely establishes a condition precedent to suit." *Travis County v. Pelzel & Assocs.*, 77 S.W.3d 246, 249 (Tex. 2002); *see also Farmers State Bank of New Boston v. Bowie County*, 95 S.W.2d 1304, 1306 (Tex. 1936) ("The language of said article indicates that the rejection by the commissioners' court of a claim against the county, or the failure of such court to act on the same, is merely a condition precedent to the filing of a suit to recover thereon."); *Bexar Metro. Water Dist. v. Educ. and Econ. Dev. Joint Venture*, 220 S.W.3d 25, 31 (Tex. App.–San Antonio 2006, pet. dism'd) ("The language the legislature actually used in amending section 49.066(a) does not

'authorize' a suit against a water district; nor does it expressly waive immunity. Rather, the amendment creates a condition precedent: if a suit for contract damages is otherwise authorized, it may be maintained only if the stated condition is met."). We therefore reject this argument as well.

Since *Tooke*, we have consistently refused to find waivers of immunity implicit in statutory language: there can be no abrogation of governmental immunity without clear and unambiguous language indicating the Legislature's intent do so. *See, e.g.*, *Tomball*, 283 S.W.3d at 842-43; *Lamesa Indep. Sch. Dist. v. Booe*, 235 S.W.3d 710, 711 (Tex. 2007); *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 391 (Tex. 2007). The present statute is no different. In fact, every court of appeals to interpret section 49.066 after *Tooke* has concluded that the statute does not waive immunity. *See Clear Lake City Water Auth. v. MCR Corp*., No. 01-08-00955-CV, 2010 Tex. App. LEXIS 2194, at *12 (Tex. App.–Houston [1st Dist.] Mar. 11, 2010, pet. denied); *Jonah Water Special Util. Dist.*, No. 03-06-00626-CV, 2009 Tex. App. LEXIS 7072, at *7 (Tex. App.–Austin, Aug. 31, 2009, no pet.); *Boyer, Inc. v. Trinity River Auth. of Tex.*, 279 S.W.3d 354, 358 (Tex.App.–Fort Worth 2008, pet. denied); *Bexar Metro. Water Dist.*, 220 S.W.3d at 32; *Valley Mun. Util. Dist. No. 2 v. Rancho Viejo, Inc*., No. 13-07-545-CV, 2008 Tex. App. LEXIS 1109, at *11 (Tex. App.–Corpus Christi, Feb. 14, 2008, no pet.) (mem. op.). Because section 49.066 does not contain a clear and unambiguous waiver, the "sue and be sued" language in 49.066(a) does not on its own abrogate governmental immunity.

B. Local Government Code section 271.152

The Legislature enacted section 271.152 "to loosen the immunity bar so that *all* local governmental entities that have been given or are given the statutory authority to enter into contracts

shall not be immune from suits arising from those contracts." *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Property/Casualty Joint Self-Ins. Fund*, 212 S.W.3d 320, 327 (Tex. 2006) (quotations omitted).[7] The statute waives immunity from suit for certain contract claims: "A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract . . . ." TEX. LOC. GOV'T CODE § 271.152. The statute defines "contract subject to this subchapter" as "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity." *Id*. § 271.151(2).

The Agreements here are written contracts stating their essential terms. The names of the parties, property at issue, and basic obligations are clearly outlined. *See Liberto v. D.F. Stauffer Biscuit Co.*, 441 F.3d 318, 324 (5th Cir. 2006) (noting that Texas courts generally construe essential terms of a contract to include "the time of performance, the price to be paid, the work to be done, the service to be rendered, or the property to be transferred"); *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000) (noting that a contract is legally binding "if its terms are sufficiently definite to enable a court to understand the parties' obligations"). The relevant inquiry is whether the Agreements entail the provision of "goods or services" to the Authority.

[7] As supporters of the Bill explained, blanket immunity from breach of contract claims "create[d] a fundamentally unfair situation that denie[d] redress, for example, to a contractor who completed a project for a city that refused to pay." House Research Organization, Bill Analysis, Tex. H.B. 2039, 79th Leg., R.S. (2005).

Chapter 271 provides no definition for "services," despite the Legislature's definition of the term in other contexts.[8] It appears, generally, that the term is broad enough to encompass a wide array of activities. *See Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962) ("In ordinary usage the term 'services' has a rather broad and general meaning. It includes generally any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed." (quoting *Creameries of Am. v. Indus. Comm'n*, 102 P.2d 300, 304 (Utah 1940))); *but see Berkman v. City of Keene*, 311 S.W.3d 523, 527 (Tex. App.–Waco 2009, pet. denied) ("[T]he statute does not apply to contracts in which the benefit that the local governmental entity would receive is an indirect, attenuated one.") (quotations omitted).

The *Friendswood I* court relied on our analysis in *Ben Bolt* to conclude that the "agreement to hire third parties to construct the Facilities and to build the streets, roads, and bridges is . . . sufficient to constitute the provision of services to the Authority." *Friendswood I*, 256 S.W.3d at 751; *see Ben Bolt*, 212 S.W.3d at 327. In *Ben Bolt*, we liberally construed a government-pooled insurance policy (the "Fund") as encompassing "services" rendered by its members, based on the fact that the Fund's "members elect a governing board, and a board subcommittee resolves claims disputes. To that extent, at least, the Fund's members provide services to the Fund." *Id*. The services provided thus need not be the primary purpose of the agreement. *See Friendswood I*, 256

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[8] *See, e.g.*, TEX. BUS. & COM. CODE § 17.45(2) (defining "services" under the Deceptive Trade Practices Act as "work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods"); TEX. UTIL. CODE § 11.003(19) (defining "service" under the Public Utility Regulatory Act as "any act performed, anything supplied, and any facilities used or supplied by a public utility in the performance of the utility's duties under this title to its patrons, employees, other public utilities, and the public"); *see also Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895-96 (Tex. 1962) ("Within the meaning of [lien enforcement] statutes . . . and of exemption statutes, 'services' may be rendered though the actual labor . . . performed by one's employees and by means of his machinery or other equipment . . . ." (quoting *Levitt v. Faber*, 64 P.2d 498, 500 (Cal. App. 2d 1937))).

S.W.3d at 746 n.13 ("[I]n *Ben Bolt*, the Texas Supreme Court concluded that the Legislature had waived immunity under this statute even though the court concluded that the part of the contract on which the plaintiff based its claim did not involve the provisions of good [sic] or services to the local governmental entity.").

We agree with the court of appeals that the Agreements entail services provided directly to the Authority. The Developers contracted to construct, develop, lease, and bear all risk of loss or damage to the facilities, obligations far more concrete than those at issue in *Ben Bolt*. *Ben Bolt*, 212 S.W.3d at 327. We therefore hold that the Agreements contemplate the provision of services under the statute.

The Authority also argues that the Agreements fall outside chapter 271 because there is no "balance due and owed." *See* TEX. LOC. GOV'T CODE § 271.153(a)(1) (limiting "[t]he total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract" to "the balance due and owed by the local governmental entity under the contract."). According to the Authority, because the voters have not approved bonds to buy the facilities, the Developers cannot prove that the amount they seek is "due and owed." At least within the context of these Agreements, we disagree. The purpose of section 271.153 is to limit the amount due by a governmental agency on a contract once liability has been established, not to foreclose the determination of whether liability exists. Furthermore, the Agreements do stipulate the amount of reimbursement owed upon approval of bond funds. The existence of a balance "due and owed" is thus incorporated within the contract—a balance that would come due when voters approve payment in a bond election.

For the above reasons, we agree that section 271.152 waives the Authority's immunity from suit.

IV. Interpretation of the Agreements

A. Defining "any"

We disagree, however, with the court of appeals' conclusion regarding interpretation of the word "any" in the following contract provision:

> The Authority intends to call a bond election in the near future but is not obligated to do so . . . . The Authority does agree, however, that it shall include in any bond election it does hold subsequent to the effective date of this Agreement bond authorization in an amount sufficient to pay the purchase price of the Facilities.

The Authority says this provision requires the reimbursement measure be placed on one ballot only, upon which it will have fulfilled its contractual obligation. The Developers, on the other hand, contend the provision requires that the Authority place the measure on *every* bond authorization ballot until the end of time, or until the measure is approved. The court of appeals agreed with the Authority, holding that, although the pertinent sentence "could reasonably be interpreted either way, . . . the balance of the paragraph clearly indicates that only one election was contemplated." *Kirby Lake II*, 274 S.W.3d at 46.

Texas courts defining "any" have generally interpreted it to mean "every."[9] Those decisions, however, have been so rooted in context that they provide little guidance in this case. *See Texas Co. v. Schriewer*, 38 S.W.2d 141, 144 (Tex. Civ. App.–Waco 1931) ("The word 'any' is a flexible word that may have any one of several meanings according to its use. . . . Its meaning is often restrained, limited, or influenced by the subject-matter or manner in which it is used."), *aff'd in part, rev'd in part sub nom. Smith v. Tex. Co.*, 53 S.W.2d 774 (Tex. Comm'n App. 1932). Accordingly, we will examine the Agreements' grammatical structure, in context.

The Authority and the *Kirby Lake II* court point to the use of singular nouns in the succeeding sentence as indicative that "any" means "one time": "The paragraph's first sentence states that the Water Authority 'intends to call *a* bond election' but it cannot predict when or if 'such *an* election . . . will occur.' Unlike 'any,' the words 'a' and 'an' are always singular." *Kirby Lake II*, 274 S.W.3d at 46. However, the fact that "a" and "an" are singular does not foreclose interpreting "any" to mean "each" or "one of all"—both of which would require singular antecedents. *See, e.g.*, *Schriewer*, 38 S.W.2d at 145 ("In its broad, distributive sense, the sense in which the word is very frequently used, it may have the meaning of 'all,' 'every,' 'each,' or 'each one of all.'"). The more

[9] *See Hime v. City of Galveston*, 268 S.W.2d 543, 545 (Tex. Civ. App.–Waco 1954, writ ref'd n.r.e.) ("[T]he word 'any' has been judicially construed to mean: '*each*' or '*every*' or '*all*'. (Black's Law Dictionary, 3rd Ed., p. 119); and particularly in construing statutes, the word 'any' is equivalent to and has the force of '*every*' and '*all*'."); *Branham v. Minear*, 199 S.W.2d 841, 846 (Tex. Civ. App.–Eastland 1947, writ ref'd n.r.e.) ("[M]any cases are collated showing that in construing statutes and other instruments 'any' is equivalent to and has force of 'every' or 'all.' . . . We think that as found by the learned trial court, 'any minerals' as used in the deed in question, undoubtedly meant 'all minerals.'"); *Doherty v. King*, 183 S.W.2d 1004, 1007 (Tex. Civ. App.–Amarillo 1944, writ dism'd) ("When the word 'any' is used in a plural sense it means 'all,' 'all or every,' 'each,' 'each one of all,' or 'every' without limitation.") (quotations omitted); *Texas Co. v. Schriewer*, 38 S.W.2d 141, 144-45 (Tex. Civ. App.–Waco 1931) ("In its broad, distributive sense, the sense in which the word is very frequently used, it may have the meaning of 'all,' 'every,' 'each,' or 'each one of all.'), *aff'd in part, rev'd in part sub nom. Smith v. Tex. Co.*, 53 S.W.2d 774 (Tex. Comm'n App. 1932).

conventional grammatical meaning of the term, then, suggests that the proposition must be included in every bond election the Authority holds, until the voters approve reimbursement.

Moreover, the Developers argue that the Authority ignores the Agreements' overall structure and purpose, which was to construct facilities that the Authority would ultimately purchase ("Subject to other terms and provisions hereof, the Developer agrees to sell and the Authority agrees to purchase all the completed portions of the facilities . . . ."). We agree with the Developers that we must evaluate the overall agreement to determine what purposes the parties had in mind at the time they signed the Agreements. *See Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008) ("Effectuating the parties' expressed intent is our primary concern.").

Section 4.01 provides that the Developer shall lease all operable portions of the facilities to the Authority "without charge *until such time as the Authority acquires such portions*; provided that such lease shall terminate upon the acquisition by the Authority of all the Facilities." (Emphasis added.) Had the parties envisioned only one bond election, they could have easily stated that the Authority may lease the facilities until conclusion of that particular election. Instead, the Agreement permits a continued leasehold "until such time as the Authority acquires [the Facilities]." Moreover, the Agreement is silent as to the parties' obligations in the event the bond measure does not pass. While it expressly acknowledges "that the Authority has no *existing* voter authorization to issue any bonds to pay for the cost of the Facilities, and does not anticipate that funds will be available for such costs *without a voter approved bond sale*," it at no point relinquishes the Authority from its obligation "to include [the bond measure] in any bond election it *does* hold." (Emphases added.)

The *Kirby Lake II* court noted that the Agreement "does not state that a bond measure would be submitted to voters repeatedly until approved." 274 S.W.3d at 46. However, assuming that "any" means "every," such additional language would be superfluous, as the Agreement plainly states that the Authority is to include the measure "in any bond election it does hold." The more blatant omission would be the absence of a provision limiting the Authority's perpetual lease of the facilities without charge in the event the measure does not pass.

Unless the Authority were obligated to submit a measure to reimburse the Developers in each bond election, the Developers would have essentially forfeited their interest in facilities they built and paid for. *See Aquaplex, Inc. v. Rancho La Valencia, Inc*., 297 S.W.3d 768, 774 (Tex. 2009) ("Forfeitures are not favored in Texas, and contracts are construed to avoid them."). It is unlikely that the Developers intended to convey water and sewer lines as a gift. Because we conclude that the contract, as a whole, contemplates the eventual sale of the Facilities, and because we construe contracts to avoid forfeiture where possible, we hold that the Agreements require the Authority to submit a bond proposal in every bond election it chooses to hold. *See Reo Indus., Inc. v. Natural Gas Pipeline Co. of Am.*, 932 F.2d 447, 454 (5th Cir. 1991) ("Texas courts will not construe a contract to result in a forfeiture unless it cannot be construed in any other way."); *Sheppard v. Avery*, 34 S.W. 440, 442 (Tex. 1896) ("A forfeiture of rights of property is not favored by the courts, and laws will be construed to prevent rather than to cause such forfeiture.").

B. At-will termination of perpetual contracts

The Authority contends, in the alternative, that the lower court's judgments should be affirmed because the law disfavors perpetual contracts. It is true, as the Authority observes, that the

Agreements contain no time limit on its alleged duty to include reimbursement measures in every bond election. We also acknowledge the prospect that voters may never approve such a measure. In *Fort Worth Independent School District v. City of Fort Worth*, 22 S.W.3d at 841, we noted that "contracts which contemplate continuing performance (or successive performances) and which are indefinite in duration can be terminated at the will of either party" (quotations omitted). Yet the Authority ignores the line of cases that distinguish between contracts of indefinite duration and contracts that specify determinable events. *See generally Trient Partners I Ltd. v. Blockbuster Entertainment Corp*., 83 F.3d 704 (5th Cir. 1996) (applying Texas law); *City of Big Spring v. Bd. of Control*, 404 S.W.2d 810 (Tex. 1966).

Where a contract's language specifies a fixed and determinable term, "the rule of law that a contract may be terminated at the end of a reasonable time does not apply." *Big Spring*, 404 S.W.2d at 816). In *City of Big Spring v. Board of Control*, the City contracted to provide water to a state-run hospital at a pre-arranged rate for "as long as the State of Texas shall in good faith maintain and operate said hospital." *Big Spring*, 404 S.W.2d at 815. Because this language "fix[ed] an ascertainable fact or event, by which the terms of [the] contract's duration [could] be determined," we held that the contract was not indefinite in duration and therefore not terminable at will. *Id*.; *see also Fluorine on Call, Ltd. v. Fluorogas Ltd.*, 380 F.3d 849, 856 (5th Cir. 2004) (applying Texas law). The Agreements here stipulate that both lease of the facilities and the terms of the Agreements themselves terminate upon the Authority's purchase of the facilities (having attained voter-approved

bond funds). "Purchase of the Facilities" is an ascertainable event which both parties can identify; the Agreements are thus not terminable at will.[10]

C. Reserved Powers Doctrine

The Authority next argues that, should we interpret the Agreements to impose an ongoing obligation to submit bond proposals in each future election, the Agreements would interfere with substantive government functions, violating the reserved powers doctrine. *See State ex rel. City of Jasper v. Gulf States Utils. Co.*, 189 S.W.2d 693, 698 (Tex. 1945). The Authority maintains that "a contract which purports to bind all future boards of directors to include certain propositions in all future elections would abrogate [its] discretion" regarding its handling of future bond elections. *See Todd v. Helton*, 495 S.W.2d 213, 220 (Tex. 1973) (noting that elections are "essentially the exercise of political power," and exempt from judicial interference); *State ex rel. Edwards v. Reyna*, 333 S.W.2d 832, 833 (Tex. 1960) ("[T]he conduct of elections is primarily a matter for legislative regulation and control.").

Certain powers are conferred on government entities "for public purposes, and can neither be delegated nor bartered away." *Jasper*, 189 S.W.2d at 698. Government entities cannot "cede . . . away [such powers] through contracts with others so as to disable them from the performance of their public duties." *Id.*; *see also Brenham v. Brenham Water Co.*, 4 S.W. 143, 149 (Tex. 1887) ("[Municipal] corporations may make authorized contracts, but they have no power, as a party, to

[10] We note, too, that the Water Code expressly permits water districts to "enter into contracts, which may be of unlimited duration, with . . . private entities on the terms and conditions the board may consider desirable, fair, and advantageous for . . . the continuing and orderly development of the land and property within the district through the purchase, construction, or installation of works, improvements, facilities, plants, equipment, and appliances . . . ." TEX. WATER CODE § 49.213(c)(4).

make contracts or pass bylaws which shall cede away, control or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.") (quotations omitted). However, it does not apply to the case at hand. Here, the Authority contracted not to bargain away future power, but to pay an invoice for services rendered if and when funds become available through voter-approved bonds.

Nor does the present situation suggest improper impediments to the Authority's governmental operations. In *Clear Lake City Water Authority v. Clear Lake Utilities*, we held that an agreement between the Authority and a utility company was not binding because it had "the effect of potentially controlling and embarrassing [the] Authority in the exercise of its governmental powers." *Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 392 (Tex. 1977). In that case, the agreement obligated the Authority to meet all water and sewage treatment needs for the Utilities, while precluding it from extending those services directly to the landowners themselves, "under terms and rates that it deems best." *Id.* Thus we found that the Authority had bargained away its governmental power to determine "whether, on any particular date, it is in the best interests of all of its customers and the public in general, to extend water and sewer service to a particular person or entity." *Id*.

In this case, the Authority's contractual obligation to include a bond reimbursement proposition in future elections does not affect the performance of its public duties. It neither hampers nor embarrasses the manner in which the Authority holds elections—including the time, place, order, number of propositions, or even whether it chooses to hold a bond election at all. Nor does it control or impede the Authority's power to determine how and to whom it will extend water

services. *See id*. We therefore reject the Authority's contention that the Agreements run afoul of the reserved powers doctrine.

V. Inverse Condemnation Claim

Finally, Kirby, Miter, and Taylor claim that the Authority's continued, rent-free possession of the Facilities constitutes inverse condemnation. Under the Texas Constitution, no property may "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(a). This provision, like the Fifth Amendment to the United States Constitution, applies not only to traditional takings claims, but also to inverse condemnation claims, in which a property owner alleges that the government has usurped the use and value of his or her property, even if it has not completely appropriated title. U.S. CONST. amend. V; *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994); *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620, 646 (Tex. 2004); *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 130-31 (Tex. 1962).

A person who consents to the governmental action, however, cannot validly assert a takings claim. *See City of Round Rock v. Smith*, 687 S.W.2d 300, 303 (Tex. 1985) (holding that homeowners did not state a claim for inverse condemnation because their representative "consented to the taking"); *State v. Steck Co.*, 236 S.W.2d 866, 869 (Tex. Civ. App.–Austin 1951, writ ref'd); *Hightower v. City of Tyler*, 134 S.W.2d 404, 406 (Tex. Civ. App.–El Paso 1939, writ ref'd) (rejecting claim that city's use of water and sewer lines was a taking, because "appellants gave consent to the City to make such use of the lines as was made"). Moreover, when a private party contracts with the government, generally "the State does not have the requisite intent under

constitutional-takings jurisprudence when it withholds property or money from an entity in a contract dispute." *General Servs. Comm'n v. Little-Tex Insulation Co. Inc.*, 39 S.W.3d 591, 598-99 (Tex. 2001). Instead, "the State is acting within a color of right under the contract and not under its eminent domain powers." *Id.* at 599 (noting that, in such cases, the State acts "akin to a private citizen and not under any sovereign powers"); *see also J.J. Henry Co. v. U.S.*, 411 F.2d 1246, 1249 (Ct. Cl. 1969) ("The clear thrust of the authorities is that where the government possesses property under the color of legal right, as by an express contract, there is seldom a taking in violation of the Fifth Amendment.").

We agree with the *Kirby Lake III* court, which observed that the Developers consented to any alleged taking when they "agreed to allow the Authority to lease and use the Facilities free of charge until the Authority purchases the Facilities." 2008 Tex. App. LEXIS 5887, at *12-*13 (concluding that the Developers' allegations affirmatively negated jurisdiction). As the court noted, the Developers "treated the Agreements as still in effect by continuing to demand performance . . . and suing to enforce the Agreements";[11] thus, the Authority was acting under colorable contract rights and did not have the requisite intent to take the Developers' facilities under any eminent domain powers. *See Little-Tex.*, 39 S.W.3d at 599. Accordingly, the Developers' inverse condemnation claim is barred.

VI. Conclusion

In sum, we affirm the court of appeals' judgment in *Kirby Lake III*, which held the Developers did not state a claim for inverse condemnation. TEX. R. APP. P. 60.2(a). With respect

[11] 2008 Tex. App. LEXIS 5887, at *14.

to *Kirby Lake II* and *Friendswood II*, we reverse the court of appeals' judgments and remand to that court to consider the Authority's remaining issues. *Id*. 60.2(d).

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: August 27, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-1026

UNIFUND CCR PARTNERS, PETITIONER,

v.

JAVIER VILLA, RESPONDENT

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

PER CURIAM

Unifund CCR Partners (Unifund) purchased a credit card debt Javier Villa owed to Bank One. Villa later filed for bankruptcy, and his debts were discharged. In his bankruptcy filing, Villa listed Bank One, not Unifund, as creditor on the credit card debt. After Villa's bankruptcy, Unifund sued Villa on the debt. Villa answered, asserted his discharge in bankruptcy, and filed a motion for sanctions. Unifund responded by filing a notice of dismissal, and the trial court dismissed the suit with prejudice. Several months later the court assessed sanctions against Unifund pursuant to chapter 10 of the Texas Civil Practice and Remedies Code. The court of appeals affirmed. 273 S.W.3d 385. We hold that the trial court abused its discretion in assessing sanctions against Unifund because there was no evidence to support the findings underlying the sanctions.

Unifund purchased a past-due credit card debt Javier Villa owed to Bank One. Unifund sent Villa a letter notifying him that it had purchased the debt and demanding payment. Villa testified

he did not remember receiving it. Villa and his wife subsequently filed for Chapter 7 bankruptcy, listing Bank One among their creditors and listing the account that had been sold to Unifund as debt owed to Bank One. The bankruptcy court granted the Villas a discharge. After the bankruptcy discharge, Unifund sent Villa a second letter demanding payment of the debt. Villa took the letter to his attorney, but neither Villa nor his attorney responded to the letter or notified Unifund of the bankruptcy discharge.

Unifund filed suit against Villa on the debt. Villa filed an answer that, in part, asserted his discharge in bankruptcy. He also filed a motion seeking sanctions against Unifund and its attorneys pursuant to chapter 10 of the Civil Practice and Remedies Code.[1] His motion for sanctions urged that Unifund's petition was signed and filed for improper purposes because Unifund either knew Villa's debt had been discharged in bankruptcy or reasonably should have known of the bankruptcy discharge and it should have made further inquiry before filing suit. Unifund promptly filed a motion to dismiss its suit. The trial court granted the motion but also set a hearing on Villa's motion for sanctions. After the hearing, the court signed an order imposing sanctions on Unifund and directing it to pay Villa $18,685.00 for inconvenience and harassment and $2,871.00 for expenses and attorney's fees. In an en banc decision on rehearing, a divided court of appeals affirmed. 273 S.W.3d 385.

In this Court, Unifund argues that the trial court abused its discretion by imposing sanctions because (1) its plenary power had expired before it signed the sanctions order, so the order is void;

[1] Additionally, Villa filed a motion seeking sanctions under rule 13 of the Texas Rules of Civil Procedure. We address only the motion seeking sanctions under Chapter 10 because that was the only basis on which Villa proceeded in the trial court. The trial court order specified that sanctions were awarded pursuant to Chapter 10.

(2) the trial court did not have jurisdiction over the questions presented in Villa's motion for sanctions because the bankruptcy court has exclusive jurisdiction over the issues of whether Villa's debt was discharged and whether Unifund violated the bankruptcy discharge order; (3) the sanctions imposed were outside the scope of remedies authorized by section 10.004(c) of the Civil Practice and Remedies Code; (4) there is no evidence to support the sanctions; and (5) the sanctions for inconvenience and harassment are unjust and excessive. Unifund does not challenge the court of appeals' determination that it did not appeal the award of attorney's fees. Accordingly, we will address only the award of $18,685.00 for Villa's inconvenience and harassment.

First, we must address Unifund's argument that the trial court did not have jurisdiction over Villa's claim for sanctions, because if it did not, then we do not. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993). Unifund argues that the bankruptcy court has exclusive jurisdiction over allegations that a discharge order was violated and that under bankruptcy law it has a lack of notice defense which must be determined by the bankruptcy court. The argument fails because the sanctions were not based on Unifund's violation of the bankruptcy order. Villa's motion and the trial court's sanctions order were based on chapter 10 of the Civil Practice and Remedies Code and Unifund's failure to make reasonable inquiry after it had knowledge of Villa's bankruptcy discharge. The trial court found that before filing suit, Unifund made an inquiry on Villa's credit report from TransUnion LLC, the credit report showed Villa's discharge in bankruptcy, and knowledge Unifund gained from the credit report placed a duty on it to exercise due diligence and inquire further about the bankruptcy before filing suit against Villa. *See* TEX. CIV. PRAC. & REM. CODE § 10.002(c). The trial court found that Unifund brought the claim in bad faith because

the real purpose of the lawsuit was to harass, intimidate, and coerce Villa into paying a debt for which he was not responsible after his bankruptcy discharge. *See id.* §§ 10.001(1), 10.002(c). Finally, the court found that Unifund's attorney signed the original petition in violation of Section 10.001(1)[2] and that Unifund was implicated apart from its attorney's behavior "because it ignored clear evidence of Villa's prior-filed bankruptcy." Villa did not seek sanctions on the basis that Unifund violated the bankruptcy court's order, nor did the court sanction Unifund for violating federal law. Villa asserted, and the trial court found, Unifund's actions were proscribed by state law. Unifund does not urge that the trial court lacked jurisdiction to determine whether Unifund's actions warranted sanctions based solely on state law, and clearly the trial court did have jurisdiction to consider and rule on Villa's motion. *See Graber v. Fuqua*, 279 S.W.3d 608, 612 (Tex. 2009) (explaining that Congress's intent to preempt must be "clear and manifest" to overcome the presumption that Congress did not preempt state law).

Next, we address Unifund's claim that the sanctions order is void because the trial court's plenary power expired before it signed the order nine months after the order dismissing Unifund's suit. *See, e.g.*, *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 & n.2 (Tex. 1996) (stating that a court cannot issue an order of sanctions after its plenary power has expired). The expiration date for a trial court's plenary power is calculated from the date the court enters a final order disposing of all the claims and parties. *See Crites v. Collins*, 284 S.W.3d 839, 840-41 (Tex.

[2] The trial court stated during the hearing on the motion for sanctions that it would not assess sanctions against Unifund's attorney because the only evidence was that the attorney did not know of Villa's bankruptcy before filing suit. The findings in the written order were contrary to the court's oral findings, but no sanctions were assessed against the attorney, and he is not a party to this appeal.

2009). Unifund argues that in this case the date for determining when the trial court's plenary power expired was the date the order dismissing Unifund's suit was signed. Unifund relies, in part, on cases in which the motions for sanctions were filed after the trial court entered judgment dismissing the case. *See Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 310, 312 (Tex. 2000); *Schexnider*, 940 S.W.2d at 596; *Mantri v. Bergman*, 153 S.W.3d 715, 716-17 (Tex. App.—Dallas 2005, pet. denied); *Estate of Davis v. Cook*, 9 S.W.3d 288, 295-96 (Tex. App.—San Antonio 1999, no pet.). Here, Villa filed his motion for sanctions before Unifund filed its motion to dismiss, and the motion for sanctions was pending at the time the trial court signed the dismissal order. Unless the motion was specifically referenced as having been disposed of by the dismissal order, the order did not necessarily dispose of Villa's motion. TEX. R. CIV. P. 162 (a dismissal based on a nonsuit "shall have no effect on any motion for sanctions"); *Crites*, 284 S.W.3d at 840 ("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.") (citing *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 199 (Tex. 2001)). And, Villa's motion was not specifically referenced by the dismissal order.

Additionally, Unifund relies on cases in which a pending sanctions order was held to be void because it was entered after the trial court's plenary power expired following entry of a judgment determined to have been final. *See Lane Bank*, 10 S.W.3d at 312 (noting that an order of nonsuit may be final, even though a pending sanctions motion is left unresolved, when the judgment disposes of all parties and all issues in the pleadings); *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997) (recognizing that the signing of an order dismissing a case is the starting point for determining when

a trial court's plenary power expires); *Martin v. Tex. Dep't of Family & Protective Servs.*, 176 S.W.3d 390, 394 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Torres v. Tex. Dep't of Family & Protective Servs.*, No. 01-03-01125-CV, 2004 WL 1631305, at *2-3 (Tex. App.—Houston [1st Dist.] July 22, 2004, no pet.); *In re Velte*, 140 S.W.3d 709, 711-12 (Tex. App.—Austin 2004, orig. proceeding); *Jobe v. Lapidus*, 874 S.W.2d 764, 767-68 (Tex. App.—Dallas 1994, writ denied). Unifund's reliance is misplaced. In *Crites*, a motion for sanctions was filed after the plaintiffs filed notice of nonsuit but before the trial court signed an order of dismissal. 284 S.W.3d at 840. We explained that the trial court had power to grant sanctions so long as its plenary authority had not expired and whether the trial court acted within its plenary power depended on whether the order of dismissal was a final judgment. *Id.* at 840-43. We held that an order of dismissal pursuant to nonsuit is not a final, appealable order when the order does not "unequivocally express an intent to dispose of all claims and all parties" and that the motion for sanctions remained pending because (1) Crites filed the motion before the trial court signed the dismissal order and (2) the dismissal order did not contain specific language either denying or granting relief as to all pending claims. *See id.* at 841. Between the filing of Unifund's motion to dismiss and the trial court's signing of the dismissal order, the trial court set a hearing on Villa's motion for sanctions. *See id.* (noting it was instructive in determining whether the dismissal order was final that the trial court held a hearing on the sanctions motion thirty-six days after signing the order). The dismissal order was entitled "ORDER OF DISMISSAL," stated "the above styled and numbered cause be and it is hereby dismissed with prejudice," and did not specifically address Villa's pending motion for sanctions. The trial court's sanctions order, on the other hand, was entitled "ORDER IMPOSING SANCTIONS

AND FINAL JUDGMENT." The trial court specified that it was a "FINAL ORDER AND JUDGMENT IN THIS CASE, AND IS INTENDED BY THIS COURT AND THE PARTIES HERETO, TO BE FINAL AND APPEALABLE." It is apparent that the trial court's earlier dismissal order was not intended to be, and was not, a final order disposing of all pending matters and thus appealable. Accordingly, the trial court's plenary power had not expired before it entered the sanctions order. The sanctions order was not void.

We now turn to Unifund's assertion that the trial court abused its discretion in assessing sanctions because no evidence supported the findings that Unifund violated chapter 10 of the Civil Practice and Remedies Code by filing suit against Villa. Chapter 10 allows a trial court to sanction a party or an attorney for filing pleadings that lack a reasonable basis in law or fact. *See* TEX. CIV. PRAC. & REM. CODE § 10.001; *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). Generally, courts presume that pleadings and other papers are filed in good faith. *Low*, 221 S.W.3d at 617. The party seeking sanctions bears the burden of overcoming the presumption. *Id.* at 614. Accordingly, it was incumbent on Villa to support his motion for sanctions with competent proof that (1) a reasonable inquiry into the allegations in Unifund's pleadings would have disclosed that not all the allegations in its pleadings had or would likely have evidentiary support, and (2) Unifund did not make a reasonable inquiry before filing suit. *Id.* at 617. Incompetent evidence, surmise, or speculation will not suffice for the proof required.

A trial court's imposition of sanctions is reviewed for abuse of discretion. *Id.* at 614. An assessment of sanctions will be reversed only if the trial court acted without reference to any guiding

rules and principles, such that its ruling was arbitrary or unreasonable. *Id.* The trial court does not abuse its discretion if it bases its decision on conflicting evidence and some evidence supports its decision. *In re Barber*, 982 S.W.2d 364, 366 (Tex. 1998). However, a trial court abuses its discretion when its decision is contrary to the only permissible view of probative, properly-admitted evidence. *See id.*

Villa's motion and the trial court's order depend entirely on the allegation and evidence that Unifund obtained knowledge of Villa's bankruptcy by accessing and obtaining TransUnion's credit file on him. Unifund, however, denied having knowledge of Villa's bankruptcy filing and discharge. The only evidence offered at the sanctions hearing as to Unifund's having obtained or accessed Villa's credit file was a document Villa offered as a TransUnion Credit Report. Unifund objected to the document, in part, on the basis that it was hearsay. The proof as to the document, its validity, and its contents consisted entirely of Villa's testimony. He testified that he received the proffered document in response to a request he made to TransUnion. There was no evidence as to whom or what TransUnion was, how it operated, how it obtained information, its procedures for responding to requests for credit reports, how the report was generated, whether the report offered was complete or partial, or whether the same type of reports were furnished to all persons and entities that made inquiry. The trial court overruled Unifund's objections and admitted the document.

The court's findings that Unifund CCR Partners subjectively knew of Villa's bankruptcy and that it became aware of the bankruptcy before suit was filed rely entirely on the truth of the statements in the TransUnion document. But the document was hearsay, was timely objected to, and

should have been excluded from evidence. *See Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 909 (Tex. 2004). Absent the inadmissible document, there is no evidence to support Villa's motion and the trial court's findings and conclusions that Unifund violated the provisions of Chapter 10. Without evidence to support Villa's motion and the trial court's findings, the trial court abused its discretion by assessing sanctions against Unifund. *See In re Barber*, 982 S.W.2d at 366.

Our holding that there is no evidence to support the trial court's assessment of sanctions is dispositive of the appeal. We need not and do not address Unifund's additional contentions that the sanctions imposed were outside the scope of remedies authorized by section 10.004(c) of the Civil Practice and Remedies Code and that the sanctions for inconvenience and harassment are unjust and excessive.

Pursuant to rule 59.1 of the Texas Rules of Appellate Procedure, we grant the petition for review and without hearing oral argument, we reverse the court of appeals' judgment affirming the award of $18,685.00 to Villa as sanctions and render judgment that Villa take nothing on his claim for costs for inconvenience and harassment.[3]

OPINION DELIVERED: October 23, 2009

[3] The trial court's order awarding attorney's fees was not challenged on appeal.

IN THE SUPREME COURT OF TEXAS

NO. 08-1044

IN THE MATTER OF B.W.

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

JUSTICE O'NEILL delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE GUZMAN joined.

JUSTICE WAINWRIGHT filed a dissenting opinion, in which JUSTICE JOHNSON and JUSTICE WILLETT joined.

In this case we must decide whether the Legislature, by its wholesale incorporation of Penal Code offenses into the juvenile justice provisions of the Family Code, intended to permit prosecution of a thirteen-year-old child for prostitution considering its specific pronouncement that a child under fourteen is legally incapable of consenting to sex with an adult. We conclude that transforming a child victim of adult sexual exploitation into a juvenile offender was not the Legislature's intent, and reverse the court of appeals' judgment.

I. Background

B.W. waved over an undercover police officer who was driving by in an unmarked car and offered to engage in oral sex with him for twenty dollars. The officer agreed. When B.W. entered the officer's car, he arrested her for the offense of prostitution. B.W. was originally charged in

criminal court, but when a background check revealed that she was only thirteen the case was dismissed. Charges were then refiled under the Family Code, which governs juvenile proceedings. TEX. FAM. CODE §§ 51.02(2), .04(a).

Before trial, a State psychologist examined B.W. During the examination, B.W. related a history of sexual and physical abuse. The psychologist concluded that B.W. was "emotionally impoverished, discouraged and dependent." The psychologist noted that the report should be viewed with caution given that some of B.W.'s statements were inconsistent with probation records, but expressed concern over B.W.'s untreated substance abuse and her report that she had been living, and having sex, with her thirty-two-year-old "boyfriend" for the last year and a half.

At trial, pursuant to an agreed recommendation, B.W. pleaded true to the allegation that she had "knowingly agree[d] to engage in sexual conduct . . . for a fee." Following her plea, the trial court found that B.W. had engaged in delinquent conduct constituting a Class B misdemeanor offense of prostitution as defined by section 43.02 of the Penal Code, and placed her on probation for eighteen months. The trial court denied B.W.'s motion for new trial and granted her permission to appeal. The court of appeals affirmed. 274 S.W.3d 179. We granted B.W.'s petition for review to consider the challenges she raises to her adjudication of delinquency for the offense of prostitution.

II. Discussion

The statute proscribing prostitution is found in the Texas Penal Code, which does not generally apply to juveniles under the age of seventeen. *See* TEX. PENAL CODE § 8.07. Instead, the

Legislature made a blanket adoption of the Penal Code into the Texas Family Code, which provides that the juvenile justice courts have jurisdiction in all cases involving delinquent conduct of children between the ages of ten and seventeen. TEX. FAM. CODE §§ 51.02(2), .04(a). The Family Code defines "[d]elinquent conduct" as "conduct, other than a traffic offense, that violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail." *Id.* § 51.03(a)(1). One of the purposes of placing such jurisdiction in civil courts under the Family Code is to "provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions." TEX. FAM. CODE § 51.01(3).

The offense of prostitution is punishable by confinement in jail, *see* TEX. PENAL CODE §§ 12.22(2), 43.02(a), and therefore falls under the Family Code's definition of "delinquent conduct." Under the Texas Penal Code, a person commits prostitution if the person "knowingly offers to engage, agrees to engage, or engages in sexual conduct for a fee." TEX. PENAL CODE § 43.02(a)(1). "A person acts knowingly, or with knowledge, with respect to the nature of his conduct . . . when he is aware of the nature of his conduct." TEX. PENAL CODE § 6.03(b). Thus, "knowing agree[ment]" suggests agreement with an understanding of the nature of what one is agreeing to do. B.W. contends the Legislature cannot have intended to apply the offense of prostitution to children under fourteen because children below that age cannot legally consent to sex. *See* TEX. PENAL CODE § 22.021 (criminalizing sex with a child irrespective of consent). The State, on the other hand, claims that consent by a child under the age of fourteen is a shifting concept designed to protect victims of sex crimes rather than juvenile offenders like B.W. We agree with B.W.

The notion that an underage child cannot legally consent to sex is of longstanding origin and derives from the common law. *See, e.g., State v. Hazelton*, 915 A.2d 224, 233-34 (Vt. 2006) ("The rule that an underage child cannot consent to sex need not derive from statute, as suggested by the dissent, but is a part of common law"); *Payne v. Commonwealth*, 623 S.W.2d 867, 875 (Ky. 1981) ("The conclusive presumption of inability to consent is not of recent vintage. It has been with us at least from the reign of Queen Elizabeth of England (1558-1603)."); *see also* MODEL PENAL CODE § 213.1, Comment at 276 (1980); WILLIAM BLACKSTONE, 4 COMMENTARIES *212. While at the time of Blackstone this age was set at ten, every state in the United States has raised this age by statute. *See Payne*, 623 S.W. 2d at 875 ("Coming to this country as a part of our common law, the doctrine has universally been spoken to by the state legislative bodies."); MODEL PENAL CODE § 213.1, Comment at 324 ("[N]o state continues the common-law rule of 10 years"). Texas follows the majority of states which have established a two-step scheme that differentiates between sex with a younger child and sexual relations with an older teen. *See id.* at 325. (citations omitted). *See also* TEX. PENAL CODE §§ 22.011, .021. The rule's underlying rationale is that younger children lack the capacity to appreciate the significance or the consequences of agreeing to sex, and thus cannot give meaningful consent. *See, e.g.*, *Hazelton*, 915 A.2d at 234; *Collins v. State*, 691 So.2d 918, 924 (Miss. 1997); *Coates v. State*, 7 S.W. 304, 304–06 (Ark. 1888); *see also Anschicks v. State*, 6 Tex. App. 524, 535 (Tex. Ct. App. 1879); *cf. Roper v. Simmons*, 543 U.S . 551, 569 (2005) (holding that as compared to adults, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility'. . . [they] are more vulnerable or susceptible to negative influences and outside

pressures, including peer pressure") (quoting *Johnson v. Tex.*, 509 U.S. 350, 367 (1993)); *Graham v. Florida,* ___ U.S. ___ (2010) (confirming the Court's observations in *Roper* about the difference between juvenile and adult minds).

Our Legislature has incorporated this rationale into the Texas Penal Code. In enacting the sexual assault statute, section 22.011 of the Texas Penal Code, the Legislature made it a crime to intentionally or knowingly have non-consensual sex with an adult, or sex under any circumstances with a child (a person under seventeen). TEX. PENAL CODE § 22.011. There are defenses available if the child is at least fourteen, such as when the accused is no more than three years older than the child, or when the accused is the child's spouse. TEX. PENAL CODE § 22.011(e). In those instances, the child's subjective agreement or assent becomes the main issue in determining whether or not a crime has been committed. *Id.* There are no such defenses, however, when the child is under fourteen, irrespective of the child's purported willingness. TEX. PENAL CODE § 22.011, .021. Thus, in Texas, "a child under fourteen cannot legally consent to sex." *May v. State*, 919 S.W.2d 422, 424 (Tex. Crim. App. 1996).

The Legislature has passed a number of statutes providing greater protection against sexual exploitation for underage children. For example, promotion of prostitution involving an adult, without the use of force, threat, or fraud, is a misdemeanor. Compelling a child under eighteen to commit prostitution, however, is treated as a crime equivalent to using "force, threat, or fraud" to compel an adult to commit prostitution, and is a second-degree felony. TEX. PENAL CODE §§ 43.03,

.05.[1] Similarly, sexual assault of a child under fourteen is considered "aggravated sexual assault" and is subject to the same consequences as the rape of an adult involving serious bodily injury or other aggravating circumstances. TEX. PENAL CODE §§ 22.011, .021; *see also* TEX. PENAL CODE § 43.25(e) (imposing harsher penalties for inducing a child under fourteen to engage in sexual conduct or performance); TEX. PENAL CODE § 20A.02 (imposing harsher penalties for trafficking a child under eighteen for purposes of compelling prostitution or sexual performance). In passing these statutes, the Legislature has expressed both the extreme importance of protecting children from sexual exploitation, and the awareness that children are more vulnerable to exploitation by others even in the absence of explicit threats or fraud.

It is difficult to reconcile the Legislature's recognition of the special vulnerability of children, and its passage of laws for their protection, with an intent to find that children under fourteen understand the nature and consequences of their conduct when they agree to commit a sex act for money, or to consider children quasi-criminal offenders guilty of an act that necessarily involves their own sexual exploitation. In the context of these laws, and given the blanket adoption of the Penal Code into the Family Code, it is far more likely that the Legislature intended to punish those

[1] The dissent argues that because Penal Code section 43.05 makes it a crime for a person to cause a child younger than eighteen to commit prostitution, the Legislature must have envisioned the prosecution of children under the age of fourteen for prostitution. But section 43.05 applies to children who have been caused to commit prostitution whether they are six or sixteen. Furthermore, it is well established that a person may be prosecuted for compelling prostitution and other crimes of sexual exploitation even though the child herself is not prosecuted for prostitution. *See Waggoner v. State*, 897 S.W.2d 510, 513 (Tex. App.—Austin 1995, no pet.) (stating "[t]he actual commission of the offense of prostitution is not a prerequisite to the commission of the offense of compelling prostitution") (citing *Davis v. State*, 635 S.W.2d 737, 739 (Tex. Crim. App. 1982)). That a child under fourteen may be forced to engage in sex for a fee does not mean that the child may be prosecuted for that act. The fact that the State provides for the punishment of those who sexually exploit children does not mean that the State intends to punish the exploited children as well.

who sexually exploit children rather than subject child victims under the age of fourteen to prosecution. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). Given the longstanding rule that children under fourteen lack the capacity to understand the significance of agreeing to sex, it is difficult to see how a child's agreement could reach the "knowingly" standard the statute requires. Because a thirteen-year-old child cannot consent to sex as a matter of law, we conclude B.W. cannot be prosecuted as a prostitute under section 43.02 of the Penal Code. *See Duby v. State*, 735 S.W.2d 555, 557 (Tex. App.—Texarkana 1987, pet. ref'd) (holding that the minor victim of incest is not an accomplice since she is incapable of giving consent as a matter of law); *but cf. Bolin v. State*, 505 S.W.2d 912, 913 (Tex. Crim. App. 1974) (holding that the father could not be convicted of incest based solely upon uncorroborated testimony of thirteen-year-old prosecutrix who, under longstanding caselaw, was considered an accomplice witness in the absence of threats, force, fraud, or undue influence).[2]

The dissent contends Texas' statutory rape statutes do not render all minors under the age of fourteen incapable of consenting to sex with an adult as a matter of law. In the dissent's view, the statutes merely eliminate consent as an affirmative defense to the offense of child rape. But the very purpose of the Legislature's abrogation of the consent defense was its determination that underage

[2] Although *Bolin* has never been overruled, it is of questionable precedence. *Bolin* focused mainly on the question whether someone can be convicted based upon uncorroborated testimony and concentrated on whether the act was the result of force, threats, fraud, or undue influence. Remarkably, the court found that the intercourse was consensual despite the fact that the underage prosecutrix told her father "on more than one occasion" that "she did not want to do it." *Id.* at 913. Tellingly, the cases decided after *Duby* have either relied on the holding in *Duby*, *Reid v. State*, 2005 Tex. App. LEXIS 3072 (Tex. App.—Fort Worth April 21, 2005, pet. ref'd), or cited it with approval. *McCrory v. State*, 854 S.W.2d 262 (Tex. App.—Eastland 1993, pet. ref'd).

children cannot meaningfully consent to sex. While no statute explicitly states that children under fourteen are unable to provide consent for all purposes, the inability of children to consent to sex as a matter of law is both part of the common law and a necessary inference from section 22.021 and the other statutes dealing with sexual exploitation of a child. *See* TEX. PENAL CODE §§ 22.011, 43.05; *Helena Chem. Co.*, 47 S.W.3d at 493 (noting that we can consider the common law and laws on the same or similar subjects in determining legislative intent).

The dissent concedes that children below a certain age lack the mental capacity to consent to certain actions, and that the law reflects that inability to consent. Nonetheless, the dissenting justices would themselves allow children as young as ten to be prosecuted for prostitution. *See* TEX. FAM. CODE §§ 51.02(2)(A),.04(a). By contrast, our conclusion that children under a certain age lack the legal capacity to consent to sex rests on the legislative policy determination expressed in the statutory rape statute that children under the age of fourteen are legally incapable of consenting to sex. *See* TEX. PENAL CODE §§ 22.011, .021.

Courts around the country have long recognized that children lack the experience and mental capacity to appreciate the nature and consequences of sex, and therefore cannot knowingly consent to sex. *See*, *e.g., Hazelton*, 915 A.2d at 234; *Collins*, 691 So. 2d at 924; *Jones v. State*, 640 So. 2d 1084, 1089 (Fla. 1994) (Kogan, J., concurring); *Payne*, 623 S.W.2d at 875; *Goodrow v. Perrin*, 403 A.2d 864, 866 (N.H. 1979). *Cf. Roper,* 543 U.S. at 569-70; *Graham*, ___ U.S. ___ (discussing the reduced mental capacity of minors as compared to adults). As Justice Kogan noted in his concurrence in *Jones v. State*:

> I cannot believe, for example, that any responsible adult seriously thinks a six-year-old legally could consent to sex. Children of that age always lack the experience and mental capacity to understand the harm that may flow from decisions of this type. They may unwittingly "consent" to something that can ruin their lives, jeopardize their health, or cause emotional scars that will never leave them. I think most concerned adults and experts in the field would agree that this lack of prudent foresight continues in youths well into the teen years.

640 So.2d at 1089. By unequivocally removing the defense of consent to sexual assault, the Texas Legislature has drawn this line at the age of fourteen.

Nor is this the only area in which the law recognizes that minors of a certain age have a reduced or nonexistent capacity to consent, no matter their actual agreement or capacity. A minor under the age of sixteen cannot consent to be married without a court order finding the marriage to be in the child's best interest, no matter how mature the child appears or how earnestly the child might mouth the words "I do." *See* TEX. FAM. CODE § 2.103. Similarly, a minor's contracts are voidable at the minor's election, even if the minor knew what he or she was doing and innocent people are prejudiced. *See Dairyland County Mut. Ins. Co. v. Roman*, 498 S.W.2d 154, 158 (Tex. 1973). When it comes to a child under fourteen consenting to sex, the Legislature has made it clear that the child's consent is void rather than voidable. *See May*, 919 S.W.2d at 424; TEX. PENAL CODE § 22.021. To engage in an individualized determination of a child's capacity to knowingly consent to sex is contrary to the Legislature's pronouncement that all minors under fourteen lack the capacity to give that consent. The Legislature closed this door with regard to minors over the age of fourteen when it abolished the defense of promiscuity to sexual assault and indecency with a child, *see* Act of May 29, 1993, 73d Leg., ch. 900, 1993 Tex. Gen. Laws 3616, 3616-18, and has never opened this

door with regard to children under the age of fourteen. *See* Act of 1983, 68th Leg., ch. 977, 1983 Tex. Gen. Laws 5311, 5315 (current version TEX. PENAL CODE § 22.021(a)(2)(b))(explicitly stating that the promiscuity defense does not apply to children under fourteen).

The State posits a number of arguments in an attempt to show that juveniles may engage in consensual sex in certain circumstances, including the fact that children over fourteen may legally engage in sex with a person within three years of their age, and that children may legally engage in sex with a spouse. However, most of these arguments have to do with children aged fourteen and over, and do not apply in this case where the defendant is under fourteen.[3]

Additionally, while the Code of Criminal Procedure does provide certain exemptions to mandatory sex-offender registration for offenders under the age of nineteen when the victim was over thirteen and the conviction was based solely on age, this speaks more to the treatment of teenage sex offenders than to the ability of a child under the age of fourteen to legally consent to sex. TEX. CODE CRIM. PROC. art. 42.017, 62.301(a),(b). While both the dissent and the State argue that this demonstrates that a minor under fourteen may consent to sex, they have confused the ability to factually agree to sex, which can have legal relevance in the treatment of the offender, with the legal

[3] The State argues that an adult may legally engage in sexual intercourse with a thirteen-year-old spouse. In fact, the statute is unclear. While consensual sex with a minor spouse is a defense to sexual abuse under 22.011 of the Penal Code, being the spouse of the child is not a defense to section 22.021 which governs sex with children under fourteen. *See* TEX. PENAL CODE §§ 22.011, 22.021. Since children under fourteen lack the capacity to legally consent to marriage (without a court order), the question of whether the spousal defense applies to a child under fourteen has no bearing on a child-under-fourteen's ability to legally consent to sex in general.

capacity to consent, which is necessary to find that a person "knowingly agreed" to engage in sexual conduct for a fee.

We do not agree that our decision today infringes on prosecutorial discretion. The Legislature has determined that children thirteen and younger cannot consent to sex. This necessitates the holding that these children cannot be tried for prostitution. If this holding infringes on the prosecutor's discretion, then so too does every decision upholding a legislative or constitutional limitation on the ability of a prosecutor to bring a case.

We also reject the State's argument that exempting children under fourteen from prosecution for prostitution will somehow undermine the State's ability to protect children and encourage the sexual exploitation of minors. The State claims that under our interpretation, an adult male who agreed to pay a thirteen-year-old girl for sex could claim that he did not commit the offense of prostitution because the sex would not have been consensual. But section 43.02 expressly allows for the prosecution of a person who "solicits another in a public place to engage with him in sexual conduct for hire," regardless of the solicitee's consent. TEX. PENAL CODE § 43.02(a)(2). Similarly, pimps and other sexual exploiters of children may still be prosecuted for compelling prostitution and other crimes of sexual exploitation even though the child herself may not be prosecuted for prostitution. *See Waggoner v. State*, 897 S.W.2d at 513 (stating "[t]he actual commission of the offense of prostitution is not a prerequisite to the commission of the offense of compelling prostitution") (citing *Davis v. State*, 635 S.W.2d 737, 739 (Tex. Crim. App. 1982)); TEX. PENAL CODE § 43.25.

Similarly unavailing is the State's argument that our reading of the law will encourage pimps to seek out young children because they would be immune from criminal liability. The sexual exploitation of children under fourteen is already a crime, *see, e.g.*, TEX. PENAL CODE §§ 22.011, 22.021, 43.05, 43.25. It is unclear how the prosecution of a child for prostitution would serve as any further deterrent, especially in the case of children on the streets. *See Roper*, 543 U.S. at 571 ("[T]he same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.") Most of these children are controlled by their pimps through a combination of emotional and financial security mixed with violence and drugs, and are unaware that the treatment they are receiving is against the law. *See* EVA J. KLAIN, PROSTITUTION OF CHILDREN AND CHILD-SEX TOURISM: AN ANALYSIS OF DOMESTIC AND INTERNATIONAL RESPONSES (Nat'l Center for Missing & Exploited Children, 1999) *available at* http://www.hawaii.edu/hivandaids/Prostitution%20of%20Children%20and%20Child%20Sex%20Tourism.pdf; REPORT ON LEGISLATION IMPACTING CHILDREN: 81ST LEGISLATURE (Children at Risk Public Policy and Law Center, 2009).

The State has broad power to protect children from sexual exploitation without needing to resort to charging those children with prostitution and branding them offenders. Section 261.101 of the Family Code requires a person to report to a law enforcement agency or the Department of Family and Protective Services if there is cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect. TEX. FAM. CODE § 261.101. The department or agency must then conduct an investigation during which the investigating agency may

take appropriate steps to provide for the child's temporary care and protection. *See id*. §§ 261.301, 261.302, 262.001-.309.

The dissent suggests that our decision bars the State from providing treatment, confinement, probation, counseling or any other rehabilitation, implying that the juvenile justice system is the only portal to such services for children like B.W. That is simply not true. Even absent a report or investigation, a law enforcement officer may take possession of a child without a court order if a person of ordinary prudence and caution would believe there is an immediate danger to the physical health or safety of the child, or that the child has been the victim of sexual abuse. Id. § 262.104(a)(1) & (3). Presumably a thirteen-year-old girl walking the streets offering sex for money would meet this standard. The State may also seek a court order to take possession of a child to protect the child's health and safety. *See id*. § 262.001. Thus, the suggestion that lack of criminal prosecution would somehow mean the State would have no option but to put the exploited child back on the streets is entirely without merit. While in CPS custody, a child has access to a full range of counseling and treatment options, including 24-hour supervision and one-on-one monitoring. *See* Service Levels for Foster Care at http://www.dfps.state.tx.us/Child_Protection/Foster_Care/Care_Levels.asp. CPS provides these services within a purely rehabilitative setting, and without the permanent stigma associated with being adjudged a prostitute. Furthermore, while the trial court in this particular case may have exercised good judgment in adjudicating treatment and rehabilitation, there is no guarantee that a another judge would do the same, nor would the dissent's opinion

protect a thirteen-year-old, or even a ten-year-old, from being subjected to a harsh and punitive sentence.

The dissent emphasizes B.W.'s "long and sad history of delinquent behavior," presumably suggesting that her bad behavior is indicative of her mental capacity to commit this crime. The United States Supreme Court has recognized that juveniles "are more vulnerable or susceptible to negative influences and outside pressures," and that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 569, 573 (internal citations omitted). Notwithstanding that fact, B.W.'s behavior is sadly in keeping with many children who have been abused or neglected at home. This dysfunctional family life leads to problems with discipline and fighting, and often results in the child running away, just as B.W. did. *See* KLAIN, PROSTITUTION OF CHILDREN, 3. These children are also the ones most at risk of being victimized by pimps and exploited as prostitutes, and are the most in need of serious treatment. *See id.* at 3–4. If B.W.'s prior CPS temporary placement was inadequate to treat her, then that placement should be reviewed and her level of care increased.

Children are the victims, not the perpetrators, of child prostitution. Children do not freely choose a life of prostitution, and experts have described in detail the extent to which they are manipulated and controlled by their exploiters. *See, e.g.,* FEMALE JUVENILE PROSTITUTION: PROBLEM AND RESPONSE (Nat'l Center for Missing & Exploited Children, 2d Ed. 2002); KLAIN, PROSTITUTION OF CHILDREN, 3–5. Courts, legislatures, and psychologists around the country have

recognized that children of a certain age lack the mental capacity to understand the nature and consequences of sex, or to express meaningful consent in these matters. *See, e.g.*, *Hazelton*, 915 A.2d at 234; *Collins*, 691 So.2d at 924; *Jones*, 640 So.2d at 1089; *Payne*, 623 S.W.2d 867; *Goodrow*, 119 N.H. 483. *See also*, Roland C. Summitt, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983). Drawing a distinction between consensual sex with a child and exploitation simply blinks reality.

Our Legislature has passed laws recognizing the vulnerability of children to sexual exploitation, including an absolute prohibition of legal consent for children under fourteen. In the absence of a clear indication that the Legislature intended to subject children under fourteen to prosecution for prostitution when they lack the capacity to consent to sex as a matter of law, we hold that a child under the age of fourteen may not be charged with that offense. Accordingly, we reverse the court of appeals' judgment, and remand the case to the trial court for an appropriate disposition.

_____

Harriet O'Neill
Justice

OPINION DELIVERED: June 18, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-1044

IN THE MATTER OF B.W.

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

JUSTICE WAINWRIGHT, joined by JUSTICE JOHNSON and JUSTICE WILLETT, dissenting.

The Court holds that a thirteen-year-old minor cannot be adjudicated under the Juvenile Justice Code for prostitution, despite a clear statutory charge to address such distressing conduct by treatment and rehabilitation of the minor and protection of the public through the juvenile justice system. The text of the Juvenile Justice and Penal Codes does not support the Court's result. The language of the prostitution statute includes thirteen-year-olds, and the Juvenile Justice Code makes them subject to juvenile delinquency proceedings for committing that offense; and neither the Court nor B.W. point to any language in the Juvenile Justice or Penal Codes that changes the prostitution statute to mean something other than what it says. The Court attempts to justify this infirmity through a narrow exception found in a criminal statute unrelated to the provision proscribing prostitution, even though the circumstances of this case support the juvenile court order of rehabilitation and treatment. The minor's probation report states that B.W. was convicted "for Assault Causes Bodily Injury" and "for Possession of a Controlled Substance." She also pulled a knife on her school principal, threatening to kill him, and seriously assaulted a fellow resident of a

group home. Her caseworker explained that she is "violent" and a "chronic runaway." Placed in foster care by Child Protective Services, she ran away from a group home in Harris County the day after her placement there and was missing for over a year before an undercover police officer arrested her for soliciting sex for a fee. After B.W. pled true to commission of prostitution, the juvenile court judge found that she had engaged in delinquent conduct (prostitution) and that rehabilitation was in her best interest and necessary to protect the public. The court ordered probation, treatment, and counseling for the wayward teen under the auspices of the Harris County Juvenile Probation Department, and the court of appeals affirmed the ruling. This Court, however, overturns the treatment order and bars juvenile courts from ordering treatment, confinement, probation, counseling, or any other rehabilitation under the Juvenile Justice Code for minors of age thirteen who commit the charged sex crime.

The misguided result of the Court's attempt to help has turned the juvenile justice system's rehabilitative objective on its head. The Court sends B.W. back to CPS and the temporary placement that has already proven, in her case, inadequate to treat her. The Court also infringes prosecutorial discretion in which district attorneys exercise judgment in deciding whether to bring teenage offenders to the juvenile justice system for treatment or to decline those proceedings in favor of other options such as CPS. Announcing this change in state policy, the Court forgets that "in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Roper v. Simmons*, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting). The Legislature established the juvenile justice system for these types of circumstances and has not indicated an intent to depart from that system when a minor is thirteen. And the Court blanketly

decides that the juvenile justice system is never available to rehabilitate thirteen-year-olds who commit sex crimes because it proclaims that all thirteen-year-old teens are legally incapable of consenting to sex.

I. Background

The Court provides a short factual background, but there are additional pertinent facts that evidence B.W.'s need for the treatment and rehabilitation that the juvenile court ordered. Petitioner B.W. was born in April 1993 and has a long and sad history of delinquent behavior. In 2004, the State placed B.W. in CPS custody. Described by her caseworker as "violent" and a "chronic runaway," B.W. was transferred among three CPS placements in less than a year. In October 2005, she ran away from her third placement at a group home facility. B.W. was missing until January 12, 2007, when an undercover police officer arrested her for criminal prostitution—offering to engage in oral sex with him for twenty dollars. B.W. claimed to be nineteen years old, and the authorities mistook her for an adult. Upon discovering she was thirteen, the State dismissed the case against her in the adult, criminal system and re-filed it in the civil, juvenile system, in which adjudications focus more on rehabilitation of delinquency rather than prosecution for crimes. *See* TEX. FAM. CODE § 51.13(a); *see also Hidalgo v. State*, 983 S.W.2d 746, 754 (Tex. Crim. App. 1999) ("The philosophy was that, whenever possible, children should be protected and rehabilitated rather than subjected to the harshness of the criminal system because children, all children are worth redeeming." (citations and quotations omitted)).

B.W.'s probation report and psychological evaluation were admitted into evidence during her juvenile proceedings. Her CPS caseworker warned in the probation report that B.W. "will

run[]away if returned to CPS custody." The caseworker described two particularly disturbing, violent incidents: one in which B.W. pulled a knife on her principal and threatened to kill him, and another where she repeatedly bashed a classmate's head into the ground until it was bloody. Her probation report also revealed a history of legal violations: evading arrest, running away, disrupting school, assaulting another person causing bodily injury, and possessing a controlled substance.

B.W. met with a state psychologist after her arrest. During discussions with that psychologist, she maintained that she was being mistaken for someone else. She did, however, chronicle a troubled past that included living with a thirty-two-year-old man, untreated substance abuse problems, allegations of abuse, and academic difficulties. The psychologist's report concluded that B.W. is a troubled minor who has encountered much adversity at a young age, but also stressed that the veracity of B.W.'s report should be "viewed with caution given that numerous statements [she] made [were] inconsistent with probation records."

B.W. pled "true" to allegations of prostitution in the juvenile court, and the juvenile judge concluded that B.W. engaged in delinquent conduct and ordered, among other things, that B.W. (1) was in need of rehabilitation, (2) should be placed in the Chief Juvenile Probation Officer's custody, and (3) should participate in individual counseling and have HIV Awareness/Drug Assessment with an educational specialist.[1] The juvenile judge denied B.W.'s motion for new trial, but granted her permission to appeal. The court of appeals affirmed.

[1] Prior to the proceedings, a placement committee met and recommended two treatment facilities for B.W., one psychiatric and one geared towards children.

II. Discussion

B.W. requests that this Court (1) hold that minors under fourteen years old cannot consent to sexual conduct as a matter of law and, therefore, cannot be adjudicated in the juvenile justice system for engaging in conduct constituting prostitution; and (2) determine that failure to prosecute her "boyfriend" and grant her immunity in exchange for testimony against him violated her right to due process. The Court holds that B.W., and no thirteen-year-old, may ever be brought into the juvenile justice system for committing prostitution under the current Juvenile Justice Code. It asserts that the Legislature determined that thirteen-year-old minors cannot legally consent to sex, despite the fact that nowhere in the Juvenile Justice or Penal Codes has the Legislature said so. To be clear, children below a certain age probably do not have the mental capacity and the law would deem them unable to consent to certain actions, but that is not the case here. The Juvenile Justice Code expressly provides that delinquent conduct of thirteen-year-old teenagers is within the exclusive jurisdiction of the juvenile court. TEX. FAM. CODE § 51.04(a). This case concerns the legal capacity of a thirteen-year-old teenager.

A. Juvenile System Civil Adjudication of Teenagers for Prostitution Is a Policy Decision Properly Left to the Legislature.

B.W. was adjudicated delinquent under the Juvenile Justice Code for committing the offense of prostitution. She does not contest any of the facts constituting the offense, and, in fact, she stipulated to them in the juvenile court. Nor does she argue that any language in the Juvenile Justice Code provides an exemption to civil adjudication of minors aged thirteen in the juvenile system for prostitution. Instead, she contends that adjudicating her for prostitution would lead to an absurd

result because thirteen-year-old minors cannot legally consent to sex in cases of statutory rape (a crime proscribed in the sexual assault statute), and therefore, the Legislature could not have possibly intended that a minor her age be adjudicated delinquent in the juvenile justice system for other sex offenses, like prostitution. Contrary to B.W.'s allegations, this is a type of conduct and category of delinquents the Legislature decided to permit treatment and rehabilitation through the Juvenile Justice Code.

The text discloses legislative intent, and courts should apply statutory language literally unless enforcing the language of the statute as written would produce absurd results. *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009); *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991); *see also McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). Instead of subjecting minors to criminal prosecution, the Legislature created the juvenile justice system. *See* TEX. PENAL CODE § 8.07 (explaining that the Penal Code is not generally applicable to minors under seventeen); TEX. FAM. CODE § 51.02(2) (explaining that a minor ten or older and younger than seventeen years old is subject to delinquency proceedings under the Family Code). Title three of the Family Code is the Juvenile Justice Code, and it vests juvenile courts with exclusive, original, civil jurisdiction to adjudicate minors so they may be appropriately treated and rehabilitated and the public protected. *See id.* §§ 51.01(2), .04(a). A juvenile may be adjudicated in the juvenile system for "delinquent conduct," defined to include "conduct, other than a traffic offense, that violates a penal law of this state . . . punishable by imprisonment or by confinement in jail." *Id.* § 51.03.

Prostitution is a crime that violates Texas penal law and is punishable by confinement in jail. *See* TEX. PENAL CODE § 43.02(c). Commission of prostitution is thus delinquent conduct for which a minor may be adjudicated in the juvenile system. "A person commits [prostitution] if he knowingly: (1) offers to engage, agrees to engage, or engages in sexual conduct for a fee; or (2) solicits another in a public place to engage with him in sexual conduct for hire." *Id.* § 43.02(a). "A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result." *Id.* § 6.03(b). Thus, any "person" can commit prostitution if he or she does so "knowingly." A "person" under the Penal Code "means an individual, corporation, or association." *Id.* § 1.07(a)(38). A "child" under the Juvenile Justice Code includes "any person" who is "ten years of age or older" and under seventeen. TEX. FAM. CODE § 51.02(2). Thus, the age range of persons subject to delinquency proceedings for violating the prostitution statute includes teenagers like B.W. Neither B.W. nor the Court dispute that teenagers are persons under the Juvenile Justice and Penal Codes. On her own admission, the juvenile court adjudicated B.W. delinquent for the offense of prostitution.

But the Court takes the position that B.W. cannot be charged with prostitution because, as a thirteen-year-old minor, she could not legally consent to sex. The Legislature proscribed sex with a minor under seventeen years old, in the sexual assault statute. TEX. PENAL CODE § 22.011(a)(2). A minor's consent is relevant to provide a defense only when: (1) the actor and minor were married at the time of the offense; or (2) the actor was no more than three years older than the minor who is

at least fourteen years old. *See id.* § 22.011(e). As pointed out by the Court, "[t]here are no such *defenses* . . . when the child is under fourteen, irrespective of the child's purported willingness." ___ S.W.3d ___ (Tex. 2010) (emphasis added). The Court acknowledges that a fourteen-year-old may be adjudicated delinquent for prostitution, but asserts that a thirteen-year-old cannot because of the absence of a consent defense in the statutory rape statute. However, the lack of a consent defense to statutory rape does not change the prostitution statute.

B. There Is No Statutory Language Supporting the Court's Reasoning.

The Court's conclusion that a thirteen-year-old cannot commit a sex crime is based on several analytical flaws. Foremost, there is no language in either the Juvenile Justice Code or the Penal Code that supports the Court's conclusion, as both it and B.W. admit. In fact, in a post-submission letter, B.W.'s counsel candidly states, "During my rebuttal argument, Justice Hecht pointed out that the Texas statutes regarding sexual assault . . . do not expressly state that a child under 14 is legally incapable of consenting to sex. I responded that the statute 'specifically' says that a sexual assault on a child is without consent if the child is under 14." B.W.'s counsel explains in her post-submission filing that she "should have clarified" that her conclusion is an inference from Penal Code provisions, and that there is no specific language indicating that in the Code. The Court concedes that its conclusion that the inability of minors to consent to sex as a matter of law is only an "inference from section 22.011 and the other statutes dealing with sexual exploitation of a minor" and that "no statute explicitly states that children under fourteen are unable to provide consent for all purposes." ___ S.W.3d ___. Later in the opinion, the Court claims the Legislature made a "pronouncement that all minors under fourteen years lack the capacity to give that consent." *Id.* at

___. Certainly, the Legislature could have made such a specific pronouncement, but nowhere in the Penal Code, Juvenile Justice Code, or any other statute did it do so. In other words, the Court reasons that B.W. cannot legally be adjudicated for prostitution because any consent on her part to sex would be legally ineffective as a defense to the *separate* crime of statutory rape.

Specifically, section 22.011 of the Penal Code makes it a crime to intentionally or knowingly have intercourse with another person "without that person's consent." It makes that same conduct the crime of sexual assault against a minor, except "without that person's consent" is not provided as a defense for this offense against minors. TEX. PENAL CODE § 22.011(a)(2). The statutory rape provision criminalizes adult intercourse with minors. *Id.* § 22.011(a)(2) & (e). By excluding consideration of consent when the minor is under fourteen, the Legislature made sexual conduct in those circumstances a strict liability offense. *Id.* It is settled that an adult cannot prove or attempt to prove that the minor consented as a defense to statutory rape. *See May v. State*, 919 S.W.2d 422, 424 (Tex. Crim. App. 1996).

The Court takes this inference from the omission of four words in the section 22.011(a)(2) statutory rape statute and applies it to govern the section 43.02(a) prostitution statute. Citing *May* and the common law, the Court concludes that the inference from the four-word omission in section 22.011(a)(2) applies globally to the criminal and juvenile law. The Court misconstrues *May*. In that case, the Court of Criminal Appeals addressed whether a fourteen-year-old could consent to sex in a statutory rape prosecution at a time when promiscuity of the minor was a statutory defense. The Court recognized that the teen victim could, in fact, acquiesce, agree, or willingly participate in sexual conduct. 919 S.W.2d at 424. But, even if the teen did consent, "that consent is not given any

legal effect and provides no defense" for the strict liability offense of statutory rape under section 22.011(a)(2). *Id*. However, because of the existence of the promiscuity defense, the Court of Criminal Appeals held that the minor's consensual behavior was relevant to the case.[2] Thus, *May* recognizes that minors can, in fact, acquiesce in the proscribed conduct. That the promiscuity defense has been removed from the statute does not change the Court's recognition that teens may in fact consent. *May* explains that a minor's consent, absent the promiscuity provision, cannot be a defense to statutory rape. The statement in *May* that minors cannot legally consent to sex addresses the offense in that opinion—statutory rape. Importantly, the *May* decision does not give this Court license to overlay the absence of a consent defense to the section 22.011(a)(2) statutory rape offense across the entire Juvenile Justice and Penal Codes.

At another point, the Court offers a guess as to the Legislature's intent. The Court says it is "*far more likely*" that the Legislature would seek to punish those sexually exploiting minors than subject minors to "*prosecution*." ___ S.W.3d ___ (emphasis added). But we need not guess what the Legislature intended because we can read the Penal Code, which defines prostitution and statutory rape as separate crimes. And only one crime—statutory rape—indicates that a minor's consent is no defense to the charged offense.

The Court's logic that the absence of a consent defense to statutory rape precludes adjudication for the separate offense of prostitution is perplexing. This is not a case where an actor is attempting to assert consent as a defense to statutory rape. However, B.W. argued that the absence

[2] The Legislature abolished the promiscuity defense effective September 1, 1994. Act of May 24, 1973, 63rd Leg., R.S., ch. 399, 1973 Tex. Gen. Laws 883, 918, *repealed by* Act of 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3618.

of consent as a defense in the statutory rape statute is a *de jure defense* to civil juvenile adjudication for committing prostitution. The Court employs a unique approach to statutory interpretation by taking the bait and inferring that the Legislature would impose such an exemption throughout the entire Penal Code by omitting words in the sexual assault statute. The only affirmative indications of legislative intent the Court points to in support of its holding are instances where the Legislature passed statutes affording greater protection against sexual exploitation of underage minors. *See* ___ S.W.3d at ___. It points out that the Penal Code explicitly proscribes compelling prostitution of a minor under eighteen as a second-degree felony as an example of how it intended heightened protection of sexually exploited minors. TEX. PENAL CODE § 43.05(a)(2). It simply does not follow that heightened punishment for adults who exploit teenagers means that teenagers can never commit prostitution.

The Court says that the underpinning of my position is that "because Penal Code section 43.05 makes it a crime for a person to cause a child younger than eighteen to commit prostitution, the Legislature must have envisioned the prosecution of children under the age of fourteen for prostitution." ____ S.W.3d ___, n.1. This is not correct. The basis of my conclusion is not an inference implied from a different statute, as is the Court's; it is the expressed intent of the Legislature. The language of the prostitution statute includes thirteen-year-olds, and the Juvenile Justice Code makes them subject to juvenile delinquency proceedings for committing that offense; and neither the Court nor B.W. point to any language in the Juvenile Justice or Penal Codes that changes the prostitution statute to mean something other than what it says. The Court then argues that a criminal may be prosecuted for compelling sexual exploitation of a teenager even though the

teenager may not be adjudicated for prostitution. *Id.* Certainly, in the proper exercise of prosecutorial discretion,[3] this may be the case; but the Court's holding precludes exercise of that discretion in all cases involving thirteen-year-old teenagers involved in sex crimes.[4]

The language of section 43.05 of the Penal Code in fact provides that minors under eighteen years old may commit prostitution. It makes it a crime if any person knowingly "*causes* by any means a *child* younger than 18 years to *commit prostitution*, regardless of whether the actor knows the age of the child at the time the actor commits the offense." TEX. PENAL CODE § 43.05(a)(2) (emphasis added). The Legislature's use of the word "child," defined to be a person under age seventeen, certainly includes thirteen-year-olds. Yet the Court effectively limits the Legislature's definition to children ages fourteen to seventeen, without any language to support it.[5]

The Legislature easily could have created the exception that the Court proclaims today. It expressly excluded "traffic offense[s]" from the definition of delinquent conduct. TEX. FAM. CODE

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[3] The Juvenile Justice Code requires that a prosecutor review all juvenile referrals for "legal sufficiency and the desirability of prosecution." TEX. FAM. CODE § 53.012; *see also In re S.B.C.*, 805 S.W.2d 1, 6–7 (Tex. App.—Tyler 1991, writ denied) ("[S]o long as the prosecutor has probable cause to believe that an accused committed a violation of an offense defined by statute, the decision whether to prosecute, what charges to file or bring before a grand jury, or even what form the prosecution is to take, rests entirely within the prosecutor's discretion." (citing *Bordenkircher v. Hazes,* 434 U.S. 357, 364 (1978))).

[4] The Court states, "[t]hat a child under fourteen may be forced to engage in sex for a fee does not mean that the child may be prosecuted for that act." ___ S.W.3d ___, n.1. First, a juvenile adjudication is not a criminal prosecution. Second, the Court bases its conclusion, in part, on the presumption that B.W. was compelled to commit prostitution, which is neither the facts nor the issue presented to this Court.

[5] Indeed, the Court would only allow adjudication of minors older than fourteen years old. This is because the sexual assault statute permits consideration of a victim's consent if the minor is over fourteen. However, this consideration is limited to when the victim is between the ages of fourteen and seventeen and when the alleged perpetrator is within three years of the victim's age. *See* TEX. PENAL CODE § 22.011(e). According to the Court's logic, if B.W. had been arrested when she was fourteen (instead of thirteen) for soliciting sex in exchange for money from a person who was seventeen, she could be adjudicated for committing prostitution. But she could not be adjudicated for engaging in the same conduct if the person she solicits was eighteen (over three years older than B.W.).

§ 51.03(a)(1). All it needed to do was add a few words to section 51.03(a)(1) to compel the result the Court desires, but the Legislature did not exclude "prostitution" from the list of offenses constituting delinquent conduct. Alternatively, the Legislature could have limited application of the prostitution statute to persons fourteen and older, rather than any "person." TEX. PENAL CODE 43.02(a). Yet, it opted not to do so.

The Legislature has expressly recognized that teenagers can commit such offenses. A defendant may prove consent by a teenager in a statutory rape case to possibly avoid registering as a sex offender. The Texas Code of Criminal Procedure gives a trial court discretion to grant an exemption from the sex offender registration requirement if it appears, based on a preponderance of the evidence, that a victim aged thirteen or older consented to sexual contact with an offender nineteen or younger. TEX. CODE CRIM. PROC. art. 62.301; *cf.* TEX. PENAL CODE § 22.011(e)(2)(A) & (B). This is contrary to the Court's conclusion that, as a matter of law, a thirteen-year-old cannot legally consent to sex in a prostitution adjudication.

The Legislature makes social policy determinations, and has made one in this situation. The Juvenile Justice Code incorporates the offense of prostitution as proscribed in the Penal Code, and minors may be subject to civil adjudication for engaging in conduct that constitutes prostitution. Nothing in any of these statutes indicates that the Legislature could not have intended the law to be enforced as written, and the Court errs in declaring an "absurd result" where one does not exist.

C. The Common Law Does Not Support the Court's Conclusion.

The Court's opinion has shallow support in the common law. It cites William Blackstone for support, but Blackstone's Commentaries explain that twelve years is the "age of female

discretion by the common law."[6] WILLIAM BLACKSTONE, 4 COMMENTARIES *212. B.W. engaged in conduct constituting prostitution at the age of thirteen. She had reached the age of discretion under the common law. The Court further looks to find the common law primarily in cases from a few other states —Arkansas, Florida, Kentucky, Mississippi, New Hampshire, and Vermont.[7] But none of these cases addresses the question before us—whether the common law deems that no thirteen-year-old can, as a matter of law, commit prostitution. They all concern whether an adult can defend a charge of statutory rape by asserting that the child consented. And the Court's quotation to a concurrence in a Florida case focuses on a six-year-old child's capacity, a fact not at issue in that case and that says little or nothing about the issue involving the teenager before us. *See Jones v. State*, 640 So. 2d 1084, 1089 (Fla. 1994) (Kogan, J., concurring).[8]

The Court's opinion cites only four Texas cases, none written by this Court. One of the cases, *May v. State*, is discussed above. In *Anschicks v. State*, the court explained that the question of consent in the rape of a girl under the age of ten is "wholly immaterial" and then adds in dicta that a child under ten is "incapable of consent." 6 Tex. Ct. App. 524, 535 (Tex. Crim. App. 1879). While I agree with these propositions, the rape victim in that case was ten years old, and the court did not address the offense of prostitution. The case sheds little or no light on the central question

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[6] Sir Matthew Hale understood that the age of female discretion had generally been held to only extend to infants under ten. WILLIAM BLACKSTONE, 4 COMMENTARIES *212.

[7] The Court cites: *Coates v. State*, 7 S.W. 304, 306 (Ark. 1888); *Jones v. State*, 640 So. 2d 1084, 1089 (Fla. 1994) (Kogan, J., concurring); *Payne v. Commonwealth*, 623 S.W.2d 867, 875 (Ky. 1981); *Collins v. State*, 691 So.2d 918, 924 (Miss. 1997); *Goodrow v. Perrin*, 403 A.2d 864, 866 (N.H. 1979); *State v. Hazelton*, 915 A.2d 224, 233-34 (Vt. 2006).

[8] No rational person would argue that any six-year-old could consent to sex.

in this case. The other two cases concern incest, not prostitution, and the Court itself acknowledges that the second case is of "questionable precedence." *See Duby v. State*, 735 S.W.2d 555 (Tex. App.—Texarkana 1987, writ ref'd); *see also Bolin v. State*, 505 S.W.2d 912 (Tex. Crim. App. 1974).

In addition to the absence of any language in the Juvenile Justice and Penal Codes to support the Court's conclusion, the common law also provides scant support for its reasoning.

D. Juvenile System Rehabilitation, Not Criminal Penalties, Are Appropriate in This Case.

Notwithstanding the Court's use of the term "prosecute" repeatedly in its opinion, there is no dispute that in the juvenile court proceeding B.W. was not convicted of a crime. She was adjudicated delinquent as a juvenile, and the juvenile court ordered rehabilitation, counseling, and treatment. In fact, the juvenile court ordered only probation for B.W. with no term of juvenile confinement. The Court fails to credit the purpose of the juvenile justice system as distinct from the criminal justice system. Its holding precludes juvenile courts from adjudicating and then ordering counseling and treatment as the Legislature intended for minors like B.W. who commit prostitution. The Legislature enacted the Juvenile Justice Code for various public purposes, including: "to provide for the protection of the public and public safety"; "to promote the concept of punishment for criminal acts"; "to remove, where appropriate, the taint of criminality from children committing certain unlawful acts"; "to provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct"; "to provide for the care, the protection, and the wholesome moral, mental, and physical development of children

coming within its provisions"; and "to protect the welfare of the community and to control the commission of unlawful acts by children." TEX. FAM. CODE § 51.01.

The Court's opinion removes B.W. from adjudication under the Juvenile Justice Code for a criminal act she acknowledged committing. Instead of allowing B.W. to be treated as the Legislature intended, its opinion overturns the juvenile judge's treatment order and sends her back into CPS custody or, more likely given her history of running away, back to a toxic street environment. The psychologist that screened B.W. explained that she needed to be placed in a secure facility with a structured and consistent environment, that she is a "high risk for runaway," and there is a "moderate to high risk" that she will hurt others. The psychologist also recommended intensive treatment for substance abuse, enrollment in a mentor program, individual and group therapy, and tests to evaluate her educational needs. The prosecutor evaluating B.W.'s case considered B.W.'s history as well as the recommendations of those evaluating B.W. when deciding whether to bring the proceeding. The juvenile judge considered the psychologist's evaluation and ordered treatment as provided by the Juvenile Justice Code through individual counseling and other programs. In light of B.W.'s past conduct, it is reasonable that the juvenile judge would recommend that the Chief Juvenile Probation Officer supervise B.W. instead of placing her back in the CPS system.

The Legislature decided to subject minors ten or older and younger than seventeen to civil adjudication as opposed to generally subjecting them to the same criminal laws as adults. The Juvenile Justice Code provides a civil means for effectuating its stated purposes to avoid subjecting minors, who might be headed down a treacherous path, to criminal proceedings. Sadly, many minor

prostitutes are exploited by others who take advantage of their vulnerability. Those exploiters deserve criminal punishment. However, the Legislature enacted the Juvenile Justice Code not merely as a means of punishment, but also for treatment and rehabilitation in order "to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions." TEX. FAM. CODE § 51.01(3).

The Legislature passed a statute last term that instructs the executive director of the Texas Juvenile Probation Commission to establish a committee "to evaluate alternatives to the juvenile justice system, such as government programs, faith-based programs, and programs offered by nonprofit organizations, for children who are accused of engaging in acts of prostitution." TEX. HUM. RES. CODE § 141.056 (directing the committee to report to the Legislature by January 1, 2011). The Legislature recognizes the problem of prostitution committed by minors, and it continues to work on solutions to address it. Instead of exempting minors from adjudication in the statute, the Legislature requested the committee to study and evaluate the effectiveness of alternative treatment options outside the justice system. In the same September 2009 bill, the Legislature added a defense to prosecution for victims of human trafficking, acknowledging in the bill analysis that trafficked minors are often arrested for committing prostitution. *See* TEX. PENAL CODE § 43.02(d); House Comm. on Human Servs., Bill Analysis, Tex. C.S.H.B. 4009, 81st Leg., R.S. (2009) ("The vast majority of domestic victims of human trafficking are minors; approximately 70 percent fall into the sex trade. Unfortunately, most of these children are criminalized and placed with Child Protective Services with the result that the child does not receive necessary services and often falls back under the thumb of traffickers."). Nonetheless, the Legislature did not modify the Family Code to exempt

teenagers from delinquency adjudication for prostitution. But the Court's opinion today does just that and removes the juvenile justice system as a viable alternative to CPS and other treatment programs for minors younger than fourteen who are accused of prostitution. This is an unnecessary and intrusive limitation on the Legislature's discretion to address an important social policy issue.

For all of these reasons, I would apply the Juvenile Justice Code and Penal Code provisions at issue as the Legislature drafted them. I would hold that a thirteen-year-old minor may be subject to civil, juvenile delinquency proceedings and rehabilitative treatment for committing an act that constitutes prostitution as proscribed in the Penal Code. The Legislature specifically intended to hold actors that engage in sexual conduct with a minor under fourteen strictly liable for sexual assault, regardless of the minor's consent. It also specifically incorporated certain Penal Code provisions into the definition of delinquent conduct, including the offense of prostitution, making it a chargeable delinquent offense. The Court's opinion purports to recognize legislative intent that is expressed nowhere in applicable statutes and is contrary to the common law.

E. The State Did Not Violate B.W.'s Due Process Rights.

In B.W.'s second issue, she alleges that failing to prosecute her thirty-two-year-old "boyfriend" and offer her immunity in exchange for testimony against him violated her due process rights. This claim is also without merit. Because the Court holds that minors under fourteen years old cannot be adjudicated for prostitution, it does not reach B.W.'s due process challenge. I would hold that her due process rights were not violated.

"There is no doubt that the Due Process Clause is applicable in juvenile proceedings." *Schall v. Martin*, 467 U.S. 253, 263 (1984). The United States Supreme Court has held that not all, but

"certain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles." *Id.* (citing *Breed v. Jones*, 421 U.S. 519, 531 (1975) (double jeopardy); *In re Winship*, 397 U.S. 358, 366 (1970) (proof beyond a reasonable doubt); *In re Gault*, 387 U.S. 1, 13–14 (1967) (notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross-examination)). However, there is no due process right to any particular mode of investigation. *See Patterson v. New York*, 432 U.S. 197, 208 (1977) ("Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."). Nor is there a right that precludes a minor from being adjudicated delinquent for committing prostitution.

The State must offer immunity from prosecution for prostitution, but only if it compels testimony about the offense. TEX. PENAL CODE § 43.06 ("A party . . . may not be prosecuted for any offense about which he is required to furnish evidence or testify, and the evidence and testimony may not be used against the party in any adjudicatory proceeding except a prosecution for aggravated perjury."). Even if the State brings charges against the person B.W. identified as her "boyfriend," it is not obligated to require B.W. to testify. She certainly has no statutory or constitutional right to immunity simply because the State may or may not prosecute that person. I would, therefore, affirm the court of appeals' holding that B.W.'s due process rights were not violated and deny her relief on this ground.

III. Conclusion

While I would prefer a world in which such questions concerning the delinquent sexual conduct of minors would never arise, the reality is that these questions do arise, and we must answer them. I could not agree more that thirteen-year-old teenagers engaging in prostitution are victims of severe physical, sexual, and emotional scarring. But, exempting all of these minors from civil adjudication in the juvenile justice system—where treatment and rehabilitation are favored—when they commit the crime of prostitution imposes a broad policy on the State that is not supported by statute or legislative intent. The Legislature addressed the plight of minors such as B.W. by creating the juvenile justice system to offer a means, albeit not perfect, of hopeful rehabilitation. The Court globally declares that all thirteen-year-olds lack capacity to commit sex crimes and thereby precludes them all from any assistance through the juvenile justice system. I therefore respectfully dissent.

_____

Dale Wainwright
Justice

OPINION DELIVERED: June 18, 2010

IN THE SUPREME COURT OF TEXAS

NO. 08-1049

THE UNIVERSITY OF TEXAS AT EL PASO, PETITIONER,

v.

ALFREDO HERRERA, RESPONDENT

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

Argued March 25, 2010

JUSTICE WILLETT delivered the opinion of the Court.

JUSTICE LEHRMANN did not participate in the decision.

This case under the Family and Medical Leave Act (FMLA) raises two important immunity issues: (1) did Congress validly abrogate Texas' sovereign immunity under the FMLA's self-care provision; and if not (2) did the University of Texas at El Paso (UTEP) waive the State's immunity through a single sentence in its Handbook of Operating Procedures? We hold that UTEP's immunity was neither validly abrogated nor voluntarily waived, and the court of appeals erred in affirming the trial court's denial of UTEP's plea to the jurisdiction.

I. Background

Alfredo Herrera worked for UTEP as a heating, ventilation, and air-conditioning technician. In March 2005 he sustained an on-the-job injury to his left elbow. Herrera took approximately nine months leave and returned to work in January 2006. UTEP terminated Herrera's employment less than one month later.

Herrera sued UTEP, claiming it fired him for (1) taking personal medical leave under the self-care provision of the FMLA and (2) exercising his First Amendment rights by complaining about unsafe work conditions. UTEP filed a plea to the jurisdiction on the FMLA claim, contending it was barred by sovereign immunity. The trial court denied the plea, and a divided court of appeals affirmed, holding the self-care provision validly abrogated the States' sovereign immunity.[1]

The court of appeals anchored its holding on the United States Supreme Court's decision in *Nevada Department of Human Resources v. Hibbs*,[2] which concerned the FMLA's *family*-care provision related to ill spouses, children or parents. The court of appeals reasoned that the self-care provision, like the family-care provision in *Hibbs*, was intended to advance equal-protection rights and was thus a valid exercise of Congress's powers under § 5 of the Fourteenth Amendment.[3] The

[1] 281 S.W.3d 575, 585.

[2] 538 U.S. 721 (2003).

[3] 281 S.W.3d at 584. Because the court of appeals held that sovereign immunity had been abrogated on this ground, it did not address the alternative argument that UTEP waived its immunity through a statement in its Handbook of Operating Procedures.

dissenting justice emphasized that "[t]he majority opinion flies in the face of a mountain of contrary and persuasive legal authority."[4]

II. Discussion

A. Does the Self-Care Provision Validly Abrogate State Immunity?

Congress listed five purposes underlying the FMLA:

> (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
>
> (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
>
> (3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
>
> (4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and
>
> (5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.[5]

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[4] *Id.* at 592 (Carr, J., dissenting). Justice Carr's dissent on a material question of law gives us jurisdiction over this interlocutory appeal. TEX. GOV'T CODE § 22.225(c).

[5] 29 U.S.C. § 2601(b)(1)–(5).

To achieve these purposes, the FMLA grants eligible employees[6] up to "12 workweeks of leave during any 12-month period" for various health-related reasons,[7] including an employee's "serious health condition,"[8] the so-called "self-care" provision at issue in this case. Employees returning from FMLA leave are entitled to be restored to their former position, or to a new position with equivalent benefits, pay, and other terms and conditions of employment.[9]

Two threshold issues are undisputed: (1) Herrera is an "eligible employee" under the FMLA; and (2) the Act by its terms applies to state employers like UTEP.[10] Today's narrow dispute is whether Congress overreached in exposing States to FMLA claims under the self-care provision.

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[6] *Id.* § 2611(2)(A).

[7] *Id.* § 2612(a)(1). The FMLA guarantees leave to eligible employees for the following reasons:

> (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
> (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

Id. After this case was filed, Congress added subsection (E), allowing leave for exigencies arising from a family member's active duty in the Armed Forces.

[8] *Id.* § 2612(a)(1)(D).

[9] *Id.* § 2614(a)(1).

[10] *Id.* §§ 2611(4)(A)(iii), 203(x). The Act confers a private right of action "to recover [] damages or equitable relief . . . against any employer (including a public agency) in any Federal or State court of competent jurisdiction . . . ." *Id.* § 2617(a)(2).

Our federal and state constitutional designs embody the principle of state sovereignty that shields States from private suits in their own courts and in the federal courts.[11] Herrera's FMLA suit is thus barred by sovereign immunity unless (1) Congress validly abrogates it, or (2) the State voluntarily waives it. As for abrogation, federal legislation can overcome the States' immunity provided Congress (1) unequivocally expresses its intent to do so, and (2) acts "pursuant to a constitutional provision granting Congress the power to abrogate."[12] The first part is undeniable in this case; the text explicitly subjects States to FMLA claims,[13] and the Supreme Court has determined as much.[14] The second part is what matters here: did Congress have constitutional authority to abrogate the States' immunity for purposes of the FMLA's self-care provision?[15]

The principal source for abrogation authority is § 5 of the Fourteenth Amendment: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[16] As the Supreme Court has explained, "Section 5 grants Congress the power 'to enforce' the

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[11] *See Alden v. Maine*, 527 U.S. 706, 754 (1999); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003) ("[T]he Constitution does not provide for federal jurisdiction over suits against nonconsenting States."); *Tooke v. City of Mexia*, 197 S.W.3d 325, 331 (Tex. 2006); *Hoff v. Nueces County*, 153 S.W.3d 45, 48 (Tex. 2004) (per curiam).

[12] *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55, 59 (1996).

[13] 29 U.S.C. § 2617(a)(2) (enabling employees to seek damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction"); *id.* §§ 2611(4)(A)(iii), 203(x) (defining "public agency" to include both "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State").

[14] *Hibbs*, 538 U.S. at 726.

[15] *See id.*

[16] U.S. CONST. amend. XIV, § 5.

substantive guarantees of § 1 — among them, equal protection of the laws — by enacting 'appropriate legislation.'"[17]

Congress's § 5 enforcement power is not limitless, however. If federal legislation "reach[es] beyond the scope of § 1's actual guarantees," it can validly abrogate the States' immunity only when it is "an appropriate remedy for identified constitutional violations, not 'an attempt to substantively redefine the States' legal obligations.'"[18]

To pass constitutional muster, § 5 legislation must meet the two-part test refined in *City of Boerne v. Flores*[19] — that is, it must (1) counter identified constitutional injuries by the States and (2) exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[20] The first prong decides today's case, as nothing shows Congress was thinking of gender discrimination by the States when it enacted the self-care provision.

The court of appeals concluded Congress acted within its § 5 authority as the FMLA's legislative record identified unconstitutional gender bias by the States in the administration of leave benefits.[21] According to the court of appeals, Congress enacted the self-care provision to counter

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[17] *Hibbs*, 538 U.S. at 727.

[18] *Id.* at 728 (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000)).

[19] 521 U.S. 507 (1997).

[20] *Hibbs*, 538 U.S. at 728 (quoting *City of Boerne*, 521 U.S. at 520).

[21] 281 S.W.3d 575, 582.

the stereotype that women utilize leave policies more than men and to protect women from such discrimination.[22]

The court of appeals justified its holding by pointing both to the congressional findings noted in *Nevada Department of Human Resources v. Hibbs*[23] and the historical context in which the FMLA was enacted. In *Hibbs*, which concerned the Act's family-care provision, the Supreme Court held that Congress intended the FMLA to protect a right guaranteed by the Equal Protection Clause, specifically the right to be free from gender discrimination in the workplace.[24] The Court reasoned that Congress had validly exercised its § 5 power to abrogate the States' immunity with respect to family-care claims because Congress had identified a pattern of gender discrimination on the part of the States.[25] Notably, the Court was careful throughout *Hibbs* to make clear it was deciding the narrow issue of Eleventh Amendment immunity under the family-care provision, nothing else.[26] The court of appeals pointed to *Hibbs* as proof that the Supreme Court already found that "Congress had before it sufficient evidence of gender-based discrimination in the administration of leave benefits

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[22] *Id.* at 584.

[23] 538 U.S. 721 (2003).

[24] *Id.* at 728.

[25] *Id.* at 735 ("[T]he States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.").

[26] *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318, 321 (5th Cir. 2008); *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1159, 1164 (10th Cir. 2003) ("Because the Supreme Court's analysis in *Hibbs* turned on the gender-based aspects of the FMLA's § 2612(a)(1)(C), the self-care provision in subsection (D) is not implicated by that decision.").

to warrant the enactment of prophylactic § 5 legislation."[27] But all the evidence of unconstitutional State conduct cited in *Hibbs* concerned discrimination rooted in the belief that women are more likely than men to take leave to care for other family members, not themselves.[28] Indeed, the court of appeals recognized that in *Hibbs* there was evidence that the States relied on stereotypes that women's family duties trumped their workplace duties, caring for family members is "women's work," and men do not have the same domestic responsibilities as women.[29] Such evidence regarding women taking leave to care for others does not equate to evidence regarding women taking leave to care for themselves. In *Hibbs*, the Supreme Court made clear that Congress was required to show evidence of pervasive gender discrimination by the States with regard to family leave.[30] The same is required for the self-care provision. We must assess each FMLA provision separately, and abrogation of the States' immunity under this provision must rest on its own evidentiary basis; it cannot import evidence from the family-care provision.[31] There simply is no evidence — either in

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[27] 281 S.W.3d at 584.

[28] *Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 422 F.3d 392, 400–01 (6th Cir. 2005). *See Hibbs*, 538 U.S. at 729 n.2 ("Congress found that, 'due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.'") (internal citation omitted); *id.* at 730–31 (citing evidence of overt discrimination in the maternity and paternity leave benefits offered by both private and public employers); *id.* at 732 (citing evidence that even facially neutral policies were applied in a discriminatory way, and noting "serious problems with the discretionary nature of family leave"); *id.* at 736 (identifying the "impact of the discrimination targeted by the FMLA" as the "denial or curtailment of women's employment opportunities [due] to the pervasive presumption that women are mothers first, and workers second.") (internal citation omitted); *id.* at 731 (noting "the pervasive sex-role stereotype that caring for family members is women's work").

[29] 281 S.W.3d at 581.

[30] *Hibbs*, 538 U.S. at 729.

[31] *See Touvell*, 422 F.3d at 399 n.2.

Congress's findings or elsewhere in the FMLA's legislative record — that women took more personal medical leave, or were thought to, than men.[32]

The court of appeals also examined the historical context in which the FMLA was enacted,[33] concluding that Congress intentionally included the self-care provision to counter the stereotype that women take more advantage of leave policies than men and to provide women with protection from gender discrimination that might result from more-targeted legislation providing special protection only for pregnant women.[34]

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[32] *See id.* at 402, 405; H.R. REP. NO. 101-28, pt. 1, at 15 (1989) ("Recent studies . . . indicate that men and women are out on medical leave approximately equally. Men workers experience an average of 4.9 days of work loss due to illness or injury per year, while women workers experience 5.1 days per year. The evidence also suggests that the incidence of serious medical conditions that would be covered by medical leave under the bill is virtually the same for men and women. Employers will find that women and men will take medical leave with equal frequency."); *see also Laro v. New Hampshire*, 259 F.3d 1, 12 (1st Cir. 2001) ("The argument that [the self-care] provision validly abrogates New Hampshire's Eleventh Amendment immunity founders on this lack of congruence between the personal medical leave provision at issue here and the prevention of gender-based discrimination by states as employers, because Congress has not found the states to have engaged in the specific gender-based discriminatory practices this provision was designed to prevent."); *Bryant v. Miss. State Univ.*, 329 F. Supp. 2d 818, 827 (N.D. Miss. 2004) ("There is no indication that women require more actual personal medical leave than men. Nor is there any evidence that women have suffered disparate treatment due to a false perception that they require more personal medical leave than men. . . . [T]here is simply no evidence to this Court's knowledge that women and men have been subjected to different standards for personal medical leave."). *But see Parental and Medical Leave Act of 1987: Hearing on S. 249 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources*, 100th Cong., 1st Sess., pt. 2, at 170 (1987) (testimony of Peggy Montes, Mayor's Comm'n on Women's Affairs, City of Chicago) ("[M]ost workplaces have not yet adjusted to meet the needs of the increasing number of women in the labor force. . . . The lack of uniform parental and medical leave policies in the workplace has created an environment where discrimination is rampant.").

[33] 281 S.W.3d at 582.

[34] *Id.* at 584. The court of appeals surmised the self-care provision was enacted to meet a perceived need not addressed by Title VII and the Pregnancy Discrimination Act (PDA). *Id.* at 583. The Pregnancy Discrimination Act of 1978 amended Title VII to prohibit sex discrimination on the basis of pregnancy by amending the definition of the terms "because of sex" or "on the basis of sex" to include pregnancy, childbirth, and related medical conditions. *See* 42 U.S.C. § 2000e(k). Under the PDA, women may not be treated differently in employment because of conditions related to pregnancy or childbirth. But the PDA does not require pregnancy-related leave by employers who offer no benefit provisions for leave at all. The court of appeals believed that the PDA had an unintended negative impact on women's opportunities in the workplace because "employers might find it cost-effective to discriminate against married women of child-bearing age." 281 S.W.3d at 583 (quoting S. REP. NO. 102-68, at 73 (1991)).

This argument suffers from myriad flaws. First, there is no evidence that Congress, when it enacted the FMLA, was any more concerned with providing leave benefits to pregnant women than to all medically eligible employees, no matter their gender.[35] Second, there is no indication the self-care provision was designed to combat workplace discrimination arising from pregnancy-related complications, much less a pattern of such discrimination by the States.[36] Third, there is no reason to believe the self-care provision would in fact remove any disincentive to hire women that might otherwise result from a pregnancy-specific provision.[37] Indeed, if employers are reluctant to hire women because they believe women might become pregnant, or because they believe women take personal leave more frequently than men, then mandating twelve weeks of leave will only reinforce such views and make employers even *more* disinclined to hire women.[38]

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[35] *Touvell*, 422 F.3d at 404. The self-care provision allows for personal medical leave when a "serious health condition" prevents any employee from performing his or her job. 29 U.S.C. § 2612(a)(1)(D). And the term "serious health condition" in the self-care provision is not limited to or focused on those health conditions wholly or predominantly experienced by female workers, but rather is broadly defined to include any "illness, injury, impairment, or physical or mental condition" that involves "inpatient care" at some type of medical facility or "continuing treatment by a health care provider." *Id.* § 2611(11); *Touvell*, 422 F.3d at 403 ("[T]he same Senate Report that lists various pregnancy-related conditions as examples of medical conditions that would be covered under the self-care provision also lists thirteen other types of conditions, including heart conditions, strokes, 'most cancers,' and accidents on or off the job."). *See* S. REP. NO. 103-3, at 29 (1993); *see also, e.g.*, *id.* at 12 (citing testimony that a quarter of all cancer survivors face "some form of employment discrimination").

[36] *Touvell*, 422 F.3d at 404.

[37] *Id.*

[38] *See Kazmier v. Widmann*, 225 F.3d 519, 528 (5th Cir. 2000), *overruled in part by Hibbs*, 538 U.S. 721 ("[W]e find it virtually impossible to conceive how requiring employers to permit employees to take 12 weeks of leave for serious health conditions could possibly have the effect of preventing sex discrimination in *hiring practices*. If the United States is correct in surmising that employers are reluctant to hire women for fear that they will become pregnant and 'leave the labor market,' then the only possible effect on hiring practices of expressly mandating leave for pregnancy (among other serious health conditions) would be to *reinforce* such fears and make employers even *more reluctant* to hire women. A provision mandating that employers grant leave for serious health conditions cannot be viewed as reasonably calculated to achieve the objective of making employers less disinclined to hire women.").

In sum, the legislative record reveals no intention by Congress to remedy unconstitutional gender discrimination through the self-care provision.[39] Nothing links that provision to any pattern of sex-role stereotyping by the States as employers. We agree with two States' highest courts,[40] and nine federal circuit courts,[41] that Congress lacked the power to invoke its § 5 abrogation power under

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[39] In this context, we consult the congressional record to discern whether Congress validly abrogated the States' immunity. *See Hibbs*, 538 U.S. at 729 ("We now inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area."); *Kimel*, 528 U.S. at 88 ("Our task is to determine whether the [statute] is in fact just such an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination. One means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress' action."); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999) ("[F]or Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct. [The statute] failed to meet this test because there was little support in the record for the concerns that supposedly animated the law."); *Kazmier*, 225 F.3d at 524–25 ("[W]e examine . . . the legislative record of the statute under review to see whether it contains evidence of *actual constitutional violations by the States* sufficient to justify the full scope of the statute's provisions. The respect that must be accorded the States as independent sovereigns within our federal system prevents Congress from restraining them from engaging in constitutionally permissible conduct based on nothing more than the mere invocation of perceived constitutional bogeymen . . . . If Congress fails to include in the legislative record of a prophylactic statute any evidence of a significant pattern of unconstitutional discrimination by the States, then the statute will not be held to abrogate the States' sovereign immunity.") (footnotes, brackets, internal quotation marks omitted). It merits mention that this record-intensive inquiry, mandated by controlling caselaw, is unlike our ordinary statutory-construction cases, where clear text is determinative and leaves no room for legislative history.

[40] *Lizzi v. Wash. Metro. Area Transit Auth.*, 862 A.2d 1017 (Md. 2004); *Nicholas v. Attorney Gen.*, 168 P.3d 809 (Utah 2007).

[41] *See Laro*, 259 F.3d at 16 ("[T]he personal medical leave provision of the FMLA does not exhibit a sufficient congruence to the prevention of unconstitutional state discrimination to validly abrogate the states' Eleventh Amendment immunity."); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000) ("There is no evidence that this conferment of federally protected [self-care] leave is tailored to remedy sex-based employment discrimination. . . . Thus, we find that Congress did not have the authority to abrogate the sovereign immunity of the states on claims arising under the [self-care provision] at issue here. Its attempt to do so was not congruent or proportional to the harms targeted by the Fourteenth Amendment."); *Banks v. Court of Common Pleas FJD.*, 342 F. App'x 818, 821 (3d Cir. 2009) (per curiam) ("In *Chittister v. Dep't of Cmty. and Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000), we ruled that Congress did not validly abrogate the states' Eleventh Amendment immunity when it enacted provisions of the FMLA. Although the 'family-care' provisions of the FMLA were upheld by the Supreme Court in [*Hibbs*], private suits still may not be brought against states where the self-care provisions of the Act are implicated."); *Nelson*, 535 F.3d at 321 ("[W]e agree with the rationale of the Sixth, Seventh, and Tenth Circuits that the Supreme Court's ruling in *Hibbs* applies only to subsection C. Therefore, this court's decision in *Kazmier* still remains the law of this circuit with respect to subsection D."); *Touvell*, 422 F.3d at 402 ("Congress adduced no evidence of a pattern of discrimination on the part of the states regarding leave for personal medical reasons sufficient to permit the abrogation of state sovereign immunity."); *Toeller v. Wis. Dep't of Corr.*, 461 F.3d 871, 879 (7th Cir. 2006) ("We know of no reason why women would be more likely to have [a

the self-care provision.[42] Although Congress did cite evidence, detailed in *Hibbs*, of pervasive stereotyping about women as family caregivers, that evidence does not extend to the Act's *self*-care provision. There is no evidence of similar stereotypes when it comes to *personal* medical leave; the legislative record in fact demonstrates the contrary — that men and women take leave equally.[43]

In fact, the record indicates two motivations underlying the self-care provision, both unrelated to gender discrimination. First, Congress was trying to alleviate economic burdens borne by employees and their families facing health-related job loss.[44] Second, Congress was trying to curb discrimination against any employee with a "serious health condition," a term broadly defined to

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short-term] medical problem than men. Furthermore, whether we know about it is not the point in the end: what counts is that we see nothing in either the text or the legislative history of the FMLA to indicate that Congress found this to be the case."); *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106, 1107 (8th Cir. 2007) ("The district court properly dismissed with prejudice Miles's FMLA claim, which was brought under FMLA's self-care provisions. As an agency of the state of Missouri, the Center is entitled to Eleventh Amendment immunity from the claim.") (citations omitted); *Brockman*, 342 F.3d at 1164–65 ("The legislative history does not, however, identify as the basis for subsection (D) a link [to] any pattern of discriminatory stereotyping on the part of the states as employers."); *Batchelor v. S. Fla. Water Mgmt. Dist.*, 242 F. App'x 652, 653 (l1th Cir. 2007) (per curiam) (unpublished) ("Our holding in *Garrett* that Congress is without authority to abrogate state sovereign immunity for claims arising under the self-care provision of the FMLA remains the law of this Circuit.").

[42] *Nelson*, 535 F.3d at 321.

[43] *See supra* note 32.

[44] S. REP. NO. 103-3, at 11 (1993) ("The fundamental rationale for [a personal medical leave] policy is that it is unfair for an employee to be terminated when he or she is struck with a serious illness and is not capable of working. Job loss because of illness has a particularly devastating effect on workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads the household."); H.R. REP. NO. 101-28, pt. 1, at 23 ("The temporary medical leave requirement is intended to provide basic, humane protection to the family unit when it is most in need of help. It will also help reduce the societal cost born[e] by government and private charity."); *see also Touvell*, 422 F.3d at 401 ("One purpose of [the self-care provision] was alleviating the economic burdens on employees and their families of illness-related job loss."); *Brockman*, 342 F.3d at 1164 (same); *Laro*, 259 F.3d at 12 ("Attention to the legislative history reveals that Congress's primary motivation for including the personal medical leave provision contained in subsection (D) was to protect families from the economic dislocation caused by a family member losing his or her job due to a serious medical problem.").

In any event, this concern implicates the Commerce Clause rather than § 5 of the Fourteenth Amendment, and Congress cannot abrogate the States' immunity through the Commerce Clause. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001).

include *any* "illness, injury, impairment, or physical or mental condition"[45] that involves "inpatient care" at a medical facility or "continuing treatment by a health care provider," not just those health conditions wholly or mostly experienced by women.[46] Nothing in the record connects these two, gender-neutral motivations to unconstitutional workplace injuries inflicted by the States. Similarly, the congressional finding most germane to the self-care provision makes no male-female distinction, stating "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods."[47]

Because the self-care provision was not intended to combat gender bias by the States, and thus does not satisfy *City of Boerne*'s first prong, we need not reach prong two regarding congruence and proportionality. Summing up: Congress exceeded its § 5 abrogation authority when it subjected the States to private-damages suits under the FMLA's self-care provision.

B. Does UTEP's Personnel Handbook Waive the State's Immunity?

Herrera alternatively argues that even if Congress did not abrogate the State's immunity, UTEP clearly and unambiguously waived it through its Handbook of Operating Procedures, which

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[45] 29 U.S.C. § 2611(11).

[46] *See, e.g.*, S. REP. NO. 103-3, at 12 (citing testimony that a quarter of all cancer survivors face "some form of employment discrimination" and that "such discrimination against qualified employees costs society millions of dollars in lost wages, lost productivity and needless disability payments"); H.R. REP. NO. 101-28, pt. 1, at 23 ("[A] worker who has lost a job due to a serious health condition often faces future discrimination in finding a job which has even more devastating consequences for the worker and his or her family."); *see also Touvell*, 422 F.3d at 401 ("The other purpose of the self-care provision was to prevent employment discrimination against those with serious health problems."); *Brockman*, 342 F.3d at 1164 ("The legislative history accompanying the passage of the FMLA reveals two motivations for the inclusion of the self-care provision. . . . Second, Congress was attempting to prevent those with serious health problems from being discriminated against by their employers.") (citations omitted); *Laro*, 259 F.3d at 12 ("A secondary motivation that appears in the legislative history is a concern to protect workers who were temporarily disabled by serious health problems from discrimination on account of their medical condition.").

[47] 29 U.S.C. § 2601(a)(4).

states "[a]n eligible employee may also bring a civil action against an employer for violations [of the FMLA]." We disagree.

UTEP's policy manual certainly mentions employees' FMLA rights, noting that the FMLA makes it unlawful to discharge or discriminate against someone for involvement in proceedings under the Act. The handbook also includes the "may also bring a civil action" sentence, which Herrera says plainly permits FMLA claims.

This cursory language does not remotely constitute voluntary consent to suit, much less "clear and unambiguous" consent.[48] Putting aside the issue of whether UTEP (as opposed to the Legislature) can waive its immunity by declaration in a handbook,[49] UTEP's manual actually reveals nothing about an intent to waive immunity.[50] The handbook states that employees may sue for violations of the FMLA, but makes no attempt to expand the universe of actionable violations by explicitly waiving immunity that UTEP otherwise enjoys. Indeed, it is impossible to grasp how

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[48] *See Tooke v. City of Mexia*, 197 S.W.3d 325, 328–29 & n.2 (Tex. 2006) (noting that sovereign and governmental immunity are "waived only by clear and unambiguous language").

[49] *See Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002) ("This Court has long recognized that 'it is the Legislature's sole province to waive or abrogate sovereign immunity.'" (quoting *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997))); *but see Tooke*, 197 S.W.3d at 344 ("[I]t could be argued that a city lacks authority to waive its own immunity from suit by ordinance or charter. But we need not address that argument here because the quoted provision is not a clear and unambiguous waiver of immunity."); *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375, 377 (Tex. 2006) (noting that "[w]e have generally deferred to the Legislature to waive immunity," but holding that City was not immune from "claims against it which are germane to, connected with and properly defensive to claims the City asserts").

[50] *See Tooke*, 197 S.W.3d at 342 (holding that a ten-word sentence that revealed nothing about an intent to waive immunity did not waive City's immunity from suit).

fleeting language in a policy manual can "clearly and unambiguously" waive immunity when far more overt declarations in statutes enacted by the Legislature fall short.[51]

III. Conclusion

The State of Texas cannot be sued under the FMLA's self-care provision. As for abrogation, nothing in the legislative record suggests that gender bias by the States was the constitutional evil underlying the self-care provision. Congress's power under the Fourteenth Amendment to overcome the States' immunity is limited, and its attempt to do so here was an unconstitutional exercise of its § 5 power. As for waiver, a stray line in UTEP's policy manual that employees may "bring a civil action against an employer" is insufficient to waive state immunity. The trial court erroneously denied UTEP's plea to the jurisdiction. We reverse the court of appeals' judgment and dismiss Herrera's FMLA claim for lack of subject-matter jurisdiction.

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Don R. Willett
Justice

OPINION DELIVERED: July 2, 2010

[51] *Id.* (holding that phrases in Texas statutes stating a governmental entity may "sue and be sued" or "plead and be impleaded" were not clear and unambiguous waivers of sovereign immunity within the meaning of TEX. GOV'T CODE § 311.034); *see also id.* at 347–55 ("Appendix" listing Texas statutes containing "sue and be sued" or "plead and be impleaded" language).

IN THE SUPREME COURT OF TEXAS

NO. 08-1064

IN RE POLYMERICA, LLC D/B/A GLOBAL ENTERPRISES, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

Polymerica, L.L.C. d/b/a Global Enterprises, Inc. ("Global") seeks a writ of mandamus ordering the trial court to grant its motion to compel arbitration. Global, an El Paso-based manufacturer of plastics, hired Angelica Soltero in 1998. In 2002, Global contracted with *dm*Dickason Staff Leasing Company ("Dickason") to manage Global's human resources department. Soltero signed a Dispute Resolution Plan, which "appl[ies] to any disputes between *dm*Dickason/Global Enterprises and any applicant for employment, employee or former employee, including legal claims such as discrimination, wrongful discharge or harassment." The Plan includes a four-step process for resolving disputes, the fourth of which requires binding arbitration under the Federal Arbitration Act. The Plan notes that it is "a condition of employment and of continued employment" and that "employment or continued employment after the effective date of this Plan constitutes consent by the Employee to be bound by this Plan."

Subsequently, Global distributed an employee handbook and required Soltero and all other employees to acknowledge its receipt. The acknowledgment recites that the handbook "takes

precedence over, supercedes, and revokes any previous memo, bulletin, policy or procedure issued prior to [July 6, 2003], by Global Enterprises on any subject discussed in the Handbook." The handbook includes a section on arbitration, which provides, in pertinent part:

> All disputes between you and *dm*Dickason/Global shall be resolved exclusively through arbitration under the Federal Arbitration Act. All employees are required to sign a Dispute Resolution Plan Agreement, as a condition of employment, during their new employee orientation on the first day of employment.
>
> *dm*Dickason/Global's Dispute Resolution Plan and Arbitration Agreement is intended to provide a method for solving problems that is fair, prompt and effective.
>
> . . .
>
> Your decision to accept employment with Global, or to continue your current employment after the effective date of the Dispute Resolution Plan, will mean that you have agreed to, and are bound by the Plan. All disputes between you and *dm*Dickason, and/or you and Global shall be resolved exclusively through arbitration under the Federal Arbitration Act, the American Arbitration Association's National Rules for the Resolution of Employment Disputes, and *dm*Dickason's dispute resolution plan that is given to all employees during their initial employment orientation with *dm*Dickason.

On December 31, 2005, Global ended its operating agreement with Dickason and resumed full management of its human resources department. Five days later, Global terminated Soltero.

Soltero sued Global under chapter 21 of the Texas Labor Code alleging wrongful termination based on her national origin as well as retaliation for reporting alleged sexual harassment. The trial court denied Global's motion to compel arbitration. Global sought mandamus relief, which the court of appeals granted in part. 271 S.W.3d 442. The court of appeals held that Soltero's claims arising before Global and Dickason ended their relationship must be arbitrated, but that those arising after Global and Dickason's operating agreement ended should not. *Id*. at 449. Soltero then nonsuited

any claim arising before January 1, 2006 and alleged that, because her termination occurred after the Global/Dickason agreement ended, none of her claims were subject to arbitration. The trial court agreed, concluding that "all of [Soltero's] claims in this suit arise from the wrongful termination occurring after the operating agreement between Global and Dickason ended." The trial court lifted the previously ordered stay and placed the case on the trial docket. Global asks us to order the trial court to compel arbitration as to all of Soltero's claims and to stay the proceedings pending arbitration.

Soltero concedes that she signed the Dispute Resolution Plan and the 2003 Handbook, but she argues that the Handbook's statement revoking prior versions nullifies the Dispute Resolution Plan. That Handbook provision, however, does not cover contracts like the Plan's arbitration agreement. We also note that the Handbook and the Dispute Resolution Plan were intended to work in tandem. 227 S.W.3d at 448 ("We fail to see how the handbook nullifies the arbitration agreements; rather, it appears to reference them."); *see also J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). If the 2003 Handbook's discussion of arbitration eliminated the Dispute Resolution Plan, the Handbook's discussion of—and multiple references to—the Plan would be meaningless. *See Davidson*, 128 S.W.3d at 229.

Soltero also asserts that the Dispute Resolution Plan is illusory because the 2003 Handbook could be modified at any time. *See id*. at 230 n.2 (noting that "most courts . . . have held that, if a party retains the unilateral, unrestricted right to terminate the arbitration agreement, it is illusory"). But the Dispute Resolution Plan has its own termination provision, which requires notice to employees and applies prospectively only. Because Global cannot "avoid its promise to arbitrate by

amending the provision or terminating it altogether," *In re Halliburton Co.*, 80 S.W.3d 566, 570 (Tex. 2002), the Dispute Resolution Plan is not illusory.

Next, Soltero contends that because only Dickason, not Global, was a party to the Dispute Resolution Plan, Global may not enforce the Plan's terms. Global counters that even though it did not sign the Plan, it can enforce Dickason's agreement with Soltero under the equitable theory of direct-benefits estoppel. We need not address direct-benefits estoppel, however, because both Global and Soltero were parties to the Plan. The Plan notes that it "will apply to any disputes between *dm*Dickason/Global Enterprises and any applicant for employment, employee or former employee." It also defines "covered dispute" as including any claim, demand, or controversy "between Employee and *dm*Dickason and/or Global Enterprises." Although the Plan is signed only by Soltero and Dickason, we have never held that the employer must sign the arbitration agreement before it may insist on arbitrating a dispute with its employee. "[N]either the FAA nor Texas law requires that arbitration clauses be signed, so long as they are written and agreed to by the parties." *In re AdvancePCS Health, L.P.*, 172 S.W.3d 603, 606 n.5 (Tex. 2005) (noting, however, that Texas Arbitration Act requires signatures for contracts of less than $50,000 or personal injury claims); *see also In re Macy's Tex.,* Inc., 291 S.W.3d 418, 418 (Tex. 2009) (per curiam) (observing that "[t]he 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"); *Halliburton*, 80 S.W.3d at 569 (holding arbitration clause was accepted by continued employment). And while the Plan provides that it covers disputes involving former employees of the "company," defined as "*dm*Dickason Staff Leasing Company, Inc. together with its subsidiaries, parent companies, affiliates, officers, directors,

employees, agents, representatives, shareholders and assigns," it also states that it applies to "any disputes between *dm*Dickason/Global Enterprises and any . . . former employee." *See In re D. Wilson Construction Co.*, 196 S.W.3d 774, 782 (Tex. 2006) (observing that "we resolve doubts as to the scope of the agreements in favor of coverage"); *In re FirstMerit Bank*, 52 S.W.3d 749, 753 (noting that "courts must resolve any doubts about an arbitration agreement's scope in favor of arbitration").

The court of appeals held that Global could not enforce the arbitration agreements "for those claims arising from the alleged wrongful termination occurring after the operating agreement between Global and Dickason ended." 271 S.W.3d at 449. The court relied on *In re Neutral Posture, Inc.*, 135 S.W.3d 725, 730 (Tex. App.—Houston [1st Dist.] 2003, no pet.), to explain why claims post-dating the operating agreement must be tried rather than arbitrated, but we find *Neutral Posture* to be distinguishable. The arbitration agreement there included a condition stating that the parties must resolve disputes via arbitration only during a set five-year period, and the claim at issue was filed after the expiration of that period. *Id*. There is no such time limitation in the Dispute Resolution Plan, nor is there a condition that the Global and Dickason relationship must be in existence for either to enforce the Plan. Soltero's agreement to arbitrate survives the dissolution of that relationship, and the Dispute Resolution Plan explicitly covers former employees like Soltero.

The court of appeals also noted that Global's former human resources manager, Valerie Scott, "was unaware of any arbitration agreement after the termination of Global's relationship with Dickason," and "[s]he agreed that from January 2006 until July 2007, when Global created a new arbitration agreement, there was no arbitration agreement in effect." 271 S.W.3d at 446-47. But

Scott's testimony is ambiguous on this point. She testified that she "never even thought about [whether the 2002 agreement]" was still in effect after the relationship between Global and Dickason ended. When asked whether Global employees were covered by an arbitration agreement in 2006, she answered that "[t]here was not an arbitration agreement that we — that was created by Global Enterprises" and that she was unaware of any other arbitration agreement that might have applied to Global's employees. Even if Scott had testified that no arbitration agreement was in effect, her statements could not alter the effect of the unambiguous agreement. *See In re Dillard's Dep't Stores, Inc.*, 186 S.W.3d 514, 515 (Tex. 2006) (noting that "[t]he objective intent as expressed in the agreement controls the construction of an unambiguous contract, not a party's after-the-fact conduct"); *Davidson*, 128 S.W.3d at 229 ("In construing this agreement, we first determine whether it is possible to enforce the contract as written, without resort to parol evidence.").

Soltero's promise to arbitrate includes her claims against Global. Mandamus relief is appropriate when a party is forced to trial despite an enforceable agreement to arbitrate. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 462 (Tex. 2008). Accordingly, without hearing oral argument, TEX. R. APP. P. 52.8(c), we conditionally grant Global's petition for writ of mandamus and direct the trial court to compel arbitration as to all of Soltero's claims and stay the proceedings pending arbitration. We are confident the trial court will comply, and our writ will issue only if it does not.

Opinion Delivered: October 23, 2009

IN THE SUPREME COURT OF TEXAS

NO. 08-1076

IN RE DEERE & COMPANY D/B/A JOHN DEERE COMPANY AND JOHN DEERE CONSTRUCTION & FORESTRY COMPANY, RELATORS

ON PETITION FOR MANDAMUS

PER CURIAM

In this discovery dispute, we consider whether a trial court's order compelling production of documents was overly broad. Because the order neglected to limit discovery to a reasonable time period, we find that it was. Accordingly, we conditionally grant the relator's petition for writ of mandamus and direct the trial court to vacate that part of the order.

Arturo Martinez suffered severe injuries when he fell under a John Deere 410D backhoe loader. Allegedly, the step on which Martinez was standing failed, breaking off under his weight while the backhoe was moving. In the ensuing suit, Martinez alleged several legal theories, including products liability. Martinez served requests for production on Deere, including a request seeking "all [non-governmental] documents of customer complaints received by [Deere] relative to the sidestep on any model backhoe." Deere objected to the request as overly broad, and Martinez moved to compel production. The trial court conducted a hearing, and the parties agreed to limit production to documents relating to models with similar handles and step assemblies, and only going

back approximately 12 to 15 years (when production began on the 410D).[1] At the trial court's request, Martinez then filed a proposed order. The proposed order included more than 30 product lines such as backhoes, tractors, and other loaders and did not include a time limit.

The trial court held an additional hearing to determine whether models in the proposed order in fact had handles and step assemblies sufficiently similar to the 410D. Deere presented no evidence to disprove such similarity. Martinez, on the other hand, explained that Martinez's expert reported research in support of the relevant similarities on these models. After the hearing, Deere wrote to the trial court explaining that the 410D step assembly had been modified in 1996 (approximately 12 years earlier) along with a handful of other backhoe loader models, but provided no evidence in support. The trial court then entered Martinez's proposed order. The Tenth Court of Appeals denied relator's petition for mandamus. ___ S.W.3d ___ (Tex. App.—Waco 2008).

Mandamus will issue if the relator establishes a clear abuse of discretion for which there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004). "Generally, the scope of discovery is within the trial court's discretion, but the trial court must make an effort to impose reasonable discovery limits." *In re Graco Children's Prods., Inc.*, 210 S.W.3d 598, 600 (Tex. 2006) (per curiam) (internal quotations omitted). An order that compels overly broad discovery is an abuse of discretion for which mandamus is the proper remedy. *Id.* Whether discovery is overly broad in products liability cases depends on whether the order covers

[1] Regarding the inclusion of handles in addition to steps, Deere conceded: "The step that a person would actually step on to get onto the tractor, to mount the tractor, and any hand device he would hold to assist in either getting on or off the tractor, you know, we could probably do that without a lot of burdensome [sic] to do that. That probably would be acceptable."

products relevant to the case and is reasonable in its scope. *Id.* at 601; *see also* TEX. R. CIV. P. 192.3 (discovery should be of information "reasonably calculated to lead to the discovery of admissible evidence"). "Discovery orders requiring production from an unreasonably long period . . . are impermissibly overbroad." *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (citing *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (1998) (concluding that a discovery order was overly broad by requiring production of "virtually all documents regarding its products for a fifty-year period")). The party objecting to discovery "must present any evidence necessary to support the objection." TEX. R. CIV. P. 193.4 (a).

Here, the trial court made a proper effort to narrow discovery from "any model backhoe," as stated in the request for production, to only those products with handles and step assemblies similar to the allegedly defective 410D. Deere presented no evidence to meet its burden of supporting its objection, failing to show that any of the specific product lines lacked such assemblies.[2] Thus, it was not error for the trial court to permit discovery as to the list of product lines proposed by Martinez. *See* TEX. R. CIV. P. 193.4 (a). However, the trial court's order nevertheless exceeded the scope of permissible discovery by neglecting to set a reasonable time limit. *See In re CSX*, 124 S.W.3d at 152. Indeed, at the initial hearing, Martinez twice specifically requested production going back only 15 years. Because compliance with the trial court's order could require Deere to produce documents going back decades, neglecting to include a reasonable time limit was an abuse of discretion.[3]

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[2] We note that while Deere has presented such evidence to us in an affidavit, the trial court had no such evidence before it.

[3] We offer no opinion as to whether an order limiting production to documents going back 12 or 15 years would have been reasonable under the circumstances.

Therefore, without hearing oral argument, TEX. R. APP. P. 52.8(c), we conditionally grant Deere's petition for writ of mandamus and direct the trial court to vacate that part of its December 5, 2008 order that compels Deere to produce documents relating to lawsuits or complaints about the models Martinez identified as potentially relevant without setting a reasonable time limit. We trust that the trial court will comply, and the writ will issue only if it fails to do so.

OPINION DELIVERED: December 18, 2009

IN THE SUPREME COURT OF TEXAS

NO. 09-0005

TRANSCONTINENTAL INSURANCE COMPANY, PETITIONER,

v.

JOYCE CRUMP, RESPONDENT

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

Argued January 20, 2010

JUSTICE GREEN delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, and JUSTICE WILLETT joined, and in which JUSTICE JOHNSON and JUSTICE LEHRMANN joined as to Parts I, II, IV and V.

JUSTICE JOHNSON filed a concurring opinion, in which JUSTICE LEHRMANN joined.

JUSTICE GUZMAN did not participate in the decision.

In this workers' compensation case, we decide three issues: (1) whether expert medical causation testimony from a treating physician relying on a differential diagnosis is reliable and, therefore, legally sufficient evidence to support the jury's verdict; (2) whether the trial court erred in submitting a jury charge that defined "producing cause" without including a but-for component; and (3) whether an insurance carrier that is unsuccessful on judicial review is entitled to a jury trial

on the disputed amount of a claimant's attorney's fees under Texas Labor Code § 408.221(c). We hold that: (1) the treating physician's opinion was based on a reliable foundation and, therefore, legally sufficient evidence supports the jury's verdict; (2) the trial court's omission of the but-for component in the jury charge constitutes reversible error; and (3) an insurance carrier is entitled to have a jury determine the disputed amount of reasonable and necessary attorney's fees for which it is liable. Accordingly, we reverse the court of appeals' judgment and remand the case to the trial court for new trial.

I. Background

Charles Crump received a kidney transplant in 1975 and began a lifelong regimen of immunosuppressant drug therapy to ensure his body would not reject the new kidney. Crump began working for Frito-Lay in the mid-1980s. In May 2000, while training another employee in the packaging department, Crump struck his right knee on a piece of machinery. The injury caused a contusion (bruise) and a hematoma (a collection of blood) at the wound site. He applied for and received workers' compensation benefits for the work-related injury. After a series of increasingly serious health complications which required repeated, lengthy hospitalizations, Crump died in January 2001 at age forty-three. His wife, Joyce Crump,[1] applied for workers' compensation death benefits, alleging that the May 2000 injury was a producing cause of her husband's death. A contested case hearing officer found that the May 2000 injury resulted in Crump's death and awarded

[1] For simplicity, we refer to the Crumps collectively in this opinion.

death benefits. In 2002, the workers' compensation appeals panel affirmed the hearing officer's benefits award.

Frito-Lay's workers' compensation carrier, Transcontinental Insurance Company, sought judicial review of the administrative award of death benefits. *See* TEX. LAB. CODE §§ 410.301–.308 (providing for, and limiting scope of, judicial review of a death benefits award). As the party appealing the administrative decision, Transcontinental bore the burden of proving its only disputed issue—that the May 2000 injury was not a producing cause of Crump's death—by a preponderance of the evidence. *See id.* § 410.303. At trial, Transcontinental offered the testimony of Dr. Judson Hunt. Hunt reviewed Crump's medical records and testified that the May 2000 injury was not a producing cause of Crump's death, and that his death would have occurred without the work-related injury. To rebut Hunt's opinion, Crump offered Dr. John Daller, one of Crump's treating physicians, who testified that the May 2000 injury was a producing cause of Crump's death. The trial court overruled Transcontinental's objections that Daller's testimony was not based on a reliable foundation and allowed him to testify. After hearing the evidence, the jury answered in the affirmative the single question put before it, "Was Charles Crump's May 9, 2000 injury a producing cause of his death?" Crump submitted the issue of attorney's fees to the trial court. *See id.* § 408.221(c) (mandating payment of a claimant's attorney's fees by an insurance carrier that unsuccessfully seeks judicial review). Transcontinental had objected that those fees should also be submitted to the jury, rather than the trial court. The trial court disagreed with Transcontinental and awarded Crump attorney's fees, as well as fees for time spent pursuing those fees.

Transcontinental appealed. The court of appeals grouped Transcontinental's issues into three categories: (1) the trial court's acceptance of the reliability of Crump's expert's testimony on causation, as well as the legal and factual sufficiency of that testimony to support the verdict; (2) the trial court's definition of producing cause in the jury charge; and (3) the determination of Crump's attorney's fees by the trial court rather than by the jury, as well as the amount of fees awarded. 274 S.W.3d 86, 96 (Tex. App.—Houston [14th Dist.] 2008). Finding no error in any category, the court of appeals affirmed the trial court's judgment. *Id.* at 90.

We granted Transcontinental's petition for review. 53 Tex. Sup. Ct. J. 15 (Oct. 23, 2009). Finding the court of appeals' categorization of the issues useful, we address each in turn.

II. Legal Sufficiency of Expert Testimony

Producing cause was the only issue submitted to the jury at trial. Because this is an appeal of a Workers' Compensation Commission award of death benefits, Transcontinental acknowledges that it had the burden to prove that the May 2000 injury was *not* a producing cause of Crump's death. *See* TEX. LAB. CODE § 410.303 ("The party appealing the decision [of the appeals panel] on an issue [regarding compensability or eligibility for or the amount of income or death benefits] has the burden of proof by a preponderance of the evidence."); *Morales v. Liberty Mut. Ins. Co.*, 241 S.W.3d 514, 516–17 (Tex. 2007) (discussing the avenues of judicial review). Thus, Transcontinental, the insurance carrier, was the plaintiff at trial; Crump, the claimant, was the defendant.

The trial court asked the jury whether Crump's injury *was* a producing cause of his death, but to properly allocate the burden of proof, the court instructed the jury to answer "yes" unless they found by a preponderance of the evidence that the answer should be "no." In answering "yes," the

jury thus failed to find that Crump's injury did not cause his death. On appeal, Transcontinental asserts that it conclusively established the lack of causality and is therefore entitled to judgment in its favor as a matter of law.

At trial, Transcontinental's expert, Hunt, testified that the natural complications of being immunosuppressed for twenty-five years had caused Crump's death—not the May 2000 injury. Crump's expert and treating physician, Daller, testified that the wound site of the May 2000 work-related injury became infected, the infection caused Crump's already-weakened organs to fail, and his organ failure in turn caused his death. Transcontinental objected to the admission of Daller's testimony on the ground that it was unreliable, but the trial court overruled that objection. Here, Transcontinental reasserts that Daller's testimony was unreliable and therefore legally insufficient evidence of causation. Without Daller's testimony, Transcontinental argues, Hunt's testimony establishes the lack of causation. Accordingly, we must decide whether Daller's testimony was reliable and, if so, whether it was some evidence of causation.

"An expert witness may testify regarding 'scientific, technical, or other specialized' matters if the expert is qualified and if the expert's opinion is relevant and based on a reliable foundation." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006) (citing TEX. R. EVID. 702). In determining whether expert testimony is reliable, a court should consider the factors we set out in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995),[2] as well as the

[2] In *Robinson*, we outlined six useful considerations for determining the reliability of expert testimony:
1. the extent to which the theory has been or can be tested;
2. the extent to which the technique relies upon the subjective interpretation of the expert;
3. whether the theory has been subjected to peer review and/or publication;
4. the technique's potential rate of error;

expert's experience, knowledge, and training. *See Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726–27 (Tex. 1998) (deeming expert testimony based on the latter considerations unreliable when "there is simply too great an analytical gap between the data and the opinion proffered" (citing *Gen. Elec. Co. v. Joiner*, 552 U.S. 136, 146 (1997)); *see also* TEX. R. EVID. 702 (providing for witnesses qualified as experts "by knowledge, skill, experience, training, or education").

> [I]n very few cases will the evidence be such that the trial court's reliability determination can properly be based only on the experience of a qualified expert to the exclusion of factors such as those set out in *Robinson*, or, on the other hand, properly be based only on factors such as those set out in *Robinson* to the exclusion of considerations based on a qualified expert's experience.

Whirlpool Corp. v. Camacho, 298 S.W.3d 631, 638 (Tex. 2009); *see also Mack Trucks*, 206 S.W.3d at 579 ("[T]he criteria for assessing reliability must vary depending on the nature of the evidence.").

Here, we are considering the reliability of a treating physician's opinion based on a particular diagnostic methodology—differential diagnosis. This is a routine diagnostic method used in internal medicine whereby a treating physician formulates a hypothesis as to likely causes of a patient's presented symptoms and eliminates unlikely causes by a deductive process of elimination. *See, e.g.*, *Coastal Tankships, U.S.A., Inc. v. Anderson*, 87 S.W.3d 591, 604–05 & n.24 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (en banc) ("[Differential diagnosis] is a clinical process whereby a

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> 5. whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
> 6. the non-judicial uses which have been made of the theory or technique.

923 S.W.2d at 557. "We emphasized in *Robinson* that these factors are non-exclusive and that [Texas] Rule [of Evidence] 702 contemplates a flexible inquiry." *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 801 (Tex. 2006).

doctor determines which of several potential diseases or injuries is causing the patient's symptoms by ruling out possible causes—by comparing the patient's symptoms to symptoms associated with known diseases, conducting physical examinations, collecting data on the patient's history and illness, and analyzing that data—until a final diagnosis for proper treatment is reached."). If the physician's treatment of the suspected cause alleviates the patient's symptoms, the disease or condition treated can be said to have been the internal cause of the eliminated symptoms. *See id.* If the patient's symptoms remain after treatment of the suspected disease or condition, the physician rules out the suspected disease or condition as the internal cause of the patient's symptoms and formulates a new hypothesis as to the possible culprit. *See id.*

Crump asserts that because differential diagnosis is a reliable medical technique, the application of the *Robinson* factors is tempered, or less strict, when a treating physician using that technique is involved. This is the approach adopted by the court of appeals below, which refused to apply *Robinson* at all. *See* 274 S.W.3d at 96–97. We have held the opposite to be true: "[T]he relevance and reliability requirements of Rule 702 [apply] to all expert evidence offered under that rule, even though the criteria for assessing relevance and reliability must vary, depending on the nature of the evidence." *Gammill*, 972 S.W.2d at 727; *see also Camacho*, 298 S.W.3d at 638. The mere fact that differential diagnosis was used does not exempt the foundation of a treating physician's expert opinion from scrutiny—it is to be evaluated for reliability as carefully as any other expert's testimony. Both the *Robinson* and *Gammill* analyses are appropriate in this context. *See generally Guinn v. AstraZeneca Pharm. LP*, 602 F.3d 1245, 1254 (11th Cir. 2010) (per curiam); *Meister v. Med. Eng'g Corp.*, 267 F.3d 1123, 1129 (D.C. Cir. 2001); *Westberry v. Gislaved Gummi*

AB, 178 F.3d 257, 263–65 (4th Cir. 1999); *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 153–54 (3d Cir. 1999); *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 275–78 (5th Cir. 1998) (en banc).

Several of the *Robinson* factors apply to differential diagnosis as a method or technique, as well as its application and the conclusions reached in a particular case. "Differential diagnosis is 'the basic method of internal medicine' and enjoys widespread acceptance in the medical community. Generally speaking, when properly conducted the technique has important non-judicial uses, is generally accepted as valid by the medical community, and has been subjected to use, peer review, and testing." *Coastal Tankships*, 87 S.W.3d at 604 (citations omitted). While these endorsements of the technique may hold "generally," we cannot say that they will always apply in every case in which a treating physician bases his opinion on differential diagnosis. Here, though, Daller's diagnostic methodology certainly had non-judicial uses in that it was used to treat Crump, write prescriptions, and perform surgery. *Cf. Robinson*, 923 S.W.2d at 559 ("[O]pinions formed solely for the purpose of testifying are more likely to be biased toward a particular result."). Hunt, Transcontinental's expert, acknowledged that differential diagnosis was used to treat Crump. Although Hunt would have reached different conclusions regarding Crump's infection, he stated that he agreed with the treatment methodology Daller employed. *See Robinson*, 923 S.W.2d at 557 (noting that the *Robinson* reliability inquiry focuses "solely on the underlying principles and methodology, not on the conclusions they generate"); *cf. TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 235 (Tex. 2010) ("Rather than focus entirely on the reliability of the underlying technique used to generate the challenged opinion, as in *Robinson*, we have found it appropriate . . . [to] determine whether there are any significant analytical gaps in the expert's opinion that undermine its

reliability.") (citations omitted). Moreover, there is no practical way peers could conduct objective, randomized experiments to test the validity of Daller's specific conclusion regarding Crump's injury. Thus, these factors support the reliability of Daller's expert testimony in this case.

Moving to the other *Robinson* factors, we note that, in some cases, a physician's differential diagnosis may be too dependent upon the physician's subjective guesswork or produce too great a rate of error—for example, when there are several consistent, possible causes for a particular set of symptoms. Related to these factors, Transcontinental contends that Daller's diagnostic technique is not reliable because he did not exclude the other possible causes of Crump's death with reasonable medical probability. *See TXI Transp. Co.*, 306 S.W.3d at 237 ("An expert's failure to rule out alternative causes of an incident may render his opinion unreliable."); *Robinson*, 923 S.W.2d at 559 ("An expert who is trying to find a cause of something should carefully consider alternative causes. [An expert's] failure to rule out other causes of the damage renders his opinion little more than speculation." (citation omitted)); *see also Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 500 (Tex. 1995) ("[T]o constitute evidence of causation, an expert opinion must rest in reasonable medical probability."). Yet a medical causation expert need not "disprov[e] or discredit[] every possible cause other than the one espoused by him." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987). Few expert opinions would be reliable if the rule were otherwise. Still, if evidence presents "other plausible causes of the injury or condition that *could* be negated, the [proponent of the testimony] *must* offer evidence excluding those causes with reasonable certainty." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997) (emphases added); *see also Robinson*, 923 S.W.2d at 558–59 (concluding that the trial court did not abuse its discretion by excluding testimony

by an expert who "conducted no testing to exclude other possible causes . . . even though he admitted in his deposition that many of the symptoms could be caused by" other specific conditions).

We conclude that Daller's testimony adequately excluded, with reasonable medical certainty, the other plausible causes raised by the evidence. Hunt testified that, in his opinion, Crump died from a combination of kidney failure, cirrhosis of the liver, and a fungal infection in the lungs exacerbated by preexisting diabetes and a history of immunosuppressant drug usage. There is no dispute that these conditions, except the fungal infection, all preceded Crump's May 2000 work-related injury. All of these were other plausible causes of Crump's death. But there was evidence that despite his long-term health problems dating from his kidney transplant twenty-five years earlier, Crump was generally in good health before his injury at work, and that within days after the injury he contracted an infection at the site of the injury. Even Hunt acknowledged that Crump's infection was a "co-morbid condition" that made his other health conditions "more difficult to deal with." Hunt disputed any connection between Crump's injury and the infection, and he believed that the injury contributed nothing toward Crump's death. He concluded that Crump would have died on January 23, 2001, regardless of the work-related injury of May 2000. But objective evidence of Crump's good health before his injury, his contraction of an infection at the site shortly afterward, and the deleterious effect of the infection on his health reasonably ruled out the possibility that he died solely from the other conditions he suffered. Based on Daller's experience and training as a transplant specialist and surgeon, his dealings with infection-susceptible immunosuppressed patients, and his direct dealings with Crump—which included taking cultures directly from the wound site for diagnostic purposes—he concluded that Crump's wound became infected, that the infection

weakened his organs, and that the natural progression of these events caused his death. *See Crye*, 907 S.W.2d at 500 ("Reasonable [medical] probability is determined by the substance and context of the opinion, and does not turn on semantics or on the use of a particular term or phrase."). In other words, Daller's medical causation opinion provided a cause that excluded, with reasonable medical certainty, Hunt's suggested causes of death. The evidence was not conclusive, but it was not required to be. It was sufficiently reliable to be considered by the jury. Once Daller effectively responded to Hunt's other plausible causes of death with reliable testimony, the question was no longer one of legal sufficiency, but rather one of competing evidence to be weighed by the jury. *See Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 40–41 (Tex. 2007).

In addition to applying the *Robinson* factors, *Gammill* also informs our reliability inquiry. There we concluded that the *Robinson* factors could not be applied to the plaintiffs' experts, "even though mechanical engineering, the expertise claimed by the witnesses, is scientific in nature." *Gammill*, 972 S.W.2d at 727. In that situation, we asked further whether there was "simply too great an analytical gap between the data and the opinion proffered." *Id.* "The 'analytical gap' between the data . . . and [the expert]'s opinion was not shown to be due to his techniques in assessing the vehicle restraint system. . . . Rather, the 'gap' in [the expert]'s analysis was his failure to show how his observations, assuming they were valid, supported his conclusions that [the passenger] was wearing her seat belt or that it was defective." *Id.*

The analysis set out in *Gammill* lends support to the reliability of Daller's expert opinion testimony in this case. Daller is board-certified in general surgery and critical care, specializes in multiple-organ transplantation, and has worked as a clinician in teaching hospitals across the

country—including the University of Texas Medical Branch at Galveston, where he treated Crump. His educational and clinical qualifications to treat post-transplantation, immunosuppressed patients, such as Crump, are not in dispute. As explained above in addressing the *Robinson* factors, an analytical gap between the data and opinion is not shown here because of Daller's "techniques in assessing" Crump. *See id.* Rather, there must be "failure to show how his observations, assuming they were valid, supported his conclusions." *Id.* He directly treated or oversaw Crump's treatment on repeated occasions after Crump's work-related knee injury. Daller observed that Crump's wound was located in the same spot as the injury and that the wound site became symptomatic as being infected in a predictable time and manner after the injury for an immunosuppressed patient such as Crump.[3] He observed that, in his words, the wound infection tilted Crump's "seesaw" away from an immunosuppressed patient's "relative balance" between immunosuppression and infection toward systemic infection. He took cultures from the wound site and performed surgery to diagnose and to assist healing of the wound. The cultures allowed the observation that Crump's wound was infected with the same agent as the infectious agent that had become systemic in Crump. Daller observed that Crump—despite being a kidney transplant recipient with diabetes and undiagnosed hepatitis C—had no medical history of organ problems from the period after the transplant in 1975 until after the work-related injury in 2000. Daller observed the problems with Crump's organ function and concluded that "the worsening of those organs' functions was caused by the infection."

[3] "[T]emporal proximity alone does not meet standards of scientific reliability and does not, by itself, support an inference of medical causation. . . . Nevertheless, when combined with other causation evidence, evidence that conditions exhibited themselves or were diagnosed shortly after an event may be probative in determining causation." *Guevara v. Ferrer*, 247 S.W.3d 662, 667–68 (Tex. 2007) (citations omitted).

From these observations, Daller concluded:

Q. Doctor, do you have an opinion regarding the cause of Mr. Crump's death?
A. Yes, I do.
Q. And what is that opinion, sir?
A. My opinion is that his death resulted from a natural sequence of events that began at the time of his knee injury.
Q. Doctor, would you please elaborate as to what was the cause of the death as it related to the injury?
A. Mr. Crump had had [sic] a renal transplant approximately 25 years prior, I believe. He also had what is known as compensated cirrhosis from hepatitis C. At the time that he experienced the injury, that injury caused a progression of his hepatic insufficiency, and because of his inability to fight off infections and also because of his overall medical condition, it caused a series of events that led to his death.
Q. Dr. Daller, is it your opinion that the infection which Mr. Crump developed was a producing cause of his death?
A. It was the trigger cause of a sequence of events that then occurred.

Thus, we cannot conclude that there was "too great an analytical gap" between the observed data and the proffered opinion. *See Gammill*, 972 S.W.2d at 727. At this point, any "gaps" that remain between the data and the conclusion drawn from it go to the weight of Daller's testimony—not its reliability. *See Ledesma*, 242 S.W.3d at 40–41.

We conclude that Daller's testimony was based on a sufficiently reliable foundation under the standards set out in *Robinson* and *Gammill*. Because Daller's expert medical causation testimony is based on a reliable foundation, it was admissible at trial as evidence to prove that the May 2000 injury was a producing cause of Crump's death. *See* TEX. R. EVID. 702. Consequently, on legal sufficiency review, we conclude that reasonable jurors could have believed his testimony. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Because Daller's expert testimony was sufficient evidence to support the jury's verdict on causation, we cannot disturb the jury's finding

against Transcontinental on the issue of producing cause. Accordingly, Transcontinental's legal sufficiency challenge is denied.

III. Jury Charge

In its second issue, Transcontinental argues that the trial court's definition of producing cause is legally incorrect and that, had its proposed definition been given, the verdict would not have been in Crump's favor. Transcontinental seeks a new trial. After refusing Transcontinental's proposed definition and overruling its objections that Crump's definition erroneously lacked a but-for component, the trial court charged the jury as follows:

QUESTION NO. 1

> You are instructed that the Texas Workers' Compensation Commission found that Charles Crump's compensable right knee injury of May 9, 2000 resulted in his death on January 23, 2001.
>
> "Injury" means damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm.
>
> "Producing Cause" means an efficient, exciting, or contributing cause that, in a natural sequence, produces the death in question. There may be more than one producing cause.
>
> **WAS CHARLES CRUMP'S MAY 9, 2000 INJURY A PRODUCING CAUSE OF HIS DEATH?**
>
> Answer "Yes" or "No."
>
> **Answer: Yes**

A. Was the Trial Court's Definition of Producing Cause Erroneous?

Transcontinental contends that the trial court gave an erroneous definition of producing cause in its jury charge. We agree.

"The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict." TEX. R. CIV. P. 277. "An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence." *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002) (citing TEX. R. CIV. P. 278). When, as here, the content of a trial court's definition is challenged as legally incorrect, our standard of review is de novo. *See St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 525 (Tex. 2002).

Though the Texas Workers' Compensation Act does not use the phrase "producing cause,"[4] this has been the standard for proving causation in workers' compensation claims for more than eighty years.[5] Courts generally agreed that the workers' compensation causation standard was not to be as exacting as that of the common law, but no uniform definition of causation in the workers'

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[4] *See* TEX. LAB. CODE § 408.181(a) ("An insurance carrier shall pay death benefits to the legal beneficiary if a compensable injury to the employee *results* in death.") (emphasis added); *id.* § 401.011(10) ("'Compensable injury' means an injury that *arises out of* and in the course and scope of employment for which compensation is payable under this subtitle.") (emphasis added); *id.* § 401.011(26) ("'Injury' means damage or harm to the physical structure of the body and a disease or infection *naturally resulting* from the damage or harm.") (emphasis added).

[5] Initially the phrase "exciting and efficient cause" was used to describe the causation element in a workers' compensation claim. *See, e.g.*, *Travelers' Ins. Co. v. Smith*, 266 S.W. 574, 575–76 (Tex. Civ. App.—Beaumont 1924, no writ) ("[T]he act contemplates . . . that in case of the death of the employee from a disease which is shown to be the exciting and efficient cause of the employee's death, his beneficiaries are entitled to compensation, though they be unable to prove that such death was proximately caused by the injury received, as the term 'proximate cause' is used in the law of negligence."). "Producing cause" was used interchangeably with "efficient cause." *Travelers' Ins. Co. v. Peters*, 14 S.W.2d 1007, 1008 (Tex. Comm'n App. 1929, holding approved), *vacated on other grounds*, 17 S.W.2d 457 (Tex. Comm'n App. 1929). *Peters* held:

> [T]he rule of proximate cause has no application to cases arising under the Workmen's Compensation Act. The term "proximate cause" is not used anywhere in the act. A party claiming compensation under such act cannot be compelled to go further than is required by the provisions of the act, either in pleading or proving his cause of action. It is true that there must be established a causal connection between an injury and the death of an employee before a recovery would be authorized. If, however, the injury is shown to be the producing cause of the death, a finding is justified that death was due to the injury, if it arises in the course of and out of the employment.

Id.

compensation context emerged.[6] As the law developed, courts recognized that the only substantial difference between the two standards was that a proximate cause—the common law standard—must be foreseeable.[7] We finally approved a definition of producing cause for workers' compensation cases in 1943:

> Compensation is awarded to the legal beneficiary of the deceased employee if death results from the injury. Causal connection must be established between the injury and the death. The injury must be the producing cause of the death, and producing cause has been defined as that cause which, in a natural and continuous sequence, produces the death . . . in issue, and without which the death . . . would not have occurred.

Jones v. Traders & Gen. Ins. Co., 169 S.W.2d 160, 162 (Tex. 1943) (citation and quotation omitted). We have not addressed the matter since then.

In a recent products liability case, however, we held that what had been "a frequently submitted definition of 'producing cause' should no longer be used." *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 35 (Tex. 2007). The trial court in that case had given the products liability pattern jury charge definition: "'Producing cause' means an efficient, exciting, or contributing cause that,

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[6] *E.g.*, *Tex. Employers' Ins. Ass'n v. Burnett*, 105 S.W.2d 200, 202 (Tex. 1937) ("Confusion has arisen by the use of the term 'producing cause' as distinguished from the term 'proximate cause' usually employed in negligence cases.").

[7] *See, e.g.*, *Tex. Indem. Ins. Co. v. Staggs*, 134 S.W.2d 1026, 1028–29 (Tex. 1940). In *Staggs*, we explained:

> It is well settled that in a suit under the compensation law it is not necessary for the claimant to show that the injury proximately caused disability or death. Recovery is authorized if a causal connection is established between the injury and the disability or death. "Producing cause" is the term most frequently used in compensation cases. Sometimes the cause required to be proven is described as an "efficient, exciting or contributing cause." The approved definition of "proximate cause" in negligence cases and the approved definition of "producing cause" in compensation cases are in substance the same, except that there is added to the definition of proximate cause the element of foreseeableness. It is apparent that "producing cause" is broader in its scope than is "proximate cause."

Id. (citations omitted).

in a natural sequence, produces the incident in question. There may be more than one producing cause." *Id.* at 45.[8] Because we held that the trial court committed reversible error in a separate part of the charge, we reversed on that ground and remanded the case for new trial. *Id.* at 44. But to assist the parties and the court on remand, we further held that producing cause should be correctly defined as "a substantial factor in bringing about an injury, and without which the injury would not have occurred." *Id.* at 46.

The definition submitted by Crump and accepted at trial—"'Producing Cause' means an efficient, exciting, or contributing cause that, in a natural sequence, produces the death in question. There may be more than one producing cause."—is the same as the pattern jury charge definition we rejected in *Ledesma*, substituting only "death" for "incident." Transcontinental urges us now to adopt for workers' compensation cases the same definition we approved in *Ledesma* for products liability cases. Crump asserts that the *Ledesma* definition of producing cause has no place in workers' compensation law. Because we have not addressed the "substantial factor" terminology from products liability law in the context of workers' compensation cases, we must decide whether our holding in *Ledesma* applies here.[9]

In considering whether to apply *Ledesma*'s definition, we first examine the causation standards for proximate cause and producing cause. "The two elements of proximate cause are cause

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[8] *See also* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES, & PRODUCTS 70.1 (2002).

[9] Our *Ledesma* opinion was issued just after the court of appeals received briefing, but the court of appeals held it "distinguishable and inapplicable to this appeal because it is a products liability case which requires the cause to be a substantial factor of the event in issue, a requirement absent from a workers' compensation case." 274 S.W.3d at 100 n.13.

in fact (or substantial factor) and foreseeability. . . . Cause in fact is established when the act or omission was a substantial factor in bringing about the injuries, and without it, the harm would not have occurred." *IHS Cedars Treatment Ctr. v. Mason*, 143 S.W.3d 794, 798–99 (Tex. 2004). "The approved definition of 'proximate cause' in negligence cases and the approved definition of 'producing cause' in compensation cases are in substance the same, except that there is added to the definition of proximate cause the element of foreseeableness." *Staggs*, 134 S.W.2d at 1028–29. In other words, the producing cause inquiry is conceptually identical to that of cause in fact. We have recognized this in Deceptive Trade Practices Act cases. *See, e.g.*, *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995) ("For DTPA violations, only producing cause must be shown. The element common to both proximate cause and producing cause is actual causation in fact. This requires proof that an act or omission was a substantial factor in bringing about injury which would not otherwise have occurred.") (citations omitted). Also, in *Ledesma*, a products liability case, we recognized that producing cause and cause in fact are conceptually identical. *See* 242 S.W.3d at 46 ("Defining producing cause as being a substantial factor in bringing about an injury, and without which the injury would not have occurred, is easily understood and conveys the essential components of producing cause that (1) the cause must be a substantial cause of the event in issue and (2) it must be a but-for cause, namely one without which the event would not have occurred.").[10] The producing cause inquiry in workers' compensation cases is conceptually no different from the cause in fact inquiry in negligence cases and the producing cause inquiry in

[10] *Ledesma* did not distinguish between DTPA and products liability cases when surveying the various definitions of producing cause. *See* 242 S.W.3d at 45–46 n.47.

other substantive contexts. We see no reason to define producing cause differently in this context.[11] Therefore, we hold that producing cause in workers' compensation cases is defined as a substantial factor in bringing about an injury or death, and without which the injury or death would not have occurred.

Having concluded that *Ledesma* applies to this case, we must determine whether the definition given here was erroneous. The definition of producing cause given by the trial court in this case is, in all relevant respects, the same as the pattern jury charge definition we rejected in *Ledesma*. *See* 242 S.W.3d at 45. Transcontinental cites *Ledesma* for the proposition that the use of the "efficient, exciting, or contributing cause" language is erroneous. We disagree. In *Ledesma*, we reasoned that those terms had no practical meaning to modern jurors in products liability cases. *Id.* at 46. We held that the use of those terms provides "little concrete guidance" to modern jurors, and a definition that omits either the substantial factor or but-for components "is incomplete." *Id.* But we did not go so far as to say that employing the terms "efficient, exciting, or contributing cause" in a producing cause definition was, as Transcontinental suggests, erroneous. Thus, while the concerns about terminology "foreign to modern English" and incomplete definitions expressed in *Ledesma* apply equally to this case, the mere use of these terms is not, in itself, error.[12]

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[11] We observe that the substantial factor terminology, though infrequently encountered, is not entirely foreign to workers' compensation law. *See, e.g.*, *Pac. Indem. Co. v. Arline*, 213 S.W.2d 691, 698 (Tex. Civ. App.—Beaumont 1948, writ dism'd by agr.) ("[T]he Workmen's Compensation Law expresses the necessary causal relation between injury and disability by various forms of the word 'result' in almost every instance . . . . The words 'resulting from' . . . refer only to causation in fact; the requirement is that the injury be a substantial factor in bringing about the disability, something without which the disability, would not have occurred. . . . [E]very definition . . . we have seen of 'producing cause,' a term which has been frequently used, expresses only causation in fact.").

[12] Consistent with *Ledesma*, however, we believe those terms ought not to be used to define producing cause in the future.

Crump argues that the "substantial factor" component of the *Ledesma* definition imposes a higher causation burden upon workers' compensation claimants than what exists at present. We disagree. We have always required in workers' compensation cases a showing of "unbroken causal connection" between the compensable injury and the claimant's injury or death. *Staggs*, 134 S.W.2d at 1030; *see Jones*, 169 S.W.2d at 162; *Burnett*, 105 S.W.2d at 202. Although, as the dissent points out, our earlier cases did not address the "substantial factor" terminology, there is nothing in those opinions to suggest that cause in fact should not be part of the causal connection analysis. *See Jones*, 169 S.W.2d at 162; *Staggs*, 134 S.W.2d at 1030; *Burnett*, 105 S.W.2d at 202. In fact, we cannot conceive of causal connection analysis without consideration of cause in fact. The substantial factor language serves only to illustrate an essential aspect of causation to jurors, as we have noted:

> The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Lear Siegler, Inc. v. Perez, 819 S.W.2d 470, 472 & n.1 (Tex. 1991) (quoting RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965)); *see also Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 770 (Tex. 2007). In other words, for an act or event to rise to the level of cause in the legal sense, the act or event must be such that reasonable jurors would identify it as being actually responsible for the ultimate harm. The cause must be more than one of the countless ubiquitous and insignificant causes that in some remote sense may have contributed to a given effect as, for example, simply

getting up in the morning. That the term substantial factor is given to this commonsense aspect of legal causation simply makes plain to jurors that more than causation in this indirect, "philosophic sense" is required. *See Staggs*, 134 S.W.2d at 1030 (recognizing that but-for language repeated something already included in the usual and ordinary meaning of "cause" and draws juror attention to the importance of an unbroken causal connection). It does not demand, nor even imply, a higher standard of legal causation beyond the ordinary sense of the concept.

Transcontinental argues that the omission of but-for language in the charge submitted by the trial court renders the definition legally incorrect. We agree. As we discussed in one workers' compensation case, "to say of a cause of an injury that it is one 'but for which the injury would not have happened' is to repeat something already included in the usual and ordinary meaning of the word 'cause.'" *Id.* (quoting *Tex. & Pac. Ry. Co. v. Short*, 62 S.W.2d 995, 999 (Tex. Civ. App.—Eastland 1933, writ ref'd)). However, the inclusion of but-for language in producing cause definitions has long been considered useful, serving "to direct the jury's attention to the importance of unbroken causal connection between the injury and the disability or death." *Id.*; *see also Wichita County v. Hart*, 917 S.W.2d 779, 783–84 (Tex. 1996) ("A trial court must submit explanatory instructions and definitions that will assist the jury in rendering a verdict."). We recognized this in *Ledesma* and, desiring to offer "practical help to a jury striving to make the often difficult causation determination," held that a producing cause definition that did not include the but-for component was "incomplete." 242 S.W.3d at 46. Indeed, we have often referred to producing cause and cause in fact synonymously with but-for causation. *See, e.g.*, *LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 688 (Tex. 2006) (per curiam); *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003) (per

curiam); *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 667 (Tex. 1999). The producing cause definition submitted in this case lacked the but-for component. It, too, was incomplete, and therefore an erroneous statement of the law of producing cause. *See Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002).

B. Was the Trial Court's Definition of Producing Cause Harmful?

Having decided that the trial court's definition of producing cause was erroneous, we now consider whether this error requires reversal. Transcontinental asserts that the trial court's omission of the but-for component of the producing cause definition was reversible error. We agree.

"A judgment will not be reversed for charge error unless the error was harmful because it probably caused the rendition of an improper verdict . . . ." *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 856 (Tex. 2009) (citing TEX. R. APP. P. 61.1). "Charge error is generally considered harmful if it relates to a contested, critical issue." *Id.* (citing *Bel-Ton Elec. Serv., Inc. v. Pickle*, 915 S.W.2d 480, 481 (Tex. 1996) (per curiam), and *Sw. Bell Tel. Co. v. John Carlo Tex., Inc.*, 843 S.W.2d 470, 472 (Tex. 1992)). "To determine whether the instruction probably caused an improper judgment, we examine the entire record." *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 480 (Tex. 2001).

Daller, one of Crump's treating physicians and Crump's sole expert, testified:

> Mr. Crump had had [sic] a renal transplant approximately 25 years prior, I believe. He also had what is known as compensated cirrhosis from hepatitis C. At the time that he experienced the injury, that injury caused a progression of his hepatic insufficiency, and because of his inability to fight off infections and also because of his overall medical condition, it caused a series of events that led to his death.

According to Daller, the site of the injury became infected, the infection caused Crump's already-weakened organs to fail, and his organ failure in turn caused his death. Further, on cross-examination he testified:

> Q: It's your opinion that the cause of the infection was histoplasmosis but that but for the bruise the histoplasmosis would not have developed into a full-stage infection, right?
> A: That is correct.

On the other hand, Transcontinental's expert, Hunt, testified that Crump died from the natural complications of being immunosuppressed for twenty-five years rather than from the May 9, 2000 injury:

> Q. In your opinion, would the death have occurred without the May 9, 2000 injury ever taking place?
> A. Yes.

Hunt testified on cross-examination, "Had [Crump] not had that contusion to his knee, he still would have had those other problems."

> Q. So, you're saying that Mr. Crump would have been in there in Polly Ryon [Memorial Hospital] on January 23rd of 2001, dying of liver failure, kidney failure, aspiration of the stomach, his heart was giving out—I mean, his whole body was shutting down. You said yourself he was critically ill.
> A: Yes, sir.

Transcontinental bore the burden of proving, by a preponderance of the evidence, the negative proposition that the May 2000 injury was not a producing cause of Crump's death. *See* TEX. LAB. CODE § 410.303; *Morales v. Liberty Mut. Ins. Co.*, 241 S.W.3d 514, 516 (Tex. 2007) ("[T]he appealing party bears the burden of proof by a preponderance of the evidence. The factfinder may consider, but is not bound by, the appeals panel's decision. The method of review that [the Labor

Code] provides is known as modified de novo review.") (citations omitted). The but-for aspect of causation was squarely at issue in this case, and the sole question before the jury was whether the May 2000 injury was a producing cause of Crump's death. Here, the charge error "relate[d] to a contested, critical issue"—indeed, the sole issue—that of causation. *See Hawley*, 284 S.W.3d at 856; *see also Toennies*, 47 S.W.3d at 480 ("An improper instruction is especially likely to cause an unfair trial when the trial is contested and the evidence sharply conflicting, as it was in the present case [when the trial court gave an incorrect causation standard]."); *Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 637 (Tex. 1995) (finding harmful error where a jury instruction stated the standard of causation incorrectly and the evidence was "vigorously and convincingly disputed"); *John Carlo Tex., Inc.*, 843 S.W.2d at 472 ("Virtually the entire factual dispute between the parties has been over whether Bell's conduct was justified. To ask the jury to resolve this dispute without a proper legal definition [of justification,] the essential legal issue[,] was reversible error."). Including the but-for component in the definition would have assisted the jury in resolving the disputed expert testimony at the crux of the case and, more importantly, would have stated the law accurately. *See Williams*, 85 S.W.3d at 166. In these circumstances, the absence of a proper definition of producing cause probably resulted in an improper judgment and, as such, was reversible error. *See Hinds*, 904 S.W.2d at 637.

Prior to trial, Transcontinental objected to Crump's definition, the one ultimately accepted by the trial court, asserting it was not a correct statement under Texas law. Transcontinental tendered its own definition in writing, including a but-for component: "that cause, which in a natural and continuous sequence, produces death and without which, the death would not have occurred."

See TEX. R. CIV. P. 278 ("Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment."). Because Transcontinental's definition included the critical but-for component, and was otherwise a correct statement of law, it was "substantially correct" and sufficed to preserve its complaint of charge error on appeal. *See Hinds*, 904 S.W.2d at 637–38 ("There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.") (quoting *State Dep't of Highways v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992)).

We hold that the definition of producing cause approved in *Ledesma*—a substantial factor in bringing about the injury or death and without which the injury or death would not have occurred—applies in workers' compensation cases. Because the definition submitted here lacked the but-for component, and because its omission in this case constitutes harmful error, we remand the case for new trial.

IV. Attorney's Fees

Transcontinental first argues that the trial court erred in denying it a jury trial on the amount of Crump's reasonable and necessary attorney's fees for which Transcontinental was statutorily liable, and second, in permitting Crump to recover attorney's fees incurred in pursuing those statutory attorney's fees. We address the first issue—whether a judge or jury decides attorney's fees under Texas Labor Code § 408.221(c)—to provide guidance for parties and trial courts. We leave the second question—whether fees can be awarded in the pursuit of fees— for another day.

Relying on this Court's precedent and the language of § 408.221, Transcontinental argues that the trial court erred when it refused to grant a jury trial and, instead, decided the disputed amount of Crump's attorney's fees for which Transcontinental was liable under § 408.221(c). Crump contends that the statute's plain language alone provides that the court, and not a jury, is to determine the amount of reasonable and necessary attorney's fees for which Transcontinental is liable. The court of appeals favored Crump's plain language argument and held that the trial court did not err in denying Transcontinental's request to submit the issue to a jury. 274 S.W.3d at 103. We hold that when a question of fact exists on the reasonableness and necessity of a claimant's attorney's fees under § 408.221(c), the carrier has a right to submit that question to a jury.

In construing another provision of the Workers' Compensation Act, we set out the scope of our inquiry:

> The meaning of a statute is a legal question, which we review de novo to ascertain and give effect to the Legislature's intent. Where text is clear, text is determinative of that intent. This general rule applies unless enforcing the plain language of the statute as written would produce absurd results. Therefore, our practice when construing a statute is to recognize that the words the Legislature chooses should be the surest guide to legislative intent. Only when those words are ambiguous do we resort to rules of construction or extrinsic aids.

Entergy Gulf States, Inc. v. Summers, 282 S.W.3d 433, 437 (Tex. 2009) (citations, internal quotations, and italics omitted). We review de novo the trial court's denial of Transcontinental's request for a jury trial under subsection (c). *See id.*

We look first to the language of the statute.[13] The relevant portions of § 408.221 read:

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[13] Subsection (c) is the focus of the parties' dispute, but because it is part of a single section of the Labor Code governing the award of attorney's fees, we construe it in that context. *See Morales*, 241 S.W.3d at 517 ("We . . . consider each provision in the context of the entire statute, not merely those portions that are in dispute."); *Cont'l Cas. Ins. Co.*

(a) An attorney's fee, including a contingency fee, for representing a claimant before the division or court under [the Texas Workers' Compensation Act] must be approved by the commissioner or court.

(b) Except as otherwise provided, an attorney's fee under this section is based on the attorney's time and expenses according to written evidence presented to the division or court. Except as provided by Subsection (c) . . . , the attorney's fee shall be paid from the claimant's recovery.

(c) An insurance carrier that seeks judicial review . . . of a final decision of the appeals panel regarding compensability or eligibility for, or the amount of, income or death benefits is liable for reasonable and necessary attorney's fees as provided by Subsection (d) incurred by the claimant as a result of the insurance carrier's appeal if the claimant prevails on an issue on which judicial review is sought by the insurance carrier . . . . If the carrier appeals multiple issues and the claimant prevails on some, but not all, of the issues appealed, the court shall apportion and award fees to the claimant's attorney only for the issues on which the claimant prevails. In making that apportionment, the court shall consider the factors prescribed by Subsection (d). . . .

(d) In approving an attorney's fee under this section, the commissioner or court shall consider:
    (1) the time and labor required;
    (2) the novelty and difficulty of the questions involved;
    (3) the skill required to perform the legal services properly;
    (4) the fee customarily charged in the locality for similar legal services;
    (5) the amount involved in the controversy;
    (6) the benefits to the claimant that the attorney is responsible for securing; and
    (7) the experience and ability of the attorney performing the services.

. . . .

(i) Except as provided by Subsection (c) . . . , an attorney's fee may not exceed 25 percent of the claimant's recovery.

TEX. LAB. CODE § 408.221. We review the plain language of the statute as written to decide whether Crump's or Transcontinental's interpretation—judge or jury—is supported.

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v. Functional Restoration Assocs., 19 S.W.3d 393, 398 (Tex. 2000) ("Each provision must be construed in the context of the entire statute of which it is a part."); *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex. 1994) ("Only in the context of the remainder of the statute can the true meaning of a single provision be made clear.").

According to Crump, subsection (c)'s instruction that the court is to award apportioned fees means that the court alone determines the reasonable and necessary amount of fees—according to criteria given in subsection (d). This interpretation, Crump argues, comports with subsection (b)'s general rule that attorney's fees under § 408.221 are based on written evidence of time and expenses presented *to the court*, which would have no use for this information if it were not deciding the amount to award. Crump correctly notes that § 408.221 makes no mention of a jury.

Transcontinental focuses on the first words in subsection (b): "Except as otherwise provided." *Id.* § 408.221(b). It argues that subsection (c) represents an exception to the general rule set out in subsections (a) and (b), where a claimant's attorney's fees are paid out of the claimant's benefit recovery and a court decides those fees. Subsection (c) controls the situation where a claimant's attorney's fees are paid directly by the liable insurance carrier, and a court—or, according to Transcontinental, a jury if one is sought—decides the extent of the carrier's additional liability beyond the claimant's benefits award. Transcontinental points out that every reference to a court's action in § 408.221 is that of approval, except in sentence two of subsection (c), under which the court is to apportion and, after that apportionment is concluded, "award fees to the claimant's attorney only for the issues on which the claimant prevails." *Id.* § 408.221(c). Transcontinental correctly observes that the statute does not state explicitly that the court alone is to determine the amount of attorney's fees, nor does it expressly forbid a jury from deciding the matter.

The statute is silent on the critical judge-or-jury question. Both parties offer legitimate, reasonable interpretations of § 408.221 and subsection (c)'s role within it. Because both interpretations are reasonable as to their applicability here, we conclude that the statute is ambiguous.

See In re Mo. Pac. R.R. Co., 998 S.W.2d 212, 217 (Tex. 1999) ("Beyond these preliminary observations, the statute is not entirely clear in all its particulars. The language of the statute could support more than one reasonable interpretation and therefore is ambiguous. Because it is ambiguous, we may turn to extratextual sources. . . ."). Because the plain language of the statute alone is unavailing, we look beyond it. *See id.*; *see also* TEX. GOV'T CODE § 311.023 ("In construing a statute, . . . a court may consider among other matters the . . . common law or former statutory provisions, including laws on the same or similar subjects . . . ."). Specifically, we are guided by prior decisions examining the issue of reasonable and necessary attorney's fees in the context of fee-shifting provisions in other statutory regimes and by the history of how § 408.221 has evolved over the years.

Section 408.221 provides two relevant possibilities in which an insurance carrier will pay a claimant's attorney's fees.[14] The first is where the carrier pays the claimant's attorney's fees for representation before the Division of Workers' Compensation[15] and some court proceedings, but the fees are subtracted from the claimant's recovery. TEX. LAB. CODE § 408.221(a)–(b). Because, in effect, the claimant pays in this situation, the claimant's attorney's fees are limited to 25% of the claimant's recovery. *Id.* § 408.221(I). The trial court must approve these fees, *id.* § 408.221(a), and must consider several factors in doing so, *id.* § 408.221(d). The insurance carrier can only be said

[14] Attorney's fees resulting from appeals of an award of supplemental income benefits are also addressed in § 408.221, and are not under consideration here. *See* TEX. LAB. CODE § 408.221(b), (c), (i); *see also id.* § 408.147(c) (mandating payment of employee's attorney's fees if a carrier unsuccessfully disputes a supplemental income benefits award).

[15] Fee awards for representing a claimant before the Division of Workers' Compensation—not at issue here—are set forth in the Texas Administrative Code. *See* 28 TEX. ADMIN. CODE § 152.1.

to pay these fees in the technical sense that it drafts a separate check for the attorney's fees, payable directly to the claimant's attorney. *Id.* § 408.221(h). In reviewing fees awarded in this situation, we have "held that the amount of the attorney's fees to be allowed in compensation cases is a matter for the trial court to determine without the aid of a jury, and the amount of the recovery is within its discretion." *Tex. Employers Ins. Ass'n v. Motley*, 491 S.W.2d 395, 397 (Tex. 1973) (citing *Tex. Employers Ins. Ass'n v. Hatton*, 255 S.W.2d 848, 849 (Tex. 1953) ("The amount of attorney's fees to be allowed in a compensation case is exclusively for the court and not the jury, and any such [contingency-fee] contract was made subject to the approval by the court. The court in his discretion could award a lesser amount.")). Crump cites *Motley* and *Hatton* as dispositive here. But, as discussed below, those cases do not address subsection (c), which was not enacted until decades later.

The second possibility is at issue in this case. Here, the insurance carrier pays the claimant's "reasonable and necessary attorney's fees" for representing the claimant on judicial review in the courts when the carrier is unsuccessful on an issue it appealed from the Division of Workers' Compensation. TEX. LAB. CODE § 408.221(c). These fees are not subtracted from the claimant's recovery, but are paid by the carrier on top of the claimant's benefits award. *See id.* § 408.221(b)–(c). In this situation, the claimant's attorney's fees are not limited to 25% of the claimant's recovery, but only by reasonableness and necessity. *See id.* § 408.221©, (I). This fee-shifting provision in § 408.221 did not exist until 2001.[16] Prior to 2001, the only attorney's fee

[16] *See* Act of May 25, 2001, 77th Leg., R.S., ch. 1456, § 8.01, 2001 Tex. Gen. Laws 5167, 5189 (codified at TEX. LAB. CODE § 408.221).

award mechanism was the one in subsection (b), described in the paragraph above, where the claimant always pays his own attorney's fees regardless of the outcome of the carrier's appeal.[17] For this reason, *Motley* and *Hatton* do not control in this case—they addressed this other statutory scheme, and could not have contemplated the fee-shifting mechanism presented in subsection (c).

While we have not previously examined the fee-shifting provision in subsection (c), we have discussed similar fee-shifting provisions in other cases. "In general, the reasonableness of statutory attorney's fees is a jury question." *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367 (Tex. 2000). In *City of Garland*, we considered the fees available to a substantially prevailing party under the Texas Public Information Act. *Id.* at 367–68. The Act provided:

> (a) In an action brought under Section 552.321 [suit for writ of mandamus under the Act] . . . , the court may assess costs of litigation and reasonable attorney fees incurred by a plaintiff or defendant who substantially prevails.
>
> (b) In exercising its discretion under this section, the court shall consider whether the conduct of the governmental body had a reasonable basis in law and whether the litigation was brought in good faith.

Id. at 367 (quoting the former version of TEX. GOV'T CODE § 552.323). We reasoned that, from the plain language of the statute, "the trial judge decides *whether to award* attorney's fees under the Act." *Id.* (emphasis added). But we immediately noted that "section 552.323 does not dictate *how to determine the attorney's fees amount*, except that the award must be 'reasonable.' In general, the reasonableness of statutory attorney's fees is a jury question." *Id.* (emphasis added, citation omitted).

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[17] *See generally* Act of Dec. 13, 1989, 71st Leg., 2d C.S., ch. 1, § 4.09, 1989 Tex. Gen. Laws 1, 34–35 (embodying what is now codified in § 408.221 as it existed prior to the 2001 amendment adding subsection (c)).

As support for this "general" proposition, we cited *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998), which involved attorney's fee awards under the Declaratory Judgment Act. *Id.* In any proceeding under the Act, "the court may award costs and reasonable and necessary attorney's fees as are equitable and just." *Bocquet*, 972 S.W.2d at 20 (quoting TEX. CIV. PRAC. & REM. CODE § 37.009). We had to determine whether a judge or jury was to decide the amount of fees in order to answer another question: "[B]y what standard is such an award of attorney fees to be reviewed on appeal"? *Id.* Because the Act read "may," the trial court had discretion to decide whether to award fees at all. *Id.* We recognized that the Act limited this discretion in four ways: reasonableness, necessity, equity, and justice. *Id.* at 21. Each of those terms prescribed whether a judge or jury was to decide them. *Id.* Generally, reasonableness was a fact question for the jury's determination, as was necessity. *Id.* On the other hand, equity was within the trial court's discretion, as was justice. *Id.* Our examination of the Act's language led us to conclude:

> Therefore, in reviewing an attorney fee award under the Act, the court of appeals must determine whether the trial court abused its discretion by awarding fees when there was [legally or factually] insufficient evidence that the fees were reasonable and necessary, or when the award was inequitable or unjust. Unreasonable fees cannot be awarded, even if the court believed them just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees. This multi-faceted review involving both evidentiary and discretionary matters is required by the language of the Act.

Id. In concluding that reasonableness and necessity of attorney's fees were matters of fact committed to a jury, we also noted that there are "factors prescribed by law which guide the determination of whether attorney fees are reasonable and necessary." *Id.* (citing *Arthur Andersen & Co. v. Perry*

Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997) (listing factors "a factfinder should consider when determining the reasonableness of a fee")).

The principles established for construing statutory fee-shifting provisions in *City of Garland* and *Bocquet* assist the interpretation of § 408.221(c) of the Texas Labor Code. Crump has not pointed us to a reason to exempt § 408.221 from the general rule announced in those cases: "[T]he reasonableness of statutory attorney's fees is a jury question." *City of Garland*, 22 S.W.3d at 367. Nor do we see language in § 408.221 that distinguishes it from the language of the statutory regimes to which we applied the general rule in those cases. Applying that general rule here, we conclude that the carrier is entitled to submit the issue of the reasonableness and necessity of a claimant's attorney's fees, where disputed, to a jury, which will consider subsection (d)'s factors. *See* TEX. LAB. CODE § 408.221(c), (d). The next step depends on whether the claimant totally or partially prevails on the issues appealed by the insurance carrier. If the claimant prevails only on some issues, then after the jury's verdict is announced the court will apportion the fees per the factors in subsection (d), and will award reasonable and necessary attorney's fees to the claimant's attorney only for those issues on which the claimant prevails. *See* TEX. LAB. CODE § 408.221(c). If the claimant totally prevails, the jury's verdict as to the fee amount for which the carrier is liable is then subject only to the court's approval based on the factors in subsection (d). *Id.* § 408.221(a), (d); *see also Bocquet*, 972 S.W.2d at 21 ("Unreasonable fees cannot be awarded . . . ."). Regardless of whether the claimant partially or totally prevails, the jury's verdict as to the fee amount "must be approved by the . . . court." TEX. LAB. CODE § 408.221(a). When a claimant pays his attorney's fees out of his benefits recovery, the amount approved by the court is solely within its discretion based

on the attorney's time and expenses according to written evidence presented to the court and according to subsection (d)'s factors. *See id.* § 408.221(a), (b), (d); *Hatton*, 255 S.W.2d at 849. This interpretation resolves § 408.221's ambiguity while respecting its pre- and post-2001 award mechanisms and, at the same time, respects our precedent on the reasonableness and necessity of statutory attorney's fees.

Thus, we hold that an insurance carrier is entitled to have a jury determine the disputed amount of reasonable and necessary attorney's fees for which it is liable under § 408.221(c).

V. Conclusion

We hold that: (1) the treating physician's opinion is based on a reliable foundation and, therefore, legally sufficient evidence supports the jury's verdict; (2) the trial court's omission of the but-for component in the jury charge constitutes reversible error; and (3) an insurance carrier is entitled to have a jury determine the disputed amount of reasonable and necessary attorney's fees for which it is liable. We reverse the court of appeals' judgment and remand the case to the trial court for new trial.

_____
Paul W. Green
Justice

OPINION DELIVERED: August 27, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0005

TRANSCONTINENTAL INSURANCE COMPANY, PETITIONER,

v.

JOYCE CRUMP, RESPONDENT

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

Argued January 20, 2010

JUSTICE JOHNSON, joined by JUSTICE LEHRMANN, concurring.

Although I agree the trial court erred by giving a definition of "producing cause" that did not include a "but for" element, I respectfully disagree with part of section III of the Court's opinion.

For three reasons, including both procedural and substantive matters, I do not agree with the Court's holding that the producing cause definition in worker's compensation cases must include "substantial factor" language.[1] First, Transcontinental did not request the substantial factor language

[1] The parties agree that Transcontinental had the burden to prove that Charles Crump's injury was not a producing cause of his death. As the Court notes, the trial court asked the jury: "Was Charles Crump's May 9, 2000 injury a producing cause of his death?" The jury instructions required a "No" answer to be based on a preponderance of the evidence, and instructed the jury that if a preponderance of the evidence did not support a "No" answer, then the jury was to answer "Yes."

To the extent the Court's decision results in an increased level of proof for an injury to be proved a producing cause of death or disability, the decision correspondingly decreases the burden on a carrier in the position of Transcontinental to prove that an injury was *not* a producing cause of death or disability. For convenience, I address the issue only from the viewpoint of an injured employee or the employee's beneficiaries.

in the trial court. Second, the causation standard for worker's compensation is statutory and the causation language in the Worker's Compensation Act has not substantively changed since this Court construed it in *Texas Indemnity Insurance Co. v. Staggs*, 134 S.W.2d 1026 (Tex. 1940). In *Staggs*, the Court did not construe the causation language to include a "substantial factor" standard, and the Legislature presumably accepted that construction when it later amended the Act without materially changing the language. Third, the Court departs from the principle that worker's compensation statutes are liberally interpreted in favor of the injured worker. Regardless of what the Court says "substantial factor" means legally, the implication of a cause being substantial to a lay juror is that the cause must be more than minor, even if the minor cause is a concurring cause without which the death or disability would not have occurred.[2]

I. Procedural Disagreement

First, Transcontinental did not procedurally preserve error regarding the "substantial factor" language because it did not request the language in the trial court. It requested the following definition: "'Producing Cause' means that cause which in a natural and continuous sequence,

[2] A further, but more policy-oriented, reason for not changing the standard is the potential for increasing controversy in the dispute resolution process. The "substantial factor" language creates the possibility for disputes over how much a work-related injury contributed to disability or death, as opposed to just disputing whether the injury was a producing cause of the disability or death at all. One of the perceived deficiencies in the system before 1989 was increasing levels of controversy and litigation. *See* JOINT SELECT COMMITTEE ON WORKERS' COMPENSATION INSURANCE, A REPORT TO THE 71ST TEXAS LEGISLATURE 5 (Dec. 9, 1998). The 1989 reformation of the Texas worker's compensation system attempted to minimize controversy and litigation, in part, by instituting a multi-level administrative dispute resolution. The reforms seem to have been successful. Chief Justice Phil Hardberger, *Texas Workers' Compensation: A Ten-Year Survey—Strengths, Weaknesses, and Recommendations*, 32 ST. MARY'S L.J. 1, 42 (2000).

produces death, and without which, the death would not have occurred."[3] Of course, *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007), was not decided until after this case was tried, so it is hard to fault Transcontinental for not presenting the issue. Nevertheless, it did not do so. Further, Transcontinental maintained in the court of appeals that "precedent required the [trial] court" to give the instruction it requested.

The Court's desire to deal with the "substantial factor" question is understandable; it is important. Nevertheless, given the record before us, I would not address the issue. *See Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920-21 (Tex. 1993) (appellate argument that maritime law preempted state law was not preserved because of failure to bring issue to trial court's attention, despite assertion that law changed during appellate process).

II. Substantive Disagreement

A. Background

Worker's compensation claims are contractual in nature. *See Maryland Cas. Co. v. Hendrick Mem'l Hosp.*, 169 S.W.2d 969, 973 (Tex. 1943) ("[A] contractual relation arises under the Workmen's Compensation Law in which the employer, the employee and the insurer are the principal parties."). The terms of worker's compensation insurance policies include provisions of the worker's compensation statutes. *Id.* ("The provisions of the Workmen's Compensation Law become part of the contracts executed pursuant to it by those who bring themselves within the scope

[3] In contrast, in *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 45 (Tex. 2007), Ford objected to the definition the trial court gave and requested "producing cause" be defined as "that cause which, in a natural sequence, was a substantial factor in bringing about an event, and without which the event would not have occurred. There may be more than one producing cause."

of its operation."). If an employee is covered by worker's compensation insurance, then those benefits are the exclusive remedy of the employee and the employee's beneficiaries against the employer if a work-related injury causes the employee disability or death, except a claim for exemplary damages is available if death is caused by the employer's intentional act or omission or gross negligence. TEX. LABOR CODE § 408.001(a), (b). Because employees covered by worker's compensation are denied their common law right to sue their employers for work-related injuries, the worker's compensation statutes are construed liberally in favor of the worker. *E.g.*, *Payne v. Galen Hosp. Corp.*, 28 S.W.3d 15, 17 (Tex. 2000); *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999) ("[W]e liberally construe workers' compensation legislation to carry out its evident purpose of compensating injured workers and their dependents."); *Lujan v. Houston Gen. Ins. Co.*, 756 S.W.2d 295, 297 (Tex. 1988) ("[W]e have warned that the provisions of the Act 'should not be hedged about with strict construction, but should be given a liberal construction to carry out its evident purpose.'" (quoting *Yeldell v. Holiday Hills Ret. & Nursing Ctr.*, 701 S.W.2d 243, 245 (Tex. 1985))); *Hargrove v. Trinity Universal Ins. Co.*, 256 S.W.2d 73, 75 (Tex. 1953) ("Since the workman coming under the terms of the Act is denied his common law rights it is held that the Act should be liberally construed in his favor. A liberal interpretation will award him the greatest benefits the nature of his injuries will sustain.") (citations omitted); *Lumberman's Reciprocal Ass'n v. Behnken*, 246 S.W. 72, 74 (Tex. 1922).

When the first worker's compensation laws were enacted in 1913, they provided as to death claims:

> If death should result from the injury, the association hereinafter created shall pay to the legal beneficiary of the deceased employee a weekly payment . . . .

Act of March 29, 1913, 33d Leg., R.S., ch. 179, § 8, 1913 Tex. Gen. Laws 429. The Legislature re-enacted this provision without substantive change when it adopted the Workman's Compensation Act in 1917. Act approved March 28, 1917, 35th Leg., R.S., ch. 103, 1917 Tex. Gen. Laws 269. When the Court interpreted that statutory causation language in three death cases it noted—and implicitly approved—a causation instruction substantively the same as the instruction requested in this case by Transcontinental. *See Tex. Emp. Ins. Ass'n v. Burnett*, 105 S.W.2d 200 (Tex. 1937); *Tex. Indem. Ins. Co. v. Staggs*, 134 S.W.2d 1026 (Tex. 1940); *Jones v. Traders & Gen. Ins. Co.*, 169 S.W.2d 160 (Tex. 1943).

In *Burnett*, the worker died over a year after he suffered a head injury while on the job. 105 S.W.2d at 200. He died from typhoid fever that he contracted shortly before he died. *Id.* at 201. Burnett's beneficiaries did not contend that the typhoid fever was related to his injury, nor that his death resulted from the injury. *See id.* Rather, they contended the injury lowered his resistance and the lowered resistance was a producing cause of death. *Id.* The jury found for Burnett's beneficiaries based on the instruction that "'producing cause' is [a cause] such as naturally resulted in the death of said J.W. Burnett." *Id.* The court of civil appeals reversed for a different charge error and remanded for a new trial. *Id.* In doing so, however, it suggested how the trial court should define producing cause:

> [We] suggest that on another trial the court define "producing cause" as that term is used in the purview of our Workmen's Compensation Act, as that cause which, in a natural and continuous sequence, produces the death (or disability) in issue, and without which the death (or disability) would not have occurred.

Id. On further appeal, this Court rendered judgment for the carrier because

> [t]here was no positive testimony that Burnett's resistance was lowered by reason of the injury, and no positive proof that such reduced resistance, if any, materially contributed to his death. The testimony tending to prove each of these factual conclusions was entirely conjectural. . . . By whatever term we may attempt to define the causal connection between the injury and the death, in the absence of a disease or infection which is the natural result of the injury, there must be shown a direct causal connection between the injury and the death, with no efficient intervening agency, with sufficient certainty that it may be reasonably concluded that death would have resulted from the injury, notwithstanding the subsequently intervening disease.

Id. at 202. The Court reversed for legal insufficiency of the evidence. *Id.* So even though it specifically stated that the trial court's submission of the causation question was improper, it did not address the definition the court of civil appeals suggested be given on retrial. *Id.*

Certain statements in *Burnett* could have left some question about the required causal connection. For example, the following could be read as requiring proof that death would have resulted from the injury absent any intervening cause in order to be compensable: "[T]he injury and the death [must be related], with no efficient intervening agency, with sufficient certainty that it may be reasonably concluded that death would have resulted from the injury, notwithstanding the subsequently intervening disease." *Id.* And the following could be read to require that the injury must have been more than a minor concurring cause of death: "There was . . . no positive proof that such reduced resistance, if any, *materially contributed* to his death." *Id.* (emphasis added). The Court also made the statement that

> Our statute in one or more instances uses in substance the expression "if death results from the injury," . . . . It is thus seen that the statute specifically provides that the death must be the result of the injury itself; or conversely, *the injury must be the primary, active and efficient cause of the death.*

Id. (emphasis added).

Any question about the causal connection, however, was resolved in *Staggs*. *See* 134 S.W.2d 1026. H.T. Staggs was employed by Skelly Oil Company. *Id.* at 1027. He and his family lived on company property a short distance from the Skelly plant where he maintained the company machinery on a 24-hour-a-day basis. *Id.* His death occurred after he had worked nearly all night to repair an engine in the plant. *Id.* Early in the morning, he took a meal break and returned to the house where he and his family lived. *Id.* When he was leaving the house to return to work, he fell and hit his head on a concrete block, but still went to work where he later collapsed and died. *Id.* An autopsy showed Staggs had severe sclerosis of his carotid artery, degenerative brain tissue surrounding the artery, and death was caused by a cerebral hemorrhage following rupture of the carotid artery due to high blood pressure. *Id.* Staggs's beneficiaries contended, and the jury found, that both his head injury and an injury from inhaling carbon monoxide gas in Skelly's pumping station were in the course of his employment, they were producing causes of his death, and his death was not caused solely by disease. *Id.* at 1027-28. This Court noted, without comment, that the trial court defined producing cause in the language suggested by the court of civil appeals in *Burnett* and substantively the same as that requested by Transcontinental in the case now before us:

> In submitting the special issues the court thus instructed the jury as to the meaning of "producing cause": "You are instructed that the term 'producing cause' as used in this charge, is that cause which, in a natural and continuous sequence, produces the death in issue, and without which the death would not have occurred."

134 S.W.2d at 1028. The appellate court held, and Staggs's beneficiaries conceded, there was no evidence carbon monoxide injured Staggs. *Id.* This Court determined that there was sufficient

evidence to support the jury findings as to the head injury and those findings were sufficient to support awarding death benefits to Staggs's beneficiaries. *Id*. at 1030. The Court specifically addressed the causal relationship required for a death to be compensable:

> There is nothing in the compensation law indicating that an injury suffered by an employee in the course of his employment, to be compensable, must be the sole cause of disability or death *or that compensation is to be denied when an injury in the course of the employment causes disability or death not of itself but concurrently with another injury or cause*. . . .
>
> . . . *Recovery is authorized if a causal connection is established between the injury and the disability or death.* "Producing cause" is the term most frequently used in compensation cases. . . .
>
> In actions at common law to enforce liability for negligence the act or omission to be the proximate cause need not be the sole cause. It may be a concurrent or contributing cause. The same principle is given effect in compensation cases which hold that when injury is sustained by an employee in the course of his employment which results in his disability or death, compensation therefor will not be denied, although the injury may be aggravated or enhanced by the effect of disease existing at the time or afterwards occurring.
>
> . . . .
>
> In the cases last cited the diseased condition of the employee was a concurring or contributing cause of the disability or death, but *compensation was awarded because the injury received in the course of employment concurred with the disease in causing the disability or death and was therefore a producing cause*.

Id. at 1028-29 (emphasis added) (citations omitted).

Three years after *Staggs*, the Court again addressed whether a worker's death resulted from a work-related injury. The evidence in *Jones* showed that Tom Jones stepped on a nail at work and his wound became infected and intensely painful. 169 S.W.2d at 161. Six months after the injury he committed suicide by drinking a mixture of concentrated lye, cleaning fluid, and insect poison. *Id.* Jones's beneficiaries claimed his death was caused by the injury because he took his life while in a delirium resulting from constant and intense pain his injury caused. *Id.* A jury found that the

injury was a producing cause of Jones's death; the injury caused him to become mentally unbalanced to the extent he did not understand the consequences of his act in taking his own life; his mental condition was the producing cause of death; and Jones did not willfully intend to injure himself by taking poison. *Id.*

The court of civil appeals reversed and rendered judgment for the carrier, holding suicide was a new and independent agency that broke the chain of causation between Jones's injury and death because the evidence was insufficient to show his injury caused Jones to take his life "through an uncontrollable impulse or in a delirium of frenzy without conscious volition." *Traders & Gen. Ins. Co. v. Jones*, 160 S.W.2d 569, 571 (Tex. Civ. App.—Fort Worth 1942), *aff'd* 169 S.W.2d 160 (Tex. 1943). In affirming the judgment of the court of civil appeals, the Court again noted the definition of producing cause that was mentioned in *Burnett* and *Staggs* and requested by Transcontinental in this case. *Jones*, 169 S.W.2d at 162. The Court also relied on *Burnett* in holding that Jones's death was not compensable because it was caused by an independent cause unrelated to his injury:

> The injury must be the producing cause of the death, and producing cause has been defined as "that cause which, in a natural and continuous sequence, produces the death * * * in issue, and without which the death * * * would not have occurred." In the Burnett case it was held that the injury was not the producing cause of the death, *because the employee died as the result of typhoid fever which was in no way produced or caused by the injury, there being thus an independent intervening agency to which the death was directly due.*

Id. at 162 (emphasis added) (citations omitted).

After clarifying in *Staggs* that the causation standard was concurring cause, this Court has not interpreted the worker's compensation law to require any different level of causation in order for an injured employee's disability or death resulting from a work-related injury to be compensable.

B. Legislative Acceptance

The Court notes that the causation element in worker's compensation cases and the proximate cause element in negligence cases have been identified as being "in substance the same, except that there is added to the definition of proximate cause the element of foreseeableness." *Staggs*, 134 S.W.2d at 1028-29 (citations omitted). In *Staggs*, the Court relied on the concurrent cause aspect of negligence law to hold that compensation was recoverable for a work-related injury if it was a concurrent or contributing cause of disability or death. *See id.* at 1029. But that reliance did not inextricably tie worker's compensation and negligence claims together insofar as their causation elements are defined. Negligence is a common law cause of action; worker's compensation is not. Because a worker's compensation claim is based on provisions of the Worker's Compensation Act, the causation standard is established by the Act.

Once this Court has construed a statute and the Legislature re-enacts the statute without substantial change, it is presumed the Legislature has adopted our interpretation. *See Tex. Dept. of Protective and Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004) ("If an ambiguous statute that has been interpreted by a court of last resort or given a longstanding construction by a proper administrative officer is re-enacted without substantial change, the Legislature is presumed to have been familiar with that interpretation and to have adopted it."). *See also Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000) ("It is a firmly established statutory construction rule that once appellate courts construe a statute and the Legislature re-enacts or codifies that statute without substantial change, we presume that the Legislature has adopted the judicial interpretation."); *Am. Transitional Care Ctrs. of Tex., Inc. v.*

Palacios, 46 S.W.3d 873, 877 (Tex. 2001) (noting that courts presume the Legislature is aware of the existing state of the law and court decisions when it enacts statutes); *Tex. Emp. Ins. Ass'n v. Holmes*, 196 S.W.2d 390, 396 (Tex. 1946) ("The construction given an original Act should be regarded as having been brought forward in amendments to the Act, if the amendments have not obviously changed such construction, and the construction to be given a re-enacted statute should be the same as that given to the original Act, and a different construction will be given only for impelling reasons."). Therefore, we should presume that our interpretation of the Act in *Staggs* has been adopted by the Legislature if it has re-enacted the statute without substantial change. And it has.

Through multiple amendments, the substance of the Act's causation standard has not changed since the Act was construed in *Burnett*, *Staggs*, and *Jones*. In 1973, the Act was amended to provide:

> If death results from the injury, the association shall pay the legal beneficiaries of the deceased employee a weekly payment . . . .

Former TEX. REV. CIV. STAT. art. 8306 § 8.[4] In 1989, the Act was again amended, after which it provided:

> The insurance carrier shall pay death benefits to the legal beneficiary of the employee if the compensable injury results in death.

Id. art. 8308–4.41.[5] And in 1993, the Act was amended to the current version that applies in this case:

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[4] Act of May 10, 1973, 63d Leg., R.S., ch. 88, § 4, 1973 Tex. Gen. Laws 188.

[5] Act of Dec. 11, 1989, 71st Leg., 2d C.S., ch. 1, § 4.10, 1989 Tex. Gen. Laws 44.

> An insurance carrier shall pay death benefits to the legal beneficiary if a compensable injury to the employee results in death.

TEX. LABOR CODE § 408.181(a).[6] As can be seen, the substance of the causation standard has remained the same since 1913: death benefits have been and are payable if "death should result from the injury," "death results from the injury," the "injury results in death," or "a compensable injury to the employee results in death."

Consistency in the law is important, and applying the same definition of "producing cause" in all types of cases where it is part of the causation element will simplify certain matters, including the task of preparing jury charges.[7] Nevertheless, I would not change the causation standard in the worker's compensation system by judicially engrafting the substantial factor language into it. I would leave such a change to the Legislature.

C. Liberal Construction

Further, inclusion of the substantial factor language cannot but change the causation requirement from what it has been for seventy years. If it did not, there would be no need to include it. And in my view, including the language makes it possible a death will be determined non-compensable even though the work-related injury concurred with other injuries to cause death and the death would not have occurred but for the injury. Some deaths that would have been compensable under the *Staggs* standard may be non-compensable under the definition the Court

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[6] Act of May 12, 1993, 73d Leg., R.S., ch. 269, 1993 Tex. Gen. Laws 1189.

[7] For example, Crump requested the definition the trial court gave by citing to the court of appeals decision in *Ledesma*, a products liability case, and by urging that the definition was practically the same as "the definition used that was upheld by the Texas Supreme Court" in *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995). *Bowser Bouldin* involved a Deceptive Trade Act claim.

adopts because the injury was not a great-enough cause to be a "substantial" cause in the eye of the factfinder. The change does not conform to the rule previously followed by this Court that worker's compensation statutes are to be construed liberally in favor of the worker. *See, e.g.*, *Albertson's, Inc.*, 984 S.W.2d at 961; *Hargrove*, 256 S.W.2d at 75.

III. Conclusion

I would not require inclusion of the "substantial factor" term in the definition of producing cause in worker's compensation cases. Otherwise, I join the Court's opinion and holding.

_____
Phil Johnson
Justice

OPINION DELIVERED: August 27, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0061

TEXAS STATE UNIVERSITY–SAN MARCOS, PETITIONER,

v.

SAM AND BETTY BONNIN, INDIVIDUALLY, AND AS INDEPENDENT CO-ADMINISTRATORS OF THE ESTATE OF JASON LEE BONNIN, RESPONDENTS

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

PER CURIAM

JUSTICE LEHRMANN did not participate in the decision.

Jason Bonnin worked at Joe's Crab Shack, a restaurant located on the grounds of Texas State University–San Marcos. On the evening of April 21, 2005, Jason and a group of fellow employees celebrated a colleague's final day at work by jumping from the deck at Joe's Crab Shack into the San Marcos River. After his second jump, Jason was sucked into the undertow and became trapped in the caverns beneath the restaurant, where he drowned. Jason's parents sued the University, alleging that repairs made to the dam in 1998 created an "unreasonably dangerous condition," and that the University was negligent in failing to block access to the caverns.

The trial court denied the University's plea to the jurisdiction. The court of appeals reversed in part, holding that the Bonnins failed to establish a waiver of sovereign immunity for their claims

of negligent use and defective condition of property, to the extent the claims challenged discretionary repairs made to the waterway by the University. ___S.W.3d___. Because those pleadings "affirmatively negate[d] the existence of jurisdiction," the court held that the Bonnins need not be allowed an opportunity to amend. *Id.* at___. On the other hand, the court of appeals held that the Bonnins' premises defect claim under the recreational use statute, TEX. CIV. PRAC. & REM. CODE § 75.002, "unrelated to the repairs of the waterway," did not affirmatively demonstrate incurable jurisdictional defects, and remanded the case to allow the Bonnins to amend their pleadings. *Id*. at___.

The court of appeals looked to *State v. Shumake*, 199 S.W.3d 279 (Tex. 2006), in concluding that the Bonnins raised a potential premises defect claim. *Id*. at___. After the court of appeals issued its opinion, we decided *City of Waco v. Kirwan*, 298 S.W.3d 618, 620 (Tex. 2009), which clarified the duty owed "to recreational users to warn or protect [them] against the danger of a naturally occurring condition or otherwise refrain from gross negligence with respect to the condition."

Accordingly, without hearing oral argument, we grant the petition for review without reference to the merits, vacate the court of appeals' judgment, and remand the case to that court for reconsideration in light of our decision in *Kirwan*. TEX. R. APP. P. 59.1, 60.2(f).

OPINION DELIVERED: June 25, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0093

SONDRA L. GROHMAN, FORMERLY KNOWN AS SONDRA GROHMAN-KAHLIG,
PETITIONER / CROSS-RESPONDENT,

v.

CLARENCE J. KAHLIG, II; NORTH PARK LINCOLN-MERCURY, INC., NORTH PARK LINCOLN-MERCURY, LTD.; NORTH PARK HOLDING, L.L.P.; NORTH PARK LM, L.L.C.; KAHLIG ENTERPRISES, INC.; KAHLIG MOTOR, LTD.; KAHLIG MOTOR HOLDING, L.L.P.; AND KAHLIG MOTOR MANAGEMENT, L.L.C.,
RESPONDENTS / CROSS-PETITIONERS

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

PER CURIAM

CHIEF JUSTICE JEFFERSON and JUSTICE LEHRMANN did not participate in the decision.

In this case, Sondra Grohman sued her ex-husband, Clarence Kahlig II, for various torts and breach of a Security Agreement (Agreement) entered pursuant to their divorce settlement when he changed the security, stock in his two corporations, into limited partnership units. Kahlig filed a counterclaim seeking a declaration that changing the form of the business entities did not constitute an event of default under the Agreement. At trial, the court submitted the breach of contract claim to the jury, but found no evidence to support the tort claims. The jury found that Kahlig did not breach the Agreement. The trial court entered a take-nothing judgment on the verdict. The court

of appeals affirmed the trial court judgment as to the tort claims, but held that Kahlig breached the Agreement as a matter of law and reversed the take-nothing judgment. We hold Kahlig did not breach the Agreement as a matter of law, and Grohman presented no evidence to support her tort claims. Thus, we reverse the court of appeals' judgment in part and affirm in part.

Grohman and Kahlig divorced in 2001. As part of their divorce settlement, Kahlig agreed to pay Grohman approximately $22 million. Kahlig paid Grohman approximately $12.6 million in cash and gave Grohman a promissory note for $9.5 million, to be paid off in annual installment payments of approximately $1 million. As collateral, Kahlig pledged a majority of his stock in two corporations, North Park Lincoln-Mercury, Inc., and Kahlig Enterprises, Inc., totaling seventy percent of the shares outstanding in each corporation.

Kahlig and Grohman entered into a Security Agreement in 2001 to protect Grohman's interest in the collateral. The Agreement described the collateral and Kahlig's rights and duties:

> [Kahlig] grants [Grohman] a continuing security interest in and to the following:
>
> (a) [70% of the outstanding shares of common capital stock in North Park Lincoln-Mercury, Inc.]; and (b) [70% of the outstanding shares of common capital stock in Kahlig Enterprises, Inc.]; and such shares and all replacements, additions, and substitutions therefor now owned or hereafter acquired by Borrower, plus all cash and non-cash proceeds and all proceeds of proceeds arising from those shares (all of which is individually and collectively hereinafter referred to as "Collateral").
>
> Borrower hereby warrants and agrees that:
>
> 5. Borrower will not sell, transfer, lease, or otherwise dispose of the Collateral or any interest therein except in compliance with the release provisions herein. . . .
>
> 6. Borrower shall at all times keep the Collateral free from any adverse lien, security interest or encumbrance and in good order and repair and will not allow the Collateral to become wasted or destroyed. . . .

> 8. Borrower shall have all rights and all responsibilities in respect to the Collateral and may use it in any lawful manner not inconsistent with this Security Agreement.

In 1999, prior to the divorce, Kahlig inquired into the franchise tax benefits of converting his two corporations to limited partnerships. In 2003, he requested a private letter ruling from the IRS seeking confirmation that the conversion would not adversely affect the dealership's inventory accounting method. The IRS confirmed the conversion would not adversely affect the businesses in a favorable private letter ruling six months later. Kahlig converted the corporations to partnerships shortly thereafter.

Kahlig formed two identical plans of reorganization for the two corporations. Kahlig organized a holding company corresponding to each corporation. He contributed his existing stock in each corporation to each holding company. Then, Kahlig converted each corporation to a limited partnership, and each holding company exchanged the shares of corporate stock for equal units of limited partnership interest with the newly formed limited partnership. The corporate shares were canceled once they were replaced with partnership units. The conversions had no effect on Grohman's security interest other than replacing corporate stock with units of limited partnership, and Kahlig's equity in the entities actually increased in value due to the more beneficial franchise tax treatment. Kahlig converted the entities back to corporations in 2007 when the limited partnership form was no longer advantageous for reducing the entities' franchise taxes.

Grohman discovered the 2003 conversions during a second child custody suit against Kahlig. She sued Kahlig for breach of contract in August 2005 alleging that the conversions breached the Agreement because Kahlig agreed not to "sell, transfer, lease or otherwise dispose of the Collateral

or any interest therein" without Grohman's consent and further agreed not to "allow the Collateral to become wasted or destroyed."[1] Grohman contended that Kahlig's alleged breach accelerated the debt at the time of the breach, despite Kahlig's timely payment as agreed. She claimed damages, beyond the amount due under the promissory note, in the form of additional interest on the accelerated principal. Later, Grohman amended her complaint to add fraud, negligence, and gross negligence claims. Kahlig asserted a counterclaim seeking a declaratory judgment that the Agreement did not preclude Kahlig from continuing to unilaterally determine the business form under which his businesses operated, and thus the conversion of the business form was not an event of default under the Agreement.

At trial, the court held that the breach of contract claim was a question of fact and thus submitted it to the jury. The court refused to submit Grohman's tort claims, holding that no evidence supported them. The jury found that Kahlig did not breach the Agreement by converting the corporations to limited partnerships. The trial court entered a take-nothing judgment as to Grohman's claims. It also granted Kahlig's request for declaratory relief and awarded attorney's fees in the amount of $135,757.00 to Kahlig and $82,367.08 to the business entities. *See* TEX. CIV. PRAC. & REM. CODE § 37.009 (allowing recovery of attorney's fees in a suit for declaratory judgment).

Grohman appealed, contending the trial court erred by: (1) submitting a question of law to the jury that should have been answered by the trial court; (2) failing to grant a judgment

[1] Kahlig paid the annual payments due on the note each year, including during the pendency of the underlying lawsuit and this appeal. He eventually paid off the remainder of the note in 2008, satisfying his obligations thereunder and releasing Grohman's security interest.

notwithstanding the verdict because she established Kahlig breached of the Agreement as a matter of law; (3) refusing to submit her tort claims to the jury;[2] and (4) awarding attorney's fees. The court of appeals affirmed the trial court's take-nothing judgment on Grohman's tort claims, but reversed the take-nothing judgment on the breach of contract claim and the awards of declaratory relief and attorney's fees. ___ S.W.3d ___. It first held the contract stated unambiguously that the secured Collateral could only be in the form of shares of corporate stock, and it was undisputed that Kahlig converted the corporations to partnerships. *Id*. at ___. Thus, the court held that whether Kahlig breached the contract was a question of law that should not have been submitted to the jury. *Id*. at ___. The submission was not harmless error because the conversion of business entities "disposed of" the Collateral, and Kahlig had indeed breached as a matter of law. *Id*. at ___. Because Kahlig breached the Agreement and the court of appeals reversed the award of declaratory relief, it did not reach Grohman's arguments regarding attorney's fees. It reversed the attorney's fees award and remanded the case to the trial court for a determination of damages. *Id*. at ___.

Both parties appealed. Kahlig argues, as a matter of law, he did not breach the Agreement because it did not prohibit converting his corporations to limited partnerships. Thus, the court of

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[2] The trial court denied Kahlig's motion for directed verdict on all of Grohman's claims at the close of Grohman's evidence, but, at the jury charge conference, refused to submit to the jury Grohman's claims except breach of contract and negligence per se. The negligence per se claim was based upon an alleged violation of section 32.33 of the Texas Penal Code, which prohibits a person who has signed a security agreement from harming or devaluing property with the intent to hinder enforcement of a security interest on the property. The jury found that Kahlig did not commit the acts upon which Grohman based her negligence per se claims, and the trial court similarly held that Grohman take nothing on the claim. The parties do not challenge this portion of the trial court's judgment.

appeals erred in reversing the trial court's judgment because the jury submission was harmless error. Alternatively, he argues the Agreement was ambiguous as to his right to convert the business forms, and thus the trial court was correct to submit the question to the jury. Grohman argues that the court of appeals erred in remanding to the trial court, rather than rendering judgment in her favor, on the breach of contract claim. She also argues the court of appeals erred in affirming the trial court's refusal to submit her tort claims to the jury. We analyze each claim separately.

A trial court commits error if it submits a question of law to the jury. *Knutson v. Ripson*, 354 S.W.2d 575, 576 (Tex. 1962). However, the error is harmless if the jury answers the question of law correctly or if it can be deemed immaterial and disregarded by the trial court. TEX. R. APP. P. 44.1(a)(1); *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994). Contract language should be interpreted by a court as a matter of law if it can be given a certain or definite meaning. *Univ. Health Servs., Inc. v. Renaissance Women's Group, P.A.*, 121 S.W.3d 742, 746 (Tex. 2003). If the contract is ambiguous, the party's intent is a question of fact for the jury. *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). Whether a party has breached a contract is a question of law for the court, not a question of fact for the jury, when the facts of the parties' conduct are undisputed or conclusively established. *Sullivan v. Barnett*, 471 S.W.2d 39, 44 (Tex. 1971). The court's primary concern when construing a written contract is to ascertain the true intentions of the parties as expressed in the instrument. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005). We must 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." *Id.*

The Agreement states that the "Collateral" may not be transferred, disposed of, or destroyed. The Agreement's definition of Collateral guides our interpretation of these provisions. *See Dynegy Midstream Servs., Ltd. P'ship*, *v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009) ("We give contract terms their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning."). The Agreement defines "Collateral" as shares of stock in North Park Lincoln-Mercury, Inc. and Kahlig Enterprises, Inc., "and *all replacements, additions and substitutions* therefor now owned or hereafter acquired by [Kahlig], plus all cash and non-cash proceeds and all proceeds of proceeds arising from those shares." (emphasis added). Thus, as defined, Collateral encompasses the shares of corporate stock *and* any representation of interest in the companies that could replace or substitute for the shares, so long as Kahlig continued to own them.

The court of appeals held that Kahlig breached the Agreement because he destroyed the corporate stock when he converted it to units of limited partnership and thus "disposed of" the Collateral.[3] Grohman argues Kahlig destroyed the stock in violation of the Agreement because the corporate shares were eventually canceled. The court of appeals agreed, noting as a result of the conversion the shares were canceled and retired and ceased to exist. Because the shares of stock ceased to exist, the court of appeals held they were destroyed.

[3] Whether the term "disposed of" includes the destruction of property and does not require a transfer or alienation of property to a third party has not been directly decided by this Court, but this determination is unnecessary because a separate provision prohibits Kahlig from "allow[ing] the Collateral to become wasted or destroyed."

But the Agreement defines the Collateral more expansively than merely shares of stock. Kahlig breached the Agreement only if the conversion of his corporations to limited partnerships allowed his stock and "such shares and all replacements, additions, and substitutions" to be destroyed. The shares of stock were inevitably canceled, but first they were replaced with units of limited partnership that represented the same interest in the businesses. Kahlig remained the sole owner of his business interest throughout the business conversions, and at no point in the conversions was his interest in the business entities destroyed. The Collateral may have changed form, but it was not destroyed. In fact, Grohman does not dispute that the Collateral's value actually increased.

Grohman contends that Kahlig transferred the Collateral in the conversion because the plan of reorganization involved movement of interest in the companies between Kahlig and holding companies. "Transfer" is defined as:

> Any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance. The term embraces every method—direct or indirect, absolute or conditional, voluntary or involuntary—of disposing of or parting with property or an interest in property.

BLACK'S LAW DICTIONARY 1636 (9th ed. 2009). Despite the fact that the business interest technically moved between Kahlig and his holding companies, Kahlig retained ownership of his entire interest in the companies throughout the conversion. Thus, the Collateral was not transferred, and Grohman's security interest was not impaired.

The Agreement lacks any specific mention of the consequences of a business entity conversion. It gives Kahlig "all rights and all responsibilities in respect to the Collateral . . . not

inconsistent with this Security Agreement." The most reasonable interpretation of the Agreement, read as a whole to harmonize all of its provisions, is that it did not prohibit Kahlig from converting the business entities, and at no point in the conversion did Kahlig breach the Agreement. Therefore, we hold Kahlig did not breach the Agreement as a matter of law. The trial court committed harmless error by submitting the question to the jury because the jury answered it as the trial court should have. TEX. R. APP. P. 44.1(a)(1); *Spencer*, 876 S.W.2d at 157.[4]

Grohman next contends the trial court erred in refusing her request to submit questions regarding her fraud and negligence claims to the jury. Rule 278 of the Texas Rules of Civil Procedure requires the submission of questions to the jury raised by the written pleadings and the evidence. TEX. R. CIV. P. 278; *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992). A court may refuse do so if no evidence exists to warrant its submission. *Elbaor*, 845 S.W.2d at 243.

To prove her fraud cause of action, Grohman must establish that Kahlig made a material misrepresentation. *Formosa Plastics Corp. U.S.A. v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998). Grohman alleges that Kahlig misrepresented to her in their Agreement that he would refrain from converting his businesses from corporations to limited liability companies. But as we already decided, the Agreement did not prohibit a conversion of the business entities, much less represent that Kahlig would not change the legal form for operating them. There is no evidence that Kahlig made a material misrepresentation.

[4] Because we hold that the court of appeals erred in reversing the trial court's judgment we do not reach the issue of whether remand was proper.

Grohman's negligence claims allege Kahlig breached "a duty not to injure her secured interest in the Collateral," and claims damages for that conversion—acceleration of the debt—as provided in the Agreement. Even if Kahlig breached a duty in tort separate from that in contract, when "the only loss or damage is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract." *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991); *see also Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) ("The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone."). Grohman's action for breach of the Agreement was in contract alone. Thus, the trial court was correct to refuse submission of the tort claims to the jury.

Finally, because the court of appeals erred in finding that Kahlig breached the Agreement, the grounds for reversal of the declaratory relief and attorney's fees award are also in error. Normally we would render judgment on this issue, but here neither party has briefed the issue before this Court. Therefore, we remand the issue of whether Kahlig is entitled to attorney's fees to the court of appeals.

The trial court's erroneous submission of a question of law to the jury was harmless because it was answered as the trial court should have answered it. The proper judgment was rendered and thus there was no grounds for reversal. Accordingly, and without hearing oral argument, TEX. R. APP. P. 59.1, we reverse the court of appeals' judgment as to that issue and render the judgment originally entered by the trial court—Grohman takes nothing on her breach of contract claim. We remand the declaratory relief and attorney's fees issue to the court of appeals. We affirm the court

of appeals' judgment that Grohman take nothing on her claims for fraud, gross negligence, and negligence.

OPINION DELIVERED: July 2, 2010

IN THE SUPREME COURT OF TEXAS

No. 09-0122

IN RE GOLDEN PEANUT COMPANY, LLC

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

The decedent in this wrongful death suit was a party to an employee benefit plan that contained an agreement to arbitrate any personal injury or wrongful death claims against his employer, a nonsubscriber to workers' compensation insurance. The trial court denied the employer's motion to compel arbitration of the family members' claims, and the court of appeals denied mandamus relief, concluding that the wrongful death beneficiaries did not sign the arbitration agreement and were not bound by it. 269 S.W.3d 302. Given our subsequent holding in *In re Labatt Food Service, L.P.*, 279 S.W.3d 640 (Tex. 2009), however, the wrongful death beneficiaries, as derivative claimants, are bound by the decedent's agreement to arbitrate. Moreover, Texas Labor Code section 406.033(e), which prohibits pre-injury waivers of personal injury or death claims, does not invalidate the decedent's arbitration agreement. Accordingly, we conditionally grant the petition for writ of mandamus.

Grant Drennan was killed while in the course and scope of his employment with Golden Peanut Company, LLC. Golden Peanut did not subscribe to worker's compensation insurance, but instead provided employees with an Employee Injury Benefit Plan under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461. Attached to the benefit plan was a Mutual Agreement to Arbitrate which provided that any and all claims or controversies concerning or relating to Drennan's employment, including personal injury and wrongful death claims, must be submitted to binding arbitration pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16.

Following Drennan's death, his estate applied for and received plan benefits. Thereafter, Drennan's widow, Mindi Drennan, filed suit against Golden Peanut under the survival and wrongful death statutes on behalf of herself, their children, and Drennan's estate, and later Drennan's parents were added as plaintiffs (collectively, "the Drennans"). Golden Peanut filed a motion to abate the suit and compel arbitration pursuant to the Mutual Agreement to Arbitrate. The Drennans then amended their petition and dropped Drennan's estate as a party, leaving only the statutory wrongful death claims. The trial court denied Golden Peanut's motion to compel arbitration.

Golden Peanut petitioned the court of appeals for mandamus relief. The court held that the Mutual Agreement to Arbitrate was valid, was supported by consideration, and did not violate Texas Labor Code section 406.033(e), which prohibits pre-injury waivers of personal injury or wrongful death claims. 269 S.W.3d 302, 307– 09. However, without the benefit of our holding in *In re Labatt Food Service, L.P.*, the court of appeals held that the trial court did not abuse its discretion in refusing to compel arbitration because the Drennans, as nonsignatories, were not bound by the agreement to arbitrate. *Id.* 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. *Id.* at 646.

The Drennans contend the arbitration agreement is nevertheless unenforceable because it violates section 406.033(e) of the Texas Labor Code, which provides

> [a] cause of action [against a nonsubscriber] may not be waived by an employee before the employee's injury or death. Any agreement by an employee to waive a cause of action or any right described in Subsection (a) before the employee's injury or death is void and unenforceable.

TEX. LAB. CODE §406.033(e). Subsection (a), in turn, limits the common law defenses available to an employer who does not carry workers' compensation insurance. *Id*. § 406.033(a). However, an agreement to arbitrate is a waiver of neither a cause of action nor the rights provided under section 406.033(a), but rather an agreement that those claims should be tried in a specific forum. *See, e.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (holding that arbitration clauses are, "in effect, a specialized kind of forum-selection clause"). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (stating that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"). Accordingly, section 406.033(e) does not render the arbitration agreement void.

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 Drennan executed provides that any personal injury or wrongful death claim

filed by Drennan or his spouse, children, parents, or estate must be arbitrated. If Drennan had sued for his own injuries immediately before his death, he would have been bound to submit his claims to arbitration. As derivative claimants under the wrongful death statute his beneficiaries are bound as well, *In re Labatt*, 279 S.W.3d at 646, and the trial court clearly abused its discretion by refusing to compel arbitration.

Accordingly, without hearing oral argument, *see* TEX. R. APP. P. 52.8(c), we conditionally grant Golden Peanut's petition for writ of mandamus and direct the trial court to enter an order compelling arbitration of the Drennans' wrongful death claims. The writ will issue only if it fails to do so.

OPINION DELIVERED: November 20, 2009

IN THE SUPREME COURT OF TEXAS

NO. 09-0159

SAMUEL GARCIA JR., M.D., PETITIONER,

v.

MARIA GOMEZ, INDIVIDUALLY AND REPRESENTATIVE OF THE ESTATE OF OFELIA MARROQUIN, DECEASED, RESPONDENT

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

Argued January 21, 2010

JUSTICE MEDINA delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE GREEN, JUSTICE WILLETT, JUSTICE GUZMAN, and JUSTICE LEHRMANN.

CHIEF JUSTICE JEFFERSON filed a dissenting opinion, joined by JUSTICE JOHNSON.

JUSTICE JOHNSON filed a dissenting opinion.

The Texas Medical Liability Act requires that a health care liability claimant serve expert reports on each defendant physician or provider within 120 days after filing suit. TEX. CIV. PRAC. & REM. CODE §74.351(a). We have characterized this requirement as "a threshold over which a claimant must proceed to continue a [health care liability] lawsuit." *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005) (per curiam). If no report is timely served, the trial court must, on motion,

dismiss the claim and award reasonable attorney's fees and costs to the affected physician or provider.[1]

No expert report was served in this case, and the trial court accordingly dismissed it. The court, however, did not award attorney's fees. The court of appeals affirmed, concluding the trial court had not abused its discretion in failing to award attorney's fees because the record contained no evidence of the reasonable fees incurred by the physician in defense of the claim. 286 S.W.3d 445, 449. We conclude, however, that there is some evidence of reasonable attorney's fees and some evidence that the physician incurred attorney's fees. We further conclude that section 74.351(b) mandates an award of attorney's fees and costs, when expert reports are not served timely, and accordingly reverse the court of appeals' judgment and remand to the trial court for further proceedings.

I

Ofelia Marroquin died from a pulmonary embolism following surgery. Her daughter, Maria Gomez, individually and as representative of her mother's estate, sued the hospital and the treating

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[1] The statute provides that when the claimant fails to serve a defendant physician or health care provider with an expert report within 120 days of filing suit:

> [T]he 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).

physician, Dr. Samuel Garcia. Gomez asserted that her mother had a history of blood clots and that Dr. Garcia had not taken proper precautions to guard against the embolism that caused her death. Specifically, she argues that the standard of care required the doctor to install a blood filter as a preventive measure.

Medical records obtained from Dr. Garcia failed to indicate that he had placed such a filter in her mother's chest cavity during surgery. After filing suit, however, Gomez obtained additional medical records from the hospital, which revealed that a filter had in fact been placed in her mother's chest cavity apparently during some earlier procedure. This new information apparently caused Gomez not to serve expert reports.

After the deadline for serving these reports, Dr. Garcia moved to dismiss Gomez's claim. Gomez did not oppose the dismissal, although she did contest Garcia's right to attorney's fees, arguing that Garcia had in a sense brought the suit on himself by failing to produce the medical records confirming the existence of the blood filter. After a hearing, the trial court granted the physician's motion in part, dismissing the health care liability claim with prejudice, while denying him attorney's fees.[2] Dr. Garcia appeals complaining that he is entitled to an award of attorney's fees.

Dr. Garcia's evidence on attorney's fees came from his counsel, who testified as follows:

> My name is Ronald Hole. I'm an attorney practicing in Hidalgo County, doing medical-malpractice law/litigation. I have done it since 1984. For a usual and

[2] The trial court also dismissed the case against the hospital, but the hospital did not seek attorney's fees and is not a party to this appeal.

> customary case like this these fees for handling it up to the point of dismissal, the reasonable and necessary attorney's fees for handling that is 12,200 dollars.
>
> If the case is appealed to the Court of Appeals, the reasonable fee for handling the matter at the Court of Appeals would be 8,000 dollars. If a Petition for Review is filed at the Supreme Court, an additional fee of 5,000 dollars would be reasonable for handling the matter of the Petition for Review and our brief or briefs on the merit. Petition granted by the Supreme Court then adds an additional 6,000 dollars. That would be a reasonable fee for handling the matter at that stage.

In affirming the trial court's judgment, the court of appeals concluded that this testimony was conclusory and therefore no evidence of the reasonable attorney's fees incurred by Dr. Garcia. 286 S.W.3d at 449. The court further concluded that the attorney's testimony was insufficient because it failed to establish that the physician actually incurred attorney's fees, which the court described as "an essential statutory element." *Id.*

II

An attorney's testimony about the reasonableness of his or her own fees is not like other expert witness testimony. Although rooted in the attorney's experience and expertise, it also consists of the attorney's personal knowledge about the underlying work and its particular value to the client. The testimony is similar to that of a property owner whose personal knowledge qualifies him to give an opinion about his own property's value. *See, e.g., State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 874 (Tex. 2009); *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002). The attorney's testimony is not objectionable as merely conclusory because the opposing party, or that party's attorney, likewise has some knowledge of the time and effort involved and if the matter is truly in dispute, may effectively question the attorney regarding the reasonableness of his fee.

In this case, Garcia's attorney testified briefly about his experience in medical malpractice litigation. He then estimated $12,200 to be a reasonable and necessary fee for representation through dismissal in a case like this one. Finally, he testified about his fees in the event of an appeal and that such fees were also reasonable. Gomez did not cross-examine the witness or present any additional evidence on the issue of attorney's fees. Nor did she question the reasonableness of the amount of any of these fees. While the attorney's testimony lacked specifics, it was not, under these circumstances, merely conclusory. It was some evidence of what a reasonable attorney's fee might be in this case.

Dr. Garcia argues, however, that the attorney's testimony was not only some evidence of his reasonable attorney's fees, but also conclusive evidence on the issue. Generally, the determination of reasonable attorney's fees is a question of fact and "'the testimony of an interested witness, such as a party to the suit, though not contradicted, does no more than raise a fact issue to be determined by the jury.'" *Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547 (Tex. 2009) (quoting *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990)). Dr. Garcia's argument, however, relies on an exception to this general rule, that is, "where the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon, it is taken as true, as a matter of law.'" *Ragsdale*, 801 S.W.2d at 882 (quoting *Cochran v. Wool Growers Cent. Storage Co.*, 166 S.W.2d 904, 908 (Tex. 1942)). Because Gomez had the means and opportunity to contest the attorney's testimony on what a reasonable attorney fee would

be in this case, but failed to do so, Garcia concludes that reasonableness was established as a matter of law.

While we agree that Garcia's attorney's testimony is some evidence of a reasonable fee, it is not conclusive. The statute here provides that the trial court is to award "*reasonable attorney's fees and costs of court incurred* by the physician or health care provider" when the claimant fails to serve an expert report within 120 days of filing suit. TEX. CIV. PRAC. & REM. CODE § 74.351(b) (emphasis added). Under the statute, the fees awarded must be both "reasonable" and "incurred." Id. § 74.351(b)(1). A reasonable fee is one that is not excessive or extreme, but rather moderate or fair.[3] A fee is incurred when one becomes liable for it.[4]

Both the adjective "reasonable" and the verb "incurred" act to limit the amount of attorney's fees the trial court may award. Ideally, they will be the same, such as when the physician has agreed to pay reasonable fees and costs. But a physician may negotiate a fee that is either more or less than a reasonable fee and thus incur, or become liable for, a greater or lesser amount. The statute, however, limits the award to the lesser of the two, that is, the fee to be awarded is the lesser of a reasonable fee or the fee actually incurred. Testimony about reasonable fees then is not necessarily evidence about the fees incurred.

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[3] *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 981 (1984) (defining the adjective "reasonable"); *see also* BLACK'S LAW DICTIONARY 1272 (7th ed. 1999). (defining "reasonable" as fair, proper, or moderate under the circumstances).

[4] *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 611 (1984) (defining the verb "incur"); *see also* BLACK'S LAW DICTIONARY 771 (7th ed. 1999) (defining "incur" as to suffer or bring on oneself (a liability or expense)).

Although there is no evidence of the amount of the fees incurred by Dr. Garcia, the court of appeals goes further to conclude there is no evidence that Dr. Garcia actually incurred attorney's fees at all. The record reflects, however, that services were performed on the doctor's behalf. The attorney filed an answer, a plea in abatement, a motion to dismiss, and a notice of appeal. The attorney also appeared, argued, and gave testimony regarding the motion to dismiss. While there is no evidence about what Dr. Garcia (or perhaps his insurance carrier) agreed to pay for these services, it blinks reality to assume that the attorney was a volunteer or that Dr. Garcia did not incur attorney's fees for this work. As we recently held in another case involving this statute, a health-care-liability defendant incurs attorney's fees when he is "personally liable in the first instance for both defense costs and any potential judgment." *Aviles v. Aguirre*, 292 S.W.3d 648, 649 (Tex. 2009) (per curiam).

Section 74.351(b) requires the award of the reasonable attorney's fees incurred by a physician who is not served with a timely expert report. Because there is some evidence in this case that attorney's fees were both incurred and reasonable, the trial court should have awarded attorney's fees to Dr. Garcia. The court of appeals therefore erred in affirming that part of the trial court's judgment.

III

Gomez argues, however, that Dr. Garcia should nevertheless be denied attorney's fees because he failed to produce the appropriate medical records in a timely manner. Pertinent to this argument is section 74.051(d) of the Texas Medical Liability Act, which provides that all parties are "entitled to obtain complete and unaltered copies of the patient's medical records from any other party within 45 days from the date of a written request for such records . . ." TEX. CIV. PRAC. &

REM. CODE § 74.051(d). This provision is part of the section requiring pre-suit notice of a health care liability claim. *Id.* § 74.051. Its purpose is to encourage pre-suit negotiations and settlement and thereby reduce litigation costs. *See De Checa v. Diagnostic Ctr. Hosp., Inc.*, 852 S.W.2d 935, 938 (Tex. 1993) (interpreting similar provision in statute's predecessor). Gomez contends Dr. Garcia waived his right to recover his attorney's fees because he was slow to produce medical records and ultimately failed to produce the critical records which indicated that the blood filter was indeed in place during her mother's surgery. Gomez's argument assumes that Dr. Garcia withheld relevant medical records, but the record in this case does not support that assumption.

Gomez's pleadings asserted that Dr. Garcia was negligent in "not prevent[ing] the formation of a pulmonary embolism by appropriate means," but the pleadings did not expressly mention the critical blood filter. Even assuming the physician understood the filter's significance to Gomez's case, it is not apparent why he would have concealed this exculpatory information. Instead, Dr. Garcia maintains that he produced all relevant medical records in his possession. Moreover, the hospital ultimately produced the records confirming the filter's existence as part of its medical records. Nothing in the record suggests that Dr. Garcia's records also contained this information or that he withheld the information. Gomez fails to explain why she did not seek or obtain these records from the hospital during the pre-suit notice period or why it was Dr. Garcia's responsibility to obtain them for her. Although we can imagine a case in which discovery sanctions might offset an award of fees and costs under section 74.351(b), this is not such a case because the trial court has made no finding of discovery abuse.

* * * * *

Section 74.351(b) of the Texas Medical Liability Act requires the award of reasonable attorney's fees incurred by a physician in defense of a health care liability claim when expert reports are not timely served. Because there was some evidence of these fees, the trial court erred in failing to make an award, and the court of appeals erred in affirming that part of the trial court's judgment. Accordingly we reverse the court of appeals' judgment, in part, and remand the physician's attorney's fees claim to the trial court for further proceedings. The remainder of the court of appeals' judgment is affirmed.

_____

David M. Medina
Justice

OPINION DELIVERED: August 27, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0159

SAMUEL GARCIA JR., M.D., PETITIONER,

v.

MARIA GOMEZ, INDIVIDUALLY AND REPRESENTATIVE OF THE ESTATE OF OFELIA MARROQUIN, DECEASED, RESPONDENT

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

Argued January 21, 2010

CHIEF JUSTICE JEFFERSON, joined by JUSTICE JOHNSON, dissenting.

In a health care liability case, a plaintiff must serve an expert report on a defendant physician within 120 days of filing suit. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a). If a claimant fails to serve a report, the physician may move to dismiss the claim and recover attorney's fees. Specifically, the statute provides:

> If . . . an expert report has not been served . . . the court, on the motion of the affected physician or health care provider, shall . . . 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). Notably, the statute requires the trial court to award fees that are both "reasonable" and "incurred." *Id*. Today, however, the Court concludes that section 74.351(b) mandates a fee award even though the defendant introduced no evidence of fees incurred. For this reason, I respectfully dissent.

The Court has previously stated, and emphasizes again today, that if a timely and sufficient expert report is not served, a trial court must dismiss the case and award fees on motion by the affected physician or health care provider. *See* __ S.W.3d at __ ("[S]ection 74.351(b) mandates an award of attorney's fees and costs, when expert reports are not served timely . . . ."); *see also Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009) ("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."); *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."). But even a mandatory fee award must have evidentiary support. *Bocquet*, 972 S.W.2d at 21.

Section 74.351(b) requires proof of "reasonable" fees and evidence of the fees "incurred." *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b); *see also* __ S.W.3d at __ ("Under the statute, the fees awarded must be both 'reasonable' and 'incurred.'"). Here, the only evidence concerning fees came from Dr. Garcia's attorney, who stated the following:

> My name is Ronald Hole. I'm an attorney practicing in Hidalgo County, doing medical-malpractice law/litigation. I have done it since 1984. For a usual and customary case like this these fees for handling it up to the point of dismissal, the reasonable and necessary attorneys fees for handling that is 12,200 dollars. If the case is appealed, reasonable fees up to this point is 12,200. If the case is appealed to the Court of Appeals, a reasonable fee for handling the matter at the Court of Appeals would be 8,000 dollars. If a Petion [sic] for Review is filed at the Supreme

> Court, an additional fee of 5,000 dollars would be reasonable for handling the matter of the Petition for Review and our brief or briefs on the merit. Petition granted by the Supreme Court then adds an additional 6,000 dollars. That would be a reasonable fee for handling the matter at that stage.

I am surprised that the Court ignores the gap in Hole's testimony: nowhere does he state an amount of fees actually charged. There is no mention of the amount of time he spent on this case or even his hourly rate.[1] *See Brockie v. Webb*, 244 S.W.3d 905, 909 (Tex. App.–Dallas 2008, pet. denied) ("Generally, the nature and extent of the attorney's services are expressed by the number of hours and the hourly rate."). The trial court was presented, instead, with a statement that $12,200 is a reasonable and necessary fee for "a usual and customary case like this." In no other area of the law would we credit such a statement as "evidence," whether an objection is made or not.

Testimony that a fee is reasonable, without saying it was ever charged, is useless. What if Dr. Garcia incurred only $1,000 in fees, even though a "typical" case like this would involve $12,200? Would the trial court have the discretion to award $12,200? *See Daughters of Charity Health Servs. of Waco v. Linnstaedter*, 226 S.W.3d 409, 412 (Tex. 2007) (indicating that the Court favored a theory of jurisprudence that avoided a "windfall" to the injured party). This is why the statute requires evidence that attorney's fees were both reasonable and incurred.

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[1] *Cf. Doctor's Hosp. at Renaissance, Ltd. v. Ramirez*, No. 13-07-00608-CV, 2008 Tex. App. LEXIS 5124, at *8-*9 (Tex. App.–Corpus Christi July 10, 2008, no pet.) (observing that, in another case involving the same attorney representing Dr. Garcia in this case, attorney "testified that he was familiar with the usual and customary terms and fees associated with handling medical negligence cases in Hidalgo County, Texas"; "that he personally worked on this case from the beginning"; "that a reasonable and necessary fee for handling the case up to the point of dismissal was $ 9,840"; and "that in deriving this figure, he charged $ 200 per hour for forty-nine hours of work"); *Martinez v. Miranda*, No. 13-07-00497-CV, 2008 Tex. App. LEXIS 5128, at *8 (Tex. App.–Corpus Christi July 3, 2008, no pet.) (noting that Dr. Garcia's attorney "testified to his qualifications, opining that reasonable attorney's fees from the point of inception until the hearing were $ 35,000 . . . . He outlined the work he performed and the number of hours he had expended in the case.").

The Court holds that "there is some evidence in this case that attorney's fees were both incurred and reasonable." ___ S.W.3d at ___. The Court gives two reasons for that conclusion. First, the record reflects that Dr. Garcia had an attorney and that he filed pleadings on Dr. Garcia's behalf. No one disputes that Dr. Garcia was represented; the question is the amount of fees he incurred. His lawyer did not answer that question. We should not give Dr. Garcia a second chance to satisfy his burden of proof.

Next, the Court relies on our recent decision in *Aviles v. Aguirre*, 292 S.W.3d 648, 649 (Tex. 2009) (per curiam); however, such reliance is misplaced. In *Aviles*, we addressed whether a defendant physician "incurred" fees under section 74.351(b), even though an insurance carrier paid the physician's fees. *Aviles*, 292 S.W.3d at 649. We said that the statute did not require as proof that fees were "incurred" that the physician personally paid the fees. *Id.* The physician incurred fees when he first became liable for defense costs and a potential judgment, and the insurer stood in the shoes of the physician when it paid the fees. *Id.*

Aviles is not relevant here. We are not concerned with whether a party "incurs" fees when he or she becomes liable for those fees—the issue we decided in *Aviles*. Instead, we must decide whether there is evidence that fees were incurred at all.[2]

We have repeatedly held that an award of attorney's fees must be supported by evidence. *See, e.g.*, *Torrington Co. & Ingersoll-Rand Corp. v. Stutzman*, 46 S.W.3d 829, 852 (Tex. 2000)

[2] This was not an issue in *Aviles*. In *Aviles*, proof of reasonable and incurred fees was presented. *See Aviles v. Aguirre*, 292 S.W.3d 697, 702 (Tex. App.–Corpus Christi 2008) (mem. op.) (Vela, J., dissenting) ("Here, there was no claim that the fees sought as sanctions were improperly proven or unreasonable."), *rev'd*, 292 S.W.3d 648 (Tex. 2009) (per curiam).

("Generally, an award of attorney's fees must be supported by evidence."); *Bocquet*, 972 S.W.2d at 21 (noting that it is an abuse of discretion to award fees without sufficient supporting evidence); *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 672 (Tex. 1990) (reversing award of attorney's fees when "[t]he award . . . was based entirely on testimony which should not have been admitted, and when that testimony is excluded, the award cannot stand."); *Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901, 907 (Tex. 1966) (holding that attorney's fees in an insurance case must be supported by competent evidence). And, the party seeking the fees carries the burden of proof. *Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547 (Tex. 2009) (citing *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991)). As our courts of appeals have recognized, although "[a]ttorneys' fees and costs of court are mandatory under the [Texas Medical Liability Act,] . . . nothing in the act modifies the general rule that a party seeking attorneys' fees must present evidence of attorneys' fees." *Brower v. Hearn*, No. 14-07-00967-CV, 2009 Tex. App. LEXIS 3551, at *8-*9 (Tex. App.—Houston [14th Dist.] Feb. 10, 2009, no pet.); *Sandles v. Howerton*, 163 S.W.3d 829, 839 n.9 (Tex. App—Dallas 2005, no pet.); *Doades v. Syed*, 94 S.W.3d 664, 674 (Tex. App.–San Antonio 2002, no pet.) ("[E]ven a mandatory award of attorney's fees [under the Medical Liability Act] must be supported by evidence."); *Estrello v. Elboar*, 965 S.W.2d 754, 759 (Tex. App.–Fort Worth 1998, no pet.) (holding that trial court did not abuse its discretion in denying attorney's fees to health care provider who failed to present evidence of fees).[3]

[3] *Cf. Dilston House Condo. Ass'n v. White*, 230 S.W.3d 714, 718 (Tex. App.–Houston [14th Dist.] 2007, no pet.) ("Even when an award of attorney's fees is mandatory under an applicable statute, the requesting party is still required to offer evidence to support an award."); *Manon v. Tejas Toyota, Inc.*, 162 S.W.3d 743, 751-52 (Tex. App.–Houston [14th Dist.] 2005, no pet.) (even though fees are mandatory under the DTPA and Chapter 38 of the Civil Practice and Remedies Code, plaintiffs could not recover fees because they failed to introduce evidence of fees at trial).

The Court comes close to a dispositive concession by acknowledging "there is no evidence of the amount of fees incurred by Dr. Garcia . . . ." That should be the end of it. A party with the burden of proof who fails to produce evidence of attorney's fees, waives his right to those fees. *Intercontinental Group P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 657 (Tex. 2009).[4] An award of zero fees is therefore appropriate. *See Cale's Clean Scene Carwash, Inc. v. Hubbard*, 76 S.W.3d 784, 787 (Tex. App.–Houston [14th Dist.] 2002, no pet.) ("[A] zero award for attorney's fees [is] proper if the evidence . . . failed to prove (a) that any attorney's services were provided; or (b) the value of the services provided . . . ."). When the party with the burden presents "no evidence" to satisfy it, we do not ordinarily remand the matter to the trial court for a second chance. *See Guevara v. Ferrer*, 247 S.W.3d 662, 670 (Tex. 2007) (recognizing that we generally render judgment when there is no evidence).

As there is no evidence of fees incurred, I would conclude, as the court of appeals did, that the trial court did not abuse its discretion in refusing Dr. Garcia's request for attorney's fees under section 74.351(b). Accordingly, I would affirm the court of appeals' judgment. Because the Court does otherwise, I respectfully dissent.

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[4] *Cf. Eagle Trucking Co. v. Tex. Bitulithic Co.*, 612 S.W.2d 503, 507 (Tex. 1981) ("Guin had the burden to establish Eagle Trucking's negligence . . . . Guin's total failure to do anything to get a jury finding which compared Eagle Trucking's negligence . . . with his own . . . amounted to a waiver of any complaints to the charge."); *Glenn Falls Ins. Co. v. C.C. Peters*, 386 S.W.2d 529, 531 (Tex. 1965) (holding that failure to request a jury finding, by the party with the burden, waived party's right to any judgment on the pleaded issue).

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: August 27, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0159

SAMUEL GARCIA JR., M.D., PETITIONER,

v.

MARIA GOMEZ, INDIVIDUALLY AND REPRESENTATIVE OF THE ESTATE OF OFELIA MARROQUIN, DECEASED, RESPONDENT

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

Argued January 21, 2010

JUSTICE JOHNSON, dissenting.

I disagree with the Court's holding for the reasons expressed by Chief Justice Jefferson and join his dissent. However, I write to express particular disagreement with the Court's statement that "[a]n attorney's testimony about the reasonableness of his or her own fees is not like other expert witness testimony. . . . The attorney's testimony is not objectionable as merely conclusory because the opposing party, or that party's attorney, likewise has some knowledge of the time and effort involved and, if the matter is truly in dispute, may effectively question the attorney regarding the reasonableness of his fee." ___ S.W.3d at ___.

As to reasonableness of an attorney's fee, in *Arthur Andersen & Co. v. Perry Equipment Corp.*, the Court addressed language in the Deceptive Trade Practices Act[1] allowing recovery of "reasonable and necessary attorneys' fees." 945 S.W.2d 812, 818 (Tex. 1997). In considering whether a contingent fee was a reasonable fee we said:

> Factors that a factfinder should consider when determining the reasonableness of a fee include:
>
> > (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
> > (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;
> > (3) the fee customarily charged in the locality for similar legal services;
> > (4) the amount involved and the results obtained;
> > (5) the time limitations imposed by the client or by the circumstances;
> > (6) the nature and length of the professional relationship with the client;
> > (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> > (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.
> > . . . .
>
> A party's contingent fee agreement should be considered by the factfinder, *see* TEX. DISCIPLINARY R. PROF. CONDUCT 1.04(b)(8), and is therefore admissible in evidence, but that agreement cannot alone support an award of attorney's fees under Texas Business and Commerce Code section 17.50(d). In other words, the plaintiff cannot simply ask the jury to award a percentage of the recovery as a fee because without evidence of the factors identified in Disciplinary Rule 1.04, the jury has no meaningful way to determine if the fees were in fact reasonable and necessary.

Id. at 818-19 (citation omitted).

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[1] *See* TEX. BUS. & COM. CODE § 17.50(d).

Without saying why, the Court departs significantly from the evidence requirements for determining reasonable fees we set out in *Arthur Andersen*. Here the testimony touched on two of the *Arthur Andersen* factors: the attorney's experience in this type of litigation and a "reasonable and necessary" fee for a "usual and customary case like this." In *Arthur Andersen* the fee was contingent. Here the testimony did not even address the basis of the fee; that is, whether it was contingent, a flat rate through some part of the case, an hourly or per diem charge, a blend of fee types, or some other type of fee arrangement. The attorney's testimony as to experience involved facts. His testimony as to fees, however, was not factual; it was opinion and conclusory. And even assuming it addressed the attorney's own work on this case (the testimony did not specify who worked on the case and pointedly did not address work done on this specific case) it was nothing more than an *ipse dixit* by a credentialed witness.

The court of appeals addressed the *Arthur Andersen* issue and properly determined there was no evidence of a reasonable fee because the attorney's testimony was conclusory. I agree with the court of appeals. Garcia's attorney's testimony is not probative evidence because it does not contain the underlying factual basis on which it rests. *See, e.g.*, *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999) ("[A] claim will not stand or fall on the mere *ipse dixit* of a credentialed witness."); BLACK'S LAW DICTIONARY 284 (7th ed. 1999) (defining conclusory as "[e]xpressing a factual inference without stating the underlying facts on which the inference is based"). As Chief Justice Jefferson notes, in no other area of the law would such testimony be entitled to probative weight. *See* ___ S.W.3d at ___ (Jefferson, C.J., dissenting).

Further, the rule has long been that whether testimony of a witness is conclusory turns on the testimony itself, not on whether the opposing party or its attorney has knowledge of matters underlying the testimony and examines the testifying witness. *E.g.*, *Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837, 839 (Tex. 2010) ("No-evidence challenges to allegedly conclusory expert testimony require us to examine the record on its face to determine whether the evidence lacks probative value."); *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009); *Coastal Transport Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004) ("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.") (citations omitted); *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 380-81 (Tex. 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."). There may be valid reasons for the Court to take the position that an attorney's testimony about the reasonableness of his or her fees is different from other expert witness testimony. But it is hard to see valid reasons for holding that conclusory testimony, which according to long-standing precedent has no probative force, is converted to evidence with probative value because an adverse party has information or knowledge about matters underlying the testimony. In an environment where discovery plays a major part in any lawsuit, only a naive or completely unprepared litigant will lack knowledge of matters underlying the testimony of an opposing expert, especially one testifying about attorney's fees. It distorts the litigation process and burdens of proof to require an adverse party to cross-examine an

opposing party's expert and assist in proving up a case against himself or herself on pain of converting conclusory, legally insufficient evidence into legally sufficient evidence.

With the foregoing comments and for the reasons expressed both by Chief Justice Jefferson and the court of appeals, I respectfully dissent. I would affirm the judgment of the court of appeals.

_____

Phil Johnson
Justice

OPINION DELIVERED: August 27, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0161

IN RE MERRILL LYNCH & CO., INC. AND MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

JUSTICE LEHRMANN did not participate in the decision.

In this mandamus proceeding, we must decide whether the trial court abused its discretion when it refused to stay litigation that could moot the potential arbitration of related claims in the same lawsuit. In *In re Merrill Lynch Trust Co.*, we declared that there are "many circumstances in which litigation must be abated to ensure that an issue two parties have agreed to arbitrate is not decided instead in collateral litigation." 235 S.W.3d 185, 196 (Tex. 2007). We applied this principle in *Merrill Lynch Trust* to stay the plaintiffs' claims against two defendants until the plaintiffs' related claims against a third defendant were arbitrated. *Id.* Here, we apply the same principle to hold that the trial court abused its discretion by refusing to stay the litigation related to one corporation, MetroPCS Communications, Inc. (Communications), until the identical claims of its corporate affiliate, MetroPCS Wireless, Inc. (Wireless), are decided by arbitration or until

Wireless is a member of a certified class action. Accordingly, we conditionally grant relator Merrill Lynch's[1] petition for writ of mandamus.

In this lawsuit, two corporate subsidiaries of MetroPCS, Wireless and Communications, assert identical statutory and common-law claims. The claims arise out of certain security investments sold by Merrill Lynch in 2006 (to Wireless) and 2007 (to Communications). Wireless later transferred all of its securities at issue to Communications. Then, just two months later, both Wireless and Communications sued Merrill Lynch alleging that the securities were characterized at the time of sale as a low-risk investment but were, in fact, high-risk.

Wireless and Communications, jointly referred to in their petition as "MetroPCS," assert identical claims with virtually identical facts. Their pleadings do not meaningfully distinguish between the two affiliates, which also share counsel. The only relevant differences between the affiliates pertain to the arbitration provisions contained in a separate contract between Wireless and Merrill Lynch unrelated to the investments; Communications did not sign an agreement with an arbitration clause. The Wireless agreement provides, in relevant part:

> All controversies that may arise between [Wireless] and Merrill Lynch, including, but not limited to, those involving any transaction or the construction, performance or breach of this or any other agreement between [Wireless] and Merrill Lynch, whether entered into prior to, on or subsequent to the date hereof, shall be determined by arbitration.

[1] Relators are Merrill Lynch & Co., Inc., and Merrill Lynch, Pierce, Fenner & Smith Inc., collectively referred to herein as Merrill Lynch. Wireless and Communications are jointly referred to as MetroPCS.

The Wireless contract also contains a class-action carve-out clause that was adopted under, and mimics, National Association of Securities Dealers (NASD) Rule 10301(d)(3).[2] The clause allows plaintiffs to pursue or participate in class actions by preventing defendants from pulling plaintiffs away from a putative or certified class action simply by compelling arbitration:

> No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; (ii) the class is decertified; or (iii) the Customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

Wireless claims to be a member of two class actions in the Southern District of New York, *Burton v. Merrill Lynch & Co.*, CA-08-CV-03037 (S.D.N.Y. filed Mar. 25, 2008) and *Stanton v. Merrill Lynch & Co.*, CA-08-CV-03054 (S.D.N.Y. filed Mar. 26, 2008), both of which were consolidated into *In re Merrill Lynch Auction Rate Securities Litigation*, CA-08-CV-3037-LAP (S.D.N.Y. consolidated Oct. 31, 2008). The federal court recently dismissed the consolidated action with prejudice under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The dismissal has been appealed.

In the trial court below, Merrill Lynch moved to compel arbitration under the Federal Arbitration Act (FAA) and requested a stay of all litigation. The trial court initially decided to compel arbitration for Wireless's claims and to stay the litigation of Communications' claims, but on rehearing (when the class actions were brought to the court's attention) it stayed Wireless's claims

[2] We note that the NASD became the Financial Industry Regulation Authority (FINRA) in July 2007. *See In re Next Fin. Group, Inc.*, 271 S.W.3d 263, 265 n.1 (Tex. 2008) (per curiam).

until a class certification decision was rendered in the class action or Wireless determined to opt out. But the trial court did not stay the related Communications litigation. Communications then served Merrill Lynch with extensive discovery requests. Merrill Lynch sought mandamus relief, which the court of appeals denied. *See* ___ S.W.3d ___.

The rules applicable to mandamus review of a trial court's order granting or denying a motion to compel arbitration and stay related litigation are well known. A party seeking relief pursuant to the FAA from the trial court's denial of arbitration or a stay of litigation must file a petition for writ of mandamus. *See In re Merrill Lynch Trust Co.*, 235 S.W.3d at 188; *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 779–80 (Tex. 2006); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272–73 (Tex. 1992).[3] Mandamus will issue to correct a clear abuse of discretion for which the remedy by appeal is inadequate. *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). Under the FAA, mandamus relief is appropriate if the trial court abuses its discretion by failing to stay the litigation or compel arbitration. *In re Merrill Lynch Trust Co.*, 235 S.W.3d at 188.

Merrill Lynch argues that our decision in *Merrill Lynch Trust* is controlling and requires a stay of Communications' litigation. We agree. In *Merrill Lynch Trust*, the plaintiffs sued a Merrill Lynch employee and two Merrill Lynch affiliates and sought to litigate their claims, but we determined that the substance of the plaintiffs' claims against the employee were against the company, Merrill Lynch, and required the plaintiffs to abide by their agreement to arbitrate. *Id.* at

[3] While not applicable here, we note that § 51.016 of the Civil Practice and Remedies Code was amended effective September 1, 2009 to allow an interlocutory appeal of an order denying a motion to compel arbitration under the FAA. *See* TEX. CIV. PRAC. & REM. CODE § 51.016.

188, 190. We also rejected the attempt of the affiliates—who had not signed an arbitration agreement with the plaintiffs—to compel the claims against them to arbitration, but we concluded that the nonsignatories' litigation should be stayed until the plaintiffs' arbitration with Merrill Lynch was complete. *Id.* at 191–96. We reasoned that "when an issue is pending in both arbitration and litigation . . . arbitration 'should be given priority to the extent it is likely to resolve issues material to this lawsuit.'" *Id.* at 195 (quoting *AgGrow Oils, LLC v. Nat'l Union Fire Ins. Co.*, 242 F.3d 777, 783 (8th Cir. 2001)). Thus, we concluded that the litigation involving the nonsignatories to the arbitration agreement should be stayed lest it undermine issues to be resolved in the arbitration between the signatories. *Id.* at 196.

The key facts in *Merrill Lynch Trust* and in this case are nearly identical. There, the litigation involved claims relating to signatories and non-signatories to the arbitration agreement. The same is true here. There, some claims were subject to an arbitration agreement and some were not. So too here. There, the parallel litigation threatened to undermine or moot the arbitration, thereby negating the parties' agreement and bargained-for arbitration rights. Again, the same is true here. The only meaningful factual distinction between this case and *Merrill Lynch Trust* is the class-action clause, which changes the arbitration from currently pending to potentially pending at some point in the future. We must decide if this distinction compels a different outcome. On these facts, we hold that it does not.

As noted, the class-action carve-out clause mimics NASD Rule 10301(d)(3). That rule maintains access to courts for class actions while preserving the right to arbitrate individual claims, having been implemented to prevent defendants from pulling plaintiffs away from a putative class

action by enforcing arbitration provisions. Now, as stated by the Securities and Exchange Commission, plaintiffs are afforded the opportunity to evaluate their class-action options:

> [I]n all cases, class actions are better handled by the courts and . . . investors should have access to the courts to resolve class actions efficiently. In the past, individuals who attempted to certify class actions in litigation were subject to the enforcement of their separate arbitration contracts by their broker-dealers. Without access of class actions in [appropriate] cases, both investors and broker-dealers have been put to the expense of *wasteful, duplicative litigation*. The new rule ends this practice.

Order Approving Proposed Rule Change Relating to Exclusion of Class Actions from Arbitration Proceedings, Securities and Exchange Commission Release No. 34-31371, 57 Fed. Reg. 52,659, 52,661 (Nov. 4, 1992) (emphasis added). Rule 10301(d)(3) was not intended to provide a signatory with sanctuary from arbitration while a non-signatory affiliate simultaneously conducts discovery and chips away at the same issues in litigation. Accordingly, Communications cannot litigate its claims before Wireless is a member of a certified class action for resolution of its claims. In this situation, a stay is appropriate because the alternative—allowing Communications to continue litigating—would create duplicative litigation, contrary to the rule's intent. More importantly, this litigation, if allowed to proceed to its end, could moot the contemplated arbitration between Wireless and Merrill Lynch, destroying the latter's bargained-for rights.

Further, the Communications litigation will not, as MetroPCS argues, be stayed for an indefinite period of time. Rather, as the clause states, the arbitration-or-class-action decision can continue unresolved for a time, but only until (1) the class certification is denied, (2) the class is decertified, or (3) Wireless is excluded from the class by the court. The Wireless contract unambiguously defers enforcement of the arbitration agreement "until" one of those three events

occurs. The agreement presumes that any disputes remain ultimately arbitrable should one of three designated events occur or if Wireless opts out of the class. Recent events in the consolidated action illustrate another option—dismissal of the class action on the merits before the class is certified.[4] If the district court's judgment is upheld on appeal, the consolidated action is definitively terminated and the class-action clause plainly does not prevent arbitration of individual claims. But if the judgment is reversed, the case will return to the district court and proceed to the class-certification stage. In that event, occurrence of one of the three designated events in the contract (or Wireless's own choice) will govern when the arbitration occurs.

We disagree with the suggestion that Wireless will *never* go to arbitration. It is entirely possible that Wireless *will* go to arbitration. We understand that waiting on a decision from Wireless or the federal courts could defer the completion of Communications' litigation, but while "[t]rial judges cannot deny a party its day in court, . . . they have always had wide discretion to say when that day will be." *In re Merrill Lynch Trust Co.*, 235 S.W.3d at 195.

As we observed, this case presents one of those "many circumstances in which litigation must be abated to ensure that an issue two parties have agreed to arbitrate is not decided instead in collateral litigation." *Id.* at 196. Under NASD Rule 10301 and the agreement, Wireless has the right to pursue the class action. But in the meantime, Communications cannot commence individual litigation to decide identical issues merely because Wireless is contemplating the class-action option.

[4] The parties dispute the effect of the federal court's dismissing the consolidated action. Merrill Lynch argues that the dismissal removes any barrier to arbitration presented by the class-action clause because the consolidated action is terminated; MetroPCS contends that the consolidated action survives while on appeal and the class-action clause is still in effect. For purposes of this proceeding, we assume that MetroPCS is correct. There is little authority on this point, but as this question does not affect the outcome here, we do not linger over it. We further assume, though the parties dispute the point, that Wireless is within the proposed class definition in the consolidated action.

At the end of the day, Wireless's claims are still arbitrable, if not immediately, then at the occurrence of a known contingency—including Wireless's own choice. Allowing Communications' claims to proceed could moot the arbitration between Wireless and Merrill Lynch and undermine Merrill Lynch's bargained-for arbitration rights. Therefore, we conclude the trial court abused its discretion by refusing to stay Communications' identical claims.

Accordingly, without hearing oral argument, *see* TEX. R. APP. P. 52.8(c), we conditionally grant mandamus relief and direct the trial court to grant Merrill Lynch's motion to stay Communications' claims. We are confident that the court will comply, and the writ will issue only if it does not.

OPINION DELIVERED: June 25, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0166

SHANE WATSON, PETITIONER,

v.

SHIRLEY NEWMAN AND JILL WATKINS, RESPONDENTS

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

On Motion for Rehearing of Petition

JUSTICE WILLETT, joined by JUSTICE HECHT, dissenting from the denial of the motion for rehearing of the petition.

Law-enforcement professionals throughout Texas earn extra money by moonlighting as private security officers. This case affords the Court an opportunity to clarify when official immunity extends to off-duty peace officers who, while working private security jobs, encounter situations that require them to discharge their assigned public-servant duties.

Here, Shane Watson, a Potter County deputy sheriff, was providing off-duty security at a Dillard's department store. Respondents attempted to return a pair of jeans, and a heated dispute arose between them and the sales clerk, who phoned her manager and requested security after Respondents allegedly threatened her. Watson, dressed in his sheriff's office uniform (and married to the sales clerk), confronted Respondents, who left the store and refused Watson's requests to stop. Watson called for back-up from the sheriff's department, pursued Respondents around the mall on

foot, and ultimately arrested them for various class B misdemeanors (evading detention, failure to identify, and interference with public duties). These criminal charges ultimately went away via dismissal or acquittal.

Respondents then sued Watson and Dillard's for several intentional torts (assault, willful detention, lack of consent, and abuse of process), and Watson moved for summary judgment on official-immunity grounds. Respondents argued there was a fact issue as to whether Watson was discharging his duties as a peace officer or rather acting as a citizen-husband and/or private security guard. The trial court denied the summary-judgment motion, and the court of appeals — where only Watson filed a brief — affirmed,[1] concluding (in rather conclusory fashion) that parsing public capacity from private capacity "presents embedded fact issues that are best left to the trier of fact."[2]

The ubiquity of Texas peace officers supplementing their incomes by working off-duty security jobs — directing Sunday church parking, patrolling shopping malls, securing private parties — makes this case worth the Court's attention. When *does* the role change from private security guard to public peace officer? The official-immunity doctrine serves a vital purpose: to enable public officials "to act in the public interest with confidence and without the hesitation that could arise from having their judgment continually questioned by extended litigation." *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 424 (Tex. 2004). Accordingly, the private-versus-public capacity of off-duty officers merits bright-line guidance, and the Court should clarify the official-

[1] As the court of appeals put it, "Appellees did not favor us with a brief nor did they request additional time in which to do so." ___ S.W.3d ___, ___.

[2] *Id*. at ___.

immunity standard for peace officers working off-duty security jobs. At the very least, the important issue of a moonlighting officer's exposure to personal liability merits full briefing in this Court.

This case deserves much closer study, and because the Court declines to do so, I respectfully dissent.

_____
Don R. Willett
Justice

OPINION DELIVERED: November 20, 2009.

IN THE SUPREME COURT OF TEXAS

NO. 09-0195

GALVESTON INDEPENDENT SCHOOL DISTRICT, PETITIONER,

v.

BRENT JACO, RESPONDENT

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

PER CURIAM

JUSTICE GUZMAN did not participate in the decision.

Brent Jaco sued the Galveston Independent School District under the Texas Whistleblower Act, alleging that he was demoted from his position as Director of Athletics and Extracurricular Activities for reporting a Ball High School football player's violations of the University Interscholastic League's eligibility rules to UIL officials. In a plea to the jurisdiction, the District asserted that Jaco's claims were barred by governmental immunity and the trial court lacked subject matter jurisdiction because Jaco failed to make a good-faith report of a violation of law to an appropriate law-enforcement authority, as required by the Texas Whistleblower Act. *See* TEX. GOV'T CODE § 554.002(a). The trial court denied the plea to the jurisdiction and the District 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 affirmed, holding that the elements of section 554.002(a) of the Government Code are not jurisdictional. 278 S.W.3d 477, 482–83 (Tex. App.—Houston [14th Dist.] 2009). However, in *State v. Lueck*, 290 S.W.3d 876, 883 (Tex. 2009), we held that "the elements of section 554.002(a) can be considered to determine both jurisdiction and liability." Accordingly, whether the reporting of a violation of UIL rules and regulations to the UIL is 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, under the analysis set forth in *Lueck*, Jaco has alleged a violation under the Whistleblower Act. *See* TEX. GOV'T CODE § 554.002(a).

OPINION DELIVERED: February 12, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0224

WAL-MART STORES, INC., PETITIONER,

v.

CHARLES T. MERRELL, SR., AS WRONGFUL DEATH BENEFICIARY OF CHARLES THOMAS MERRELL, II, DECEASED, AND AS REPRESENTATIVE OF THE ESTATE OF CHARLES THOMAS MERRELL, II AND JANE CEVERNY, AS WRONGFUL DEATH BENEFICIARY OF CHARLES THOMAS MERRELL II, DECEASED, RESPONDENTS

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

PER CURIAM

JUSTICE GREEN did not participate in the decision.

Charles Merrell, Jr., ("Charlie") and Latosha Gibson died from smoke inhalation in the bedroom of their rented home. When police officers arrived, they found in the living room a badly burned recliner, a damaged pole-style floor lamp, and other furniture covered in soot and smoke. There were candles, melted wax, an ashtray, and a "blunt"[1] on the table next to the recliner, as well

[1] The police officer who initially took photographs of the scene to determine whether a crime had been committed testified that "[w]e found quite a bit of paraphernalia. . . . We found several little joints, we found several little smoking pipes and a bong." In describing the "little joints," he refers to them as "blunts": "a blunt is like the butt of a cigarette," in which there is "just enough to hold on to to get a hit off of and then lay it down." He further testified that "some of those" were found in the living room.

as smoking paraphernalia throughout the house, including ash trays, a bong,[2] and marijuana cigarette butts. Two photographs were taken of the scene. The fire marshal declared the fire accidental and of unknown origin. The property owner discarded the burnt household items after authorities concluded their investigation.[3]

The parents of Charlie Merrell, Jane Ceverny and Charles Merrell, Sr., ("Merrell") brought wrongful death and survival claims against Wal-Mart, alleging that a halogen lamp in the apartment, purchased from Wal-Mart, caused the fire. Charles Merrell, Sr., testified that he bought the lamp at Wal-Mart for his son, but could not produce a receipt.

Merrell's expert, Dr. Craig Beyler, attributed the fire to "'nonpassive failure' of the lamp igniting the recliner below." He opined that the lamp's halogen bulb exploded, sending burning glass shards onto the recliner, which smoldered for several hours. According to Beyler, "[o]ther possible mechanisms [causing the fire] are dropping combustible ceiling material onto the wok and tipping of the lamp by joint failure." Beyler ruled out smoking materials as the cause because none were found in the immediate "area of origin." He noted that "the mere fact that occupants may be smokers and may have smoked somewhere during the hours before the fire does not provide data relevant to the investigation of causes available in the area of origin." He also discounted candles

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[2] *See Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 515 n.1 (1994) ("A 'bong' is a 'water pipe that consists of a bottle or a vertical tube partially filled with liquid and a smaller tube ending in a bowl, used often in smoking narcotic substances.'" (quoting AMERICAN HERITAGE DICTIONARY 215 (3d ed. 1992))).

[3] In an attempt to recover the lamp from the scene of the fire, Charles Merrell, Sr. offered a $500 reward to anyone who could locate it. A man came forward with a burnt pole-style lamp, on which Merrell's original expert relied to draw conclusions about the cause of the fire. When Wal-Mart's expert found traces of gasoline on the lamp, however, the man confessed that he had acquired an undamaged halogen lamp, burned it, and gave it to Merrell in exchange for the reward. Merrell dismissed the expert, and the lamp was excluded from evidence.

as the cause of the fire because, had the candles been the source of ignition, the candle wax on the table would not have survived the exposure. Beyler concluded that nonpassive failure of the lamp was "consistent with the facts of this case and . . . wholly consistent with our knowledge of fire science."

Wal-Mart's expert, John Lentini, testified that "[t]he more likely cause of this fire was careless disposal of smoking materials." Wal-Mart moved for summary judgment, asserting, among other things, that there was no evidence of any element of Merrell's causes of action, no evidence that the pole-style floor lamp was a halogen lamp[4] (as opposed to an incandescent one), and no evidence that it was ever purchased at Wal-Mart.

Overruling Wal-Mart's objection, the trial court admitted Dr. Beyler's expert testimony but granted Wal-Mart's motion for summary judgment. The court of appeals reversed, holding that Merrell produced evidence on each challenged element of their cause of action. 276 S.W.3d 117, 137-38. Wal-Mart sought review here asserting that there was no evidence that the lamp was defective or that it caused the fire. 52 Tex. Sup. Ct. J. 445, 449 (2009).

Wal-Mart contends that even if Beyler's testimony was properly admitted, it constitutes no evidence of defect or causation because his opinion lacks factual substantiation and is therefore conclusory. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 231-32 (Tex. 2004). Specifically, Wal-Mart contends that Beyler's testimony constitutes no evidence that the lamp was more likely to have caused the fire than any other obvious potential sources. No-

[4] Richard Dyer, an expert for Wal-Mart, testified that the "cone shaped component" visible in the photograph of the lamp taken by police officers "appeared to be where an incandescent bulb would have been inserted into the lamp," and therefore "indicated that this lamp was not a halogen unit."

evidence challenges to allegedly conclusory expert testimony require us to examine the record on its face to determine whether the evidence lacks probative value. *Id*. at 233. In *Coastal Transportation*, we explained that "[o]pinion 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.'" *Id*. at 232 (quoting TEX R. EVID. 401). "[S]uch conclusory statements cannot support a judgment even when no objection was made to the statements at trial." *Id*.

Applying the *Coastal* analysis to a case involving a car accident, we held that an expert's testimony that failed to account for the sequence of events was legally insufficient to support a jury verdict. *See Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 910-12 (Tex. 2004). In that case, the expert provided some evidence for his theory that a defect in the vehicle's wheel caused the crash, but he neglected to account for inconsistencies raised by this theory, thereby nullifying the probative value of his testimony. *Id*. at 910 ("[The expert] was offered to prove that a defect in a metal bearing caused the left rear wheel assembly to separate from the axle . . . [, however, he] does not explain how the left rear wheel remained floating directly underneath the stub axle, from which it had allegedly detached, through the accident sequence.").

Similarly, Dr. Beyler did not say why a burning cigarette could not have caused the fire. He dismissed as irrelevant the fact that post-mortem toxicology reports revealed that Charlie Merrell and Latosha Gibson had been smoking the very night of the fire because, according to Beyler, that evidence "d[id] not provide data relevant to the investigation of causes available in the area of origin." If, by "area of origin" Beyler was referring to the recliner itself, he failed to address how he ruled out smoking materials on the basis of not having found evidence of burnt cigarettes there,

when there was likewise no evidence of charred or exploded glass (either in the recliner or anywhere else in the house) to support his own theory. *See Ramirez*, 159 S.W.3d at 911 (describing the basis of the challenged expert's "limited opinion on causation" as equally consistent with the opposing expert's conclusion, and therefore non-probative).

Beyler did undertake to eliminate one potential cause of the fire that might otherwise seem on a par with the lamp theory. He explained why the melted candle wax and location of the candles precluded the candles as the source of the fire (pointing to the melted pool of wax on the table, which could not have survived the fire exposure if the candles themselves had ignited the fire). Yet he provided no explanation for why lit smoking materials could not have been the source. An expert's failure to explain or adequately disprove alternative theories of causation makes his or her own theory speculative and conclusory. *See Gen. Motors Corp. v. Iracheta*, 161 S.W.3d 462, 470 (Tex. 2005) ("[The expert] eliminated the obvious possibility that fuel or vapors from the tank filler neck ignited only by saying so, offering no other basis for his opinion. Such a bare opinion was not enough.").

Most importantly, while Beyler laid a general foundation for the dangers of halogen lamps, his specific causation theory amounted to little more than speculation. Evidence that halogen lamps can cause fires generally (assuming that the lamp here was a halogen lamp) does not establish that the lamp in question caused *this* fire. *See City of San Antonio v. Pollock*, 284 S.W.3d 809, 819 (Tex. 2009) (finding evidence that chemical exposure in high amounts can cause chromosomal anomalies is insufficient proof that exposure to 1/60th of the same amount of chemicals caused plaintiff's chromosomal anomalies).

Dr. Beyler may be qualified in fire research, but his testimony in this case lacks objective, evidence-based support for its conclusions. *See Coastal*, 136 S.W.3d at 232 ("'[I]t 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.'" (quoting *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999))). Because Beyler's testimony was legally insufficient to support causation, we do not reach Wal-Mart's remaining issues. *See Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 643 (Tex. 2009).

Without hearing oral argument, we reverse the court of appeals' judgment and render judgment that Merrell take nothing. TEX. R. APP. P. 60.2(c).

OPINION DELIVERED: June 18, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0236

THE STATE OF TEXAS, PETITIONER,

v.

K.E.W., RESPONDENT

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

Argued February 18, 2010

JUSTICE JOHNSON delivered the opinion of the Court.

JUSTICE GREEN filed a concurring opinion, in which JUSTICE WILLETT joined.

JUSTICE LEHRMANN did not participate in the decision.

In this case we consider whether the evidence supporting a court order requiring a mentally ill person to undergo mental health services is legally sufficient. The trial court found that K.E.W. was mentally ill and as a result of that mental illness was likely to cause serious harm to others, and the court ordered him to submit to temporary inpatient mental health services. The court of appeals reversed. It held there was no evidence of a recent overt act tending to confirm that K.E.W. was likely to cause serious harm to others. We conclude the evidence is legally sufficient to support the trial court's order and reverse the court of appeals' judgment. We remand to the court of appeals for review of K.E.W.'s factual sufficiency issues.

I. Background

On April 17, 2008, K.E.W., who had previously been diagnosed with schizophrenia and was a regular patient of the Gulf Coast Mental Health and Mental Retardation Center (Center), went to the Center for an appointment. While he was there he told his treating physician at the Center, Dr. Pugh, that he had been assigned to impregnate multiple women. K.E.W. would not cooperate with the staff. He paced around the building smoking cigarettes, stated that he wanted to impregnate some of the Center's female staff, and repeatedly asked for a particular female employee. The staff became concerned enough about his behavior that they isolated the female employee. Dr. Pugh called the police because he believed K.E.W. might be a danger to others. K.E.W. refused to cooperate with the police, and they took him to the emergency room at the University of Texas Medical Branch at Galveston. There, K.E.W. told the treating physicians that he had been chosen to help populate a new and better race of humans. He said there was a group of women he planned to find and impregnate, including his adult step-daughter. He had written plans detailing his mission and papers with the names of several women whom he believed he needed to impregnate. He expressed his belief that some of the women he was seeking had been at or near the hospital when he was brought there, but they had departed by plane and time travel. He became agitated and angry and accused the hospital staff of withholding information about the women's whereabouts. He insisted that he needed to leave the hospital to accomplish his mission.

The State sought court orders to commit K.E.W. for temporary mental health services and to administer psychoactive medication. *See* TEX. HEALTH & SAFETY CODE § 574.034. Section

574.034 of the Texas Health and Safety Code is entitled "Order for Temporary Mental Health Services" and provides, in relevant part:

> (a) The judge may order a proposed patient to receive court-ordered temporary inpatient mental health services only if the judge or jury finds, from clear and convincing evidence, that:
>
> (1) the proposed patient is mentally ill; and
>
> (2) as a result of that mental illness the proposed patient:
>
> (A) is likely to cause serious harm to himself;
>
> (B) is likely to cause serious harm to others; or
>
> (C) is:
>
> (i) suffering severe and abnormal mental, emotional, or physical distress;
>
> (ii) experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health, or safety; and
>
> (iii) unable to make a rational and informed decision as to whether or not to submit to treatment.
>
> . . . .
>
> (c) If the judge or jury finds that the proposed patient meets the commitment criteria prescribed by Subsection (a), the judge or jury must specify which criterion listed in Subsection (a)(2) forms the basis for the decision.
>
> (d) To be clear and convincing under Subsection (a), the evidence must include expert testimony and, unless waived, evidence of a *recent overt act* or a continuing pattern of behavior *that tends to confirm*:
>
> (1) the likelihood of serious harm to the proposed patient or others; or
>
> (2) the proposed patient's distress and the deterioration of the proposed patient's ability to function.

Id. § 574.034 (emphasis added).

At the non-jury hearing on its commitment motion, the State presented K.E.W.'s medical records, testimony from two Center employees, and testimony from two doctors who examined him at the hospital. K.E.W. presented no evidence.

The trial court committed K.E.W. to Austin State Hospital for inpatient care not to exceed ninety days. The court found by clear and convincing evidence that K.E.W. was mentally ill and as a result of that mental illness he (1) was likely to cause serious harm to others and (2) was suffering severe and abnormal mental, emotional, or physical distress; was experiencing substantial mental or physical deterioration of his ability to function independently, which was exhibited by his inability, except for reasons of indigence, to provide for his basic needs, including food, clothing, health, or safety; and was unable to make a rational and informed decision as to whether to submit to treatment. *See* 276 S.W.3d 686, 691-92.

Immediately following the commitment hearing, the trial court heard and granted the State's application for an order to administer psychoactive medication. The trial court based its order on findings that K.E.W.'s mental illness rendered him incapable of making medical treatment decisions and that such treatments would be in K.E.W.'s best interest.

K.E.W. appealed. The court of appeals determined that the evidence was legally sufficient to support the trial court's finding that K.E.W. was mentally ill but reversed the order for mental health services. *Id.* at 699-700. It held there was no evidence of an overt act or continuing pattern of behavior that tended to confirm either deterioration of K.E.W.'s ability to function independently, *id.* at 697, or that he was likely to cause serious harm to others. *Id.* at 699; *see* TEX. HEALTH & SAFETY CODE § 573.034(d). Because the order authorizing the administration of psychoactive

medications depended on the existence of a valid order for mental health services, the court of appeals also reversed the order to administer psychoactive medication. 276 S.W.3d at 700.

We granted the State's petition for review.

The State urges that the evidence was legally sufficient to support the trial court's findings and orders. Specifically, it argues that (1) the court of appeals erred by applying an elevated standard of evidentiary review; (2) the evidence was legally sufficient to support the trial court's finding that K.E.W. committed an overt act that tended to confirm the likelihood he would cause serious harm to others; and (3) because the evidence was legally sufficient to support the commitment order, both the trial court's commitment order and its order that K.E.W. be administered psychoactive medication should be affirmed.

K.E.W. does not challenge the finding that he is mentally ill. He urges us to affirm the court of appeals' decision as to the standard of review and the legal insufficiency of the evidence. K.E.W. agrees that disposition of the commitment order controls disposition of the order to administer psychoactive medications.

II. Discussion

A. Jurisdiction

The ninety-day period for which K.E.W. was ordered to receive services has expired. Nevertheless, we have jurisdiction. The expiration of the time for which he was ordered to receive services does not require the appeal to be dismissed for mootness. *State v. Lodge*, 608 S.W.2d 910, 912 (Tex. 1980).

B. Standard of Review

The State argues that Section 574.034's clear and convincing evidence requirement does not alter the appropriate standard of review. It urges that the evidence was legally sufficient so long as there was more than a scintilla of evidence to support the trial court's challenged finding. We disagree.

Clear and convincing evidence is "that measure or degree of proof which 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." *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979) (per curiam). Evidence that merely exceeds a scintilla is not legally sufficient when the burden of proof is clear and convincing. *See In re J.F.C.*, 96 S.W.3d 256, 264-65 (Tex. 2002); *see also Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 627 (Tex. 2004). In evaluating evidence for legal sufficiency under a clear and convincing standard, we review all the evidence in the light most favorable to the finding to determine whether a reasonable factfinder could have formed a firm belief or conviction that the finding was true. *See In re J.F.C.*, 96 S.W.3d at 266. We resolve disputed fact questions in favor of the finding if a reasonable factfinder could have done so, and we disregard all contrary evidence unless a reasonable factfinder could not have done so. *City of Keller v. Wilson*, 168 S.W.3d 802, 817 (Tex. 2005); *In re J.F.C.*, 96 S.W.3d at 266.

C. Order for Temporary Civil Commitment

1. Proof required

In regard to the issue urged by the State, the trial court, to commit K.E.W., was required to find by clear and convincing evidence that as a result of his mental illness, K.E.W. was likely to

cause serious harm to others. TEX. HEALTH & SAFETY CODE § 574.034(a)(2)(B). The statute does not prescribe what evidence the State must present to carry its burden, except that it must include expert testimony and evidence of a recent overt act that "tends to confirm the likelihood of serious harm to . . . others." *Id.* § 574.034(d)(1). The court of appeals interpreted the latter as requiring evidence of "a substantial threat of harm, based on actual dangerous behavior, manifested by some overt act or threats in the past." 276 S.W.3d at 695. The court further stated that evidence of "possible" or "potential" harm to others does not satisfy the State's burden. *Id.* at 694. Arranging previous court of appeals' cases into three categories—those involving "Per Se Overt Acts of Dangerousness,"[1] those involving "Ambiguous Conduct,"[2] and those involving "No Substantially Dangerous Conduct"[3]—K.E.W. urges the court of appeals' judgment be affirmed on the basis that courts of appeals have consistently required an "overt act" be proven by evidence of actual harmful conduct demonstrating a threat of imminent harm to others. The State, on the other hand, urges that

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[1] *State ex rel. E.E.*, 224 S.W.3d 791 (Tex. App.—Texarkana 2007, no pet.); *State ex rel. D.C.*, No. 12-05-00138-CV, 2005 WL 3725079 (Tex. App.—Tyler Jan. 31, 2006, no pet.); *D.M. v. State*, 181 S.W.3d 903 (Tex. App.—Dallas 2006, no pet.); *In re K.S.*, No. 2-03-295-CV, 2004 WL 254267 (Tex. App.—Fort Worth Feb. 12, 2004, no pet.); *In re S.E.W.*, Nos. 14-02-00602-CV, 14-02-0063-CV, 2002 WL 31599910 (Tex. App.—Houston [14th Dist.] Nov. 21, 2002, no pet.); *Goldwait v. State*, 961 S.W.2d 432 (Tex. App.—Houston [1st Dist.] 1997, no writ); *L.S. v. State*, 867 S.W.2d 838 (Tex. App.—Austin 1993, no writ); *K.L.M. v. State*, 735 S.W.2d 324 (Tex. App.—Fort Worth 1987, no writ); *W.L. v. State*, 698 S.W.2d 782 (Tex. App.—Fort Worth 1985, no writ).

[2] *J.J.K. v. State*, Nos. 14-03-00379-CV, 14-03-00380-CV, 2003 WL 22996950 (Tex. App.—Houston [14th Dist.] Dec. 23, 2003, no pet.); *G.H. v. State*, 96 S.W.3d 629 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *In re P.W.*, 801 S.W.2d 1 (Tex. App.—Fort Worth 1990, writ denied).

[3] *State ex rel. L.H.*, 183 S.W.3d 905 (Tex. App.—Texarkana 2006, no pet.); *M.S. v. State*, 137 S.W.3d 131 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *In re K.D.C.*, 78 S.W.3d 543 (Tex. App.—Amarillo 2002, no pet.); *K.T. v. State*, 68 S.W.3d 887 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *D.J. v. State*, 59 S.W.3d 352 (Tex. App.—Dallas 2001, no pet.); *In re C.O.*, 65 S.W.3d 175 (Tex. App.—Tyler 2001, no pet.); *T.G. v. State*, 7 S.W.3d 248 (Tex. App.—Dallas 1999, no pet.); *Johnstone v. State*, 961 S.W.2d 385 (Tex. App.—Houston [1st Dist.] 1997, no writ); *Broussard v. State*, 827 S.W.2d 619 (Tex. App.—Corpus Christi 1992, no writ); *In re J.S.C.*, 812 S.W.2d 92 (Tex. App.—San Antonio 1991, no writ).

the statute does not require evidence of an act that either is actually harmful itself or that demonstrates harm to others is imminent. We agree with the State.

In construing statutes, our primary objective is to give effect to the Legislature's intent as expressed in the statute's language. *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). We rely on the plain meaning of the text unless a different meaning is supplied by legislative definition, is apparent from the context, or unless such a construction leads to absurd results. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008). Language in a statute is presumed to have been selected and used with care, and every word or phrase in a statute is presumed to have been intentionally used with a meaning and purpose. *See In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008); *Chastain v. Koonce*, 700 S.W.2d 579, 582 (Tex. 1985).

First, we address the "overt act" requirement. The phrase is not defined in the Health and Safety Code. Accordingly, we read it in context and construe the term according to common usage. *See* TEX. GOV'T CODE § 311.011(a). When something is "overt," it is generally considered to be open and observable, rather than concealed or secret. *See* BLACK'S LAW DICTIONARY 1137 (8th ed. 2004); WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1386 (1996). And an "act" is something that is done or performed. *See* BLACK'S at 26; WEBSTER'S at 19. Although this Court has not construed the term in the civil commitment context, courts from other jurisdictions have said it can include both physical acts and verbal statements. *See, e.g.*, *In re Mental Health of E.M.*, 875 P.2d 355, 356-57 (Mont. 1994) (holding that a verbal statement of a threatening nature can constitute an overt act within the context of civil commitment cases). We do not see any indication the Legislature intended to limit the term "overt act" to physical conduct as opposed to any other action

objectively perceptible, including verbal statements. Words can express intent just as physical actions can. For example, a person saying he is going to hit someone can reflect intent to do so, just as the physical act of making a fist and drawing back can reflect such intent. We conclude that a proposed patient's words are overt acts within the meaning of Section 574.034(d). Further, when the words expressed by a person that has a mental illness foreshadow violence, the Legislature has permitted the law's intervention to prevent serious injury to others. Stated another way, statements made by a proposed patient such as K.E.W. can be relevant both to determining whether he is mentally ill and also to predicting what actions he might or will take in the future as a result of his mental illness. The court of appeals stated that "potential" harm is not sufficient to deprive a person of his liberty and the threat of harm must be substantial. 276 S.W.3d at 694-95 (citing *J.M. v. State*, 178 S.W.3d 185, 193 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *State ex rel. L.C.F.*, 96 S.W.3d 651, 657 (Tex. App.—El Paso 2003, no pet.); *In re C.O.*, 65 S.W.3d 175, 181-82 (Tex. App.—Tyler 2001, no pet.); *Broussard v. State*, 827 S.W.2d 619, 622 (Tex. App.—Corpus Christi 1992, no writ) (stating that "[b]are psychiatric expert opinion of a 'potential danger' to others is insufficient to support a commitment")). Echoing that statement, K.E.W. argues that evidence of an overt act within the meaning of the statute must show a clear and present danger of imminent harm to others. He urges that to the extent his words can be considered evidence, the requirement that they show imminent harm to others accords with the United States Supreme Court's holdings that speech is "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949); *see also Schenck v. United States*, 249 U.S. 47, 52 (1919). K.E.W.'s argument misses the mark.

The statute does not require that the overt act demonstrate serious harm to others is imminent if the proposed patient is not committed; its language is broad enough to permit commitment even if the person's oral threat does not cause physical harm.[4] TEX. HEALTH & SAFETY CODE § 574.034. Rather, the statute requires evidence of an overt act that "tends to confirm" the "likelihood" of serious harm to others. *Id.* § 574.034(d). In determining the meaning of the statutory language, we presume its words were selected with care and used with purpose. *See In re Caballero*, 272 S.W.3d at 599. "Likelihood" connotes more than mere possibility or conjecture and is synonymous with "probability." WEBSTER'S at 1114; *see Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 681 (Tex. App.—Texarkana 1991, writ denied).

Some appellate courts, including the court of appeals in this case, have held that the proposed patient must have engaged in "actual dangerous behavior" manifested by an overt act or threats. *See, e.g.*, 276 S.W.3d at 695 (citing *J.M.*, 178 S.W.3d at 196; *Taylor v. State*, 671 S.W.2d 535, 538 (Tex. App.—Houston [1st Dist.] 1983, no writ)). This proposition seems to have originated with the court of appeals' analysis in *Moss v. State*, 539 S.W.2d 936, 948-51 (Tex. Civ. App.—Dallas 1976, no

[4] The requirements as to danger to others posed by the proposed patient varies widely in other jurisdictions, with some jurisdictions requiring the danger to others to be imminent while others require the risk to be a substantial risk, a clear and present threat, likely, or a reasonable expectation. *See, e.g.*, ARIZ. REV. STAT. § 36-501 (can reasonably be expected to result in serious physical harm); HAW. REV. STAT. § 334-60.2 (imminently dangerous); IOWA CODE § 229.1(17) (is likely to physically injure the person's self or others); LA. REV. STAT. § 28:2(3) (reasonable expectation of substantial risk of physical harm); MICH. COMP. LAWS § 330.1401(a) (can reasonably be expected within near future to cause serious injury); MINN. STAT. § 253B.02 Subd. 17(2) (presents a clear danger); MONT. CODE § 53-21-102(7) (injury or imminent threat thereof); N.M. STAT. § 43-1-3(N) ("more likely than not that in the near future" person will cause harm).

writ). In *Moss*, physicians testified that their diagnoses were based on statements the proposed patient made to them, but they did not reveal the contents of those statements or explain why they believed she was dangerous. *Id.* The *Moss* court stated that an order for involuntary commitment must be supported by the recommendation of a physician and proof of the factual information on which the recommendation was based. *Id.* at 950. We do not read *Moss* as requiring proof of a substantial threat of future harm founded on actual, dangerous behavior. In any event, after *Moss* was decided, the Legislature specified both the criteria by which a person can be ordered to submit to mental health services and certain elements of evidence required by the clear and convincing evidentiary standard in such proceedings. Act of April 20, 1983, 68th Leg., R.S., ch. 47, § 50, 1983 Tex. Gen. Laws 211, 241 (current version recodified at TEX. HEALTH & SAFETY CODE § 574.034); *see also* HOUSE STUDY GROUP, BILL ANALYSIS, C.S. S.B. 435, 68th Leg., R.S., 4 (1983). The statute applicable to this case does not require evidence of a recent overt act that by itself proves the likelihood a proposed patient will cause serious harm to others. *See* TEX. HEALTH & SAFETY CODE § 574.034(d). It requires only that the overt act "tends to confirm" the likelihood of serious harm. *Id.* "Tends" means "to have leaning," "to contribute to," or "have a more or less direct bearing or effect." *See* BLACK'S LAW DICTIONARY 1507 (8th ed. 2004) (defining "tend" as to be disposed toward something; to serve, contribute, or conduce in some degree or way; to have more or less a direct bearing or effect; and to be directed or have a tendency to an end, object, or purpose); WEBSTER'S at 1955 (defining "tend" as "to be disposed or inclined in action, operation, or effect to do something"); *see also Simmons v. State*, 282 S.W.3d 504, 508 (Tex. Crim. App. 2009) (stating that in determining whether non-accomplice evidence tends to connect a defendant to the offense,

"the evidence must simply link the accused in some way to the commission of the crime and show that rational jurors could conclude that this evidence sufficiently tended to connect [the accused] to the offense" (quoting *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008))); *Nash v. State*, 134 S.W. 709, 717-21 (Tex. Crim. App. 1911) (defining the word "tend" as "[t]o stretch, extend, direct one's course; to be directed as to any end, object or purpose; to aim; to have or give a leaning" and stating that "if the circumstances lead toward, or tend toward, the defendant as the party who committed the offense, and show the truth of the prosecutrix, this would be all the law required"). Accordingly, a recent overt act by a proposed patient "tends to confirm" that the patient poses a likelihood of serious harm to others within the meaning of Section 573.034(d) if the overt act is to some degree probative of a finding that serious harm is probable, even though the overt act itself may not be dangerous. Such a construction honors the statute's language and the Legislature's attempt to fairly balance the rights of a proposed patient, the difficulties in predicting future behavior of mentally ill persons, and the community's interest in protection from persons who are mentally ill and who, by reason of their illness, may commit future harmful acts against others. *See Addington v. Texas*, 441 U.S. 418, 426-30 (1979).

In sum, the statute requires evidence of a recent act by the proposed patient, either physical or verbal, that can be objectively perceived and that is to some degree probative of a finding that serious harm to others is probable if the person is not treated. The overt act itself need not be of such character that it alone would support a finding of probable serious harm to others. *See* TEX. HEALTH & SAFETY CODE § 573.034(d)(1).

Keeping the foregoing in mind, we next review the evidence presented at the commitment hearing.

2. The Commitment Hearing

An employee of the Gulf Coast Center testified that he was present when K.E.W. came to the Center on April 17, 2008. According to the employee, K.E.W. appeared to be extremely paranoid, was difficult to redirect, and asked numerous times for a certain female staff member who worked there. The staff became concerned enough to place the female staff member "in the back behind a closed door" until K.E.W. could be escorted from the Center. The employee further testified that K.E.W. refused to cooperate with the staff, paced around the building, and refused to calm down or stand still. As a result of K.E.W.'s behavior the police were called, but when they arrived, he still refused to cooperate.

A counselor from the Center testified that according to the medical records, K.E.W. said "he wanted to get some Gulf Coast Center women pregnant." She testified that he was a regular patient of the Center—"[h]e is on our Ag team, the highest level of services you will see"—and that the Center employees recommended he be committed to Austin State Hospital.

Dr. Ortiz, one of K.E.W.'s treating psychiatrists at the hospital, testified that she had seen K.E.W. daily during the week preceding the hearing and that during his stay at the hospital he would become agitated regarding his belief about the women. When he was in the emergency room he was inconsolable because he "experienced" the knowledge that some of the women that he was seeking were in the emergency room, that he had just missed them, and that staff members in the emergency room were withholding information from him about the women's whereabouts as a conspiracy to

hide them from him. During the times Dr. Ortiz interacted with K.E.W., he became agitated, was intrusive, and "invaded [her] space." There were additional times when K.E.W. became very upset because he believed Dr. Ortiz knew where the women were located.

Dr. Ortiz expressed concern about two particular behaviors of K.E.W. as a potential danger to others. One of the potential dangers was non-consensual sexual interaction with the specific women he sought. While Dr. Ortiz acknowledged K.E.W. did not state that he intended to impregnate anyone against her will and to her knowledge K.E.W. did not directly proposition a particular staff member or patient at the hospital, she explained that K.E.W. was very intrusive and she did not know, given his state of mind, if he would understand that "no" means "no."

Dr. Stone, another of K.E.W.'s treating psychiatrists at the hospital, evaluated K.E.W. and stated that K.E.W. had been diagnosed with schizophrenia. K.E.W. told Dr. Stone on several occasions that he was on a mission to create a superior race, which involved tracking down and impregnating certain women. Dr. Stone stated that K.E.W. carried papers with him that detailed his intent to carry out his plans and that "there are several names that he has that he claims are the names of the women that he wishes to impregnate." Dr. Stone testified that K.E.W. did not exhibit any threatening behavior at the hospital, but that because of K.E.W.'s firm belief in his delusion that he needed to locate and impregnate certain women, he could harm others. He opined that K.E.W. was a danger to this group of women and expressed concern that K.E.W. would act on his delusions if he found a female who he believed was promised to him. Dr. Stone also testified that K.E.W. is a danger to women in general because K.E.W. might mistake any woman for one of the women he believed was promised to him. He testified, "In fact on the unit we're very careful when female

medical staff go to talk to him to keep the door open. Not because he is homicidal, but in his confused belief he could believe a woman is there and someone promised to him that does want to be impregnated."

Dr. Stone recommended that K.E.W. receive antipsychotic medication and treatment at Austin State Hospital.

3. Legal Sufficiency of the Evidence

The record demonstrates that after K.E.W. arrived for his appointment at the Gulf Coast Center, he stated that he wanted to "get some Gulf Coast Center women pregnant" and that he had an assignment to impregnate multiple women; vehemently insisted on contacting a certain female Center staff member; and interfered with female staff despite being directed otherwise.

After he was taken to the hospital, K.E.W. said on several occasions that there were women he needed to track down and impregnate. He had written plans detailing his mission and had several names of women he was searching for. His treating physicians at the hospital testified that he would become very agitated, intrusive, and angry regarding his beliefs, accused the hospital staff of conspiring against him and withholding information about the women's whereabouts, and insisted that he needed to leave the hospital to accomplish his mission.

In holding that the evidence failed to establish a recent overt act that tended to confirm K.E.W. was likely to cause serious harm to others, the court of appeals relied heavily on (1) the fact that the record did not contain the statement K.E.W. made to the female staff member at the Gulf Coast Center who was then isolated by the Center staff or the specific actions taken by K.E.W. that made it necessary to protect her and (2) Dr. Ortiz's testimony that K.E.W. had not made any sexual

advances toward women at the hospital nor had he said that he would impregnate women against their will. 276 S.W.3d at 698-99. However, evidence is not legally insufficient because a fact might have been established by other or more evidence. In evaluating evidence for legal sufficiency, regardless of whether the burden of proof is by a preponderance of the evidence or by clear and convincing proof, all the evidence is reviewed in the light most favorable to the finding. *See In re J.F.C.*, 96 S.W.3d at 266. Disputed facts are resolved in favor of the finding if a reasonable factfinder could have done so, and all contrary evidence is disregarded unless a reasonable factfinder could not have done so. *City of Keller*, 168 S.W.3d at 817; *In re J.F.C.*, 96 S.W.3d at 266.

We agree with the court of appeals that evidence of a proposed patient's mental illness, without more, does not fulfill the statutory requirement for ordering involuntary inpatient mental health services. But K.E.W.'s statements fall within the kinds of overt conduct the statute's language makes clear the Legislature considered relevant to a commitment determination. Thus, K.E.W.'s statements regarding his belief that he had an assignment to impregnate specific women, his statements seeking access to the Center's female worker, the fact that he had written plans detailing his mission and had the names of specific women who he firmly believed he needed to impregnate, and his verbal insistence on searching for the women were all overt acts within the meaning of Section 574.034(d). And the trial court was required to consider those acts in light of his particular mental illness because the statute required a finding that he was mentally ill and that *as a result of that mental illness*, he was likely to cause serious harm to others. *See* TEX. HEALTH & SAFETY CODE § 574.034(a)(2).

To the extent the concurrence says that statements made by proposed patients must be evaluated in light of the particular words of the statement and the facts of each case, we agree. But we disagree with the proposition that a verbal statement alone cannot suffice as an overt act under the statute. The concurrence agrees only that K.E.W.'s conduct in writing down and carrying with him plans to complete his mission and the names of women he was assigned to impregnate constitutes an "overt act . . . that tends to confirm . . . the likelihood of serious harm to the proposed patient or others." *See* TEX. HEALTH & SAFETY CODE § 574.034(d). We, however, believe that his verbal expression of the plan was sufficient under the circumstances to amount to an overt act within the meaning of the statute. Further, we conclude that when his statements and the other evidence are viewed in the light most favorable to the trial court's findings, as they must be, *see In re J.F.C.*, 96 S.W.3d at 266, there is legally sufficient evidence to support the findings. That is, there is legally sufficient evidence on which a reasonable trier of fact could have formed a firm belief or conviction that as a result of his mental illness, K.E.W. would likely cause serious harm to others and that recent objectively observable acts by K.E.W. tended to confirm such a finding. *See id.* § 574.034(d). We sustain the State's first issue.

D. Order to Administer Psychoactive Medication

After issuing the commitment order, the trial court held a hearing on and granted the State's order to administer psychoactive medication. The court was authorized to order administration of psychoactive medication only if K.E.W. was under a valid order for temporary or involuntary mental health services. *See id.* § 574.106(a)(1). K.E.W. agrees that the disposition of the commitment order controls the order to administer psychoactive medications. Because we have determined that the

court of appeals erred in reversing the trial court's order committing K.E.W. for temporary involuntary mental health services, we also conclude that the court of appeals erred in reversing the trial court's order that K.E.W. be administered psychoactive medication.

III. Conclusion

The evidence is legally sufficient to support the trial court's order that K.E.W. be required to undergo temporary inpatient mental health services. We reverse the court of appeals' judgment and remand the case to that court for it to consider K.E.W.'s factual sufficiency complaints and for further proceedings.

_____

Phil Johnson
Justice

OPINION DELIVERED: July 2, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0236

THE STATE OF TEXAS, PETITIONER,

v.

K.E.W., RESPONDENT

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

Argued February 18, 2010

JUSTICE GREEN, joined by JUSTICE WILLETT, concurring.

I concur with the Court's judgment in this case, and in nearly all of its analysis. I write separately to pause, however, on the notion that a verbal statement, by itself, may be an "overt act . . . that tends to confirm . . . the likelihood of serious harm to the proposed patient or others," TEX. HEALTH & SAFETY CODE § 574.034(d). Certainly some verbal statements—verbal threats—may constitute such overt acts, as the Montana Supreme Court held in a case the Court cites. *See In re Mental Health of E.M.*, 875 P.2d 355, 356–57 (Mont. 1994). Indeed, what the United States Supreme Court has called "true threats" are treated uniquely even in the First Amendment context, where other liberties are at stake:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular

> individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Virginia v. Black, 538 U.S. 343, 359–60 (2003) (quotations and citations omitted). By contrast, as the Court states here, "Dr. Ortiz acknowledged K.E.W. did not state that he intended to impregnate anyone against her will and to her knowledge K.E.W. did not directly proposition a particular staff member or patient at the hospital." ___ S.W.3d at ___. Some of K.E.W.'s verbal statements in this case may not, by themselves, rise to the level of a verbal threat in my view, at least in the sense described by *Black*. For instance, "K.E.W.'s statement[] regarding his belief that he had an assignment to impregnate specific women" may not rise to the level of a threat if one considers it purely in the abstract. *See id.* at ___. Therefore, I would leave it as an open question in this case whether any of K.E.W.'s statements, by themselves, constitute an "overt act . . . that tends to confirm . . . the likelihood of serious harm to the proposed patient or others" for purposes of sanctioning "court-ordered temporary inpatient mental health services" under section 574.034.[1]

In this case, I would not address this more difficult question as the Court does by indicating that some of K.E.W.'s verbal statements were "evidence on which a reasonable trier of fact could have formed a firm belief or conviction that . . . recent objectively observable acts by K.E.W. tended to confirm" a finding that "as a result of his mental illness, K.E.W. would likely cause serious harm

[1] Moreover, the same standard applies to "court-ordered *extended* inpatient mental health services." *See* TEX. HEALTH & SAFETY CODE § 574.035(e) (emphasis added).

to others." In my view, the facts that K.E.W. "had written plans detailing his mission and papers with the names of several women whom he believed he needed to impregnate" and "carried [these] papers with him" meet the overt act requirement. *See id.* at ___, ___. It is an overt act to write a list of women's names as well as detailed plans to impregnate them (among other things), or to carry these documents on one's person and hold them out to those providing one's medical treatment, as K.E.W. did. Because these were overt acts that tend to confirm the likelihood of danger to others, I agree with the result in this case. My concern is only that in another case, where a verbal statement that does not rise to the level of a verbal threat is the only evidence, a person may be civilly committed for mental health treatment beyond the Legislature's certain intent.

_____
Paul W. Green
Justice

OPINION DELIVERED: July 2, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0269

JEFFERSON STATE BANK, PETITIONER,

v.

CHRISTA C. LENK, ADMINISTRATRIX OF THE ESTATE OF MICKEY CARL MARCUS, RESPONDENT

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

Argued February 16, 2010

JUSTICE GUZMAN delivered the opinion of the Court.

Section 4.406 of the Texas Business and Commerce Code requires customers to timely notify their banks of unauthorized transactions. Today, we decide when that duty arises for estate administrators who are appointed after the unauthorized transactions occur on the estate's account. The unauthorized transactions in this case took place approximately two years before the appointment of the administrator, who sued the bank to recover the money twenty-one months after her appointment. Section 4.406, however, precludes a customer from bringing a claim based on an unauthorized transaction if the customer fails to report the transaction to the bank within one year—contractually shortened to sixty days in this case—after the bank provides the customer with

the relevant account statement.[1] Here, although the bank never mailed any account statements to the administrator, it did hold the statements at its office, and the administrator could have obtained them at any time after the appointment. We thus hold that the statute of repose[2] in section 4.406 begins to run once a court appoints an administrator. In this case, the repose period had expired before the administrator brought suit almost two years later.[3]

I. Background

In March 2000, Mickey Marcus died with over $22,000 in his account at Jefferson State Bank. The following month, Melvyn Spillman presented the Bank with fraudulent letters of administration purporting to appoint him as administrator of the Marcus Estate. The Bank, relying on what it believed to be valid letters, gave Spillman access to the Marcus account. Throughout the next several months, Spillman withdrew most of the account balance. By January 2001, just over $1,000 remained in the account. Spillman was arrested for perpetrating this fraud and several others.

No estate administration was pending for Marcus during any of these events. In fact, Marcus had no estate representative until September 2003, when the probate court appointed Christa Lenk

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[1] Under section 4.406, a customer has one year to notify the bank of unauthorized signatures. TEX. BUS. & COM. CODE § 4.406(f). In *American Airlines Employees Federal Credit Union v. Martin*, we held that the one-year repose period could be reduced by agreement to sixty days. 29 S.W.3d 86, 89 (Tex. 2000). The account agreement here reduces the notification period to sixty days.

[2] Both parties describe section 4.406(f) as a statute of repose, and we agree with this characterization. A statute of repose runs from a specific date without regard to the accrual of a cause of action. *See Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003); *Trinity River Auth. v. URS Consultants, Inc.—Tex.*, 889 S.W.2d 259, 261 (Tex. 1994). A statute of repose is therefore a substantive definition of rights, rather than a procedural limitation. *Id.* (quoting *Lamb v. Wedgewood S. Corp.*, 302 S.E.2d 868, 872 (N.C. 1983)). Courts consistently characterize this provision of the Uniform Commercial Code as a statute of repose rather than a statute of limitations, *see Peters v. Riggs Nat'l Bank*, 942 A.2d 1163, 1167 (D.C. Cir. 2008), and we will do so as well.

[3] Because our holding on this issue bars all of the administrator's claims, we need not address whether Texas Probate Code section 186 also provides a defense to the Bank.

as the administrator for the Marcus estate. Lenk was aware of Spillman's fraud on the Estate at the time of her appointment.

Following her appointment, there was no contact between Lenk and the Bank for almost two years. The Bank, presumably unaware of Lenk's appointment as administrator, never informed Lenk about Marcus's account or sent account statements to her, though it did mail some statements to Spillman and retained the statements at its offices. Lenk, for her part, knew of Marcus's account at the Bank by February 2004, but she did not contact the Bank until June 2005.[4] That month, she sent the Bank a written demand for payment in the amount of $185,785—the amount allegedly withdrawn by Spillman. When the Bank refused to pay, Lenk sued to recover the funds.

Among other defenses, the Bank asserted that Lenk failed to timely notify the Bank of the unauthorized transactions as required by section 4.406 of the Business and Commerce Code. Lenk responded that the Bank failed to satisfy its initial obligation to send or make available the account statements as required by section 4.406(a). Both parties ultimately moved for summary judgment. The trial court granted the Bank's motion, denied Lenk's motion, and entered final judgment in favor of the Bank. The court of appeals reversed, holding that retaining account statements at the Bank was insufficient to fulfill the Bank's section 4.406 duty. __ S.W.3d __.

[4] It is unclear when Lenk first became aware of Marcus's account at the Bank, though she knew of the account by February 2004 at the latest. In September 2003, she filed a claim with the receiver appointed to hold and distribute Spillman's assets. The following February, the receiver released documents to Lenk that included several bank statements (April–June 2000) showing activity on the account after Marcus's death. The receiver also sent a copy of a Jefferson State Bank check from an account in the name of "Mickey Carl Marcus Estate. Melvyn Morris Spillman, administrator." A funeral home for whom Lenk filed a creditor's application for letters of administration was also aware of a potential account at the Bank, but it is unclear whether the funeral home made Lenk aware of the account.

We granted the Bank's petition for review. 53 Tex. Sup. Ct. J. 115 (Nov. 20, 2009). When both sides move for summary judgment, and the trial court grants one motion and denies the other, "reviewing courts consider both sides' summary-judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered." *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, ___ S.W.3d ___ , ___ (Tex. 2010).

II. Business and Commerce Code section 4.406

The Business and Commerce Code precludes a customer "from asserting against the bank [an] unauthorized signature" if the customer does not timely "discover and report the customer's unauthorized signature" after the bank "sends or makes available to a customer a statement of account." TEX. BUS. & COM. CODE § 4.406(a), (f). Here, the issue is whether the Bank satisfied its initial burden to send or make available the statement to its customer. In the context of deceased customers, we hold that (1) a bank satisfies its burden by retaining account statements for retrieval by the estate administrator, and (2) the repose period begins to run once an administrator is appointed. Because Lenk was appointed in September 2003 but did not demand payment from the Bank until June 2005, we conclude that section 4.406 precludes her from asserting Spillman's unauthorized signatures against the Bank.[5]

As an initial matter, we reject the Bank's argument that it satisfied its burden by sending statements to Spillman. Even assuming, without holding, that the Bank could have relied on the

[5] The Bank also argues that Lenk's June 2005 demand for payment failed to report specific unauthorized signatures. Because Lenk's demand occurred after the repose period had expired, we do not address this issue. Lenk did not contact the Bank at all within sixty days of her appointment, so it follows that she did not report unauthorized signatures within sixty days.

fraudulent letters, that reliance would not have made Spillman the Bank's customer. Thus, sending Spillman the statements could not fulfill the Bank's obligation to provide account statements "to a customer." § 4.406(a).

But we do agree with the Bank's argument that it made the statements available by retaining them for the estate representative. When a bank is aware of a customer's death, it has no means of satisfying its section 4.406 burden other than by retaining the statements.[6] Yet a bank should not be allowed to satisfy its burden until there is an appointed representative. Otherwise, the repose period could run without the opportunity for a customer to review the statements and discover the fraud. *Cf. Am. Airlines Employees Fed. Credit Union v. Martin*, 29 S.W.3d 86, 92 (Tex. 2000) (noting that the Code allocates liability to the party best able to prevent the loss). Once an estate administrator is appointed, however, a bank should not be faulted for failing to further send or make available the statements. After all, the bank will be unaware of the administrator's existence, and administrators are vested with the authority and duty to act on the estate's behalf. *See* TEX. PROB. CODE § 37 (noting that once letters are issued, the "administrator shall have the right to possession of the estate as it existed at the death of the . . . intestate . . . and . . . shall recover possession of and hold such estate in trust to be disposed of in accordance with the law"); *id.* § 232 ("The personal representative of an estate, immediately after receiving letters, shall collect and take into possession the personal property, record books, title papers, and other business papers of the estate . . . ."). Accordingly, we

[6] We do not answer how a bank satisfies its § 4.406 burden when it is unaware of the customer's death as that issue is not before us. *Cf.* TEX. BUS. & COM. CODE § 4.405 ("Neither death nor incompetence of a customer revokes the authority to accept, pay, collect, or account until the bank knows of the fact of death . . . ."); *Mac v. Bank of Am.*, 90 Cal. Rptr. 2d 476, 481 (Cal. Ct. App. 1999) (holding that a bank does not satisfy its burden by mailing statements to a deceased customer).

conclude that in the event of a customer's death, banks can satisfy their section 4.406 burden by retaining statements at the bank, but the customer's burden to report unauthorized signatures does not arise until an estate representative is appointed.[7]

Lenk was appointed as the estate administrator on September 2, 2003. At that time, she was vested with the authority and duty to act on behalf of the estate. The Bank acknowledges it would have provided her with statements had she inquired. Yet Lenk waited almost two years after her appointment to contact the Bank. Allowing Lenk to wait that long to sue after making no attempt to obtain the account statements would flout the Legislature's goal of "'promoting certainty and predictability in commercial transactions.'" *Am. Airlines Employees*, 29 S.W.3d at 92 (quoting *Putnam Rolling Ladder Co. v. Mfrs. Hanover Trust Co.*, 546 N.E.2d 904, 908 (N.Y. 1989)).

To be sure, this rule requires administrators to act swiftly in handling the estate's banking records. But as mentioned above, administrators have a duty to take control of the estate's property. Lenk could have readily identified the unauthorized transactions had she diligently obtained the bank statements. Because she was the only person authorized to act on the Marcus Estate's behalf, any activity on the Marcus account after his death (e.g., Spillman's withdrawals) would have immediately alerted Lenk of potentially fraudulent activity.

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[7] Our holding does not conflict with *First Citizen's Bank v. All-Lift of Georgia Inc.*, 555 S.E.2d 1 (Ga. Ct. App. 2001), the only case cited by the parties that addresses this issue. In that case, the court held that banks cannot satisfy the section 4.406 burden by merely retaining the statements at the bank (absent the customer's request to do so). *Id.* at 3. But it did not consider the important question that arises when the customer is deceased. Instead, it addressed a living customer to whom the bank could send the statements. As stated above, when the customer has died, a bank's only option is to retain the statements and make them available when the personal representative requests them.

We also acknowledge that administrators may be unaware of the decedent's bank accounts, especially when the decedent has left little personal information or maintained poor banking records. *Cf.* § 4.406 cmt. 1 ("The policy decision is that accommodating customers who do not keep adequate records is not as desirable as accommodating customers who keep more careful records."). The statute's focus on certainty and predictability trumps this concern, especially considering that the administrator's appointment could come many years after the customer's death, as happened here. With living customers, the statute sets a one-year repose period, which can be contractually shortened by agreement, as happened here. Our holding, which benefits customers by delaying the start of the repose period, has the effect of extending the bank's potential liability well beyond one year. We see no reason to extend it even further by delaying the start of the repose period until the administrator becomes aware of the account.

III. Conclusion

The statute of repose in section 4.406 of the Business and Commerce Code bars Lenk's claims because she failed to notify the Bank of any unauthorized transactions within sixty days of being appointed estate administrator. Accordingly, we reverse the court of appeals' judgment and render judgment in favor of the Bank.

_____

Eva M. Guzman
Justice

OPINION DELIVERED: August 27, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0292

ZENITH INSURANCE COMPANY, PETITIONER,

v.

CARMEN AYALA, RESPONDENT

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

PER CURIAM

In this workers' compensation case, the court of appeals concluded that the carrier waived its right to dispute the extent of the claimant's compensable injury by failing to adhere to Texas Labor Code section 409.021(c)'s sixty-day deadline. __ S.W.3d __. We recently held that the sixty-day period for challenging compensability does not apply to a dispute over extent of injury. *State Office of Risk Mgmt. v. Lawton*, 295 S.W.3d 646, 649-50 (Tex. 2009). In light of *Lawton*, we reverse the court of appeals' judgment and remand this case to the trial court for further proceedings.

On January 23, 2006, Carmen Ayala injured her lower back when a window fell on her at work. Ayala was originally diagnosed with a back sprain/strain. On March 1, Zenith received notice of Ayala's injury and commenced paying benefits. On April 13, Ayala's original diagnosis was revised to include lumbar radicular syndrome. A week later, her diagnosis was again amended to

also include lumbar spondylolisthesis.[1] To treat Ayala, physicians recommended an epidural steroid injection, a procedure requiring Zenith's preauthorization. On April 27, Zenith preauthorized the treatment, and the injection was performed. On July 28, Zenith notified Ayala that it was disputing her entitlement to benefits for the lumbar condition because the condition was degenerative and not the result of the January 23 injury.

The Texas Department of Insurance, Division of Workers' Compensation (the Division), held a contested case hearing to determine whether Ayala's compensable injury included the lumbar condition and whether Zenith had waived its right to contest compensability by not complying with Labor Code section 409.021(c)'s deadline. The parties stipulated that: (1) Ayala sustained a compensable injury; (2) Zenith received notice of Ayala's injury on March 1; (3) Zenith was not contesting compensability; and (4) Zenith did not dispute that the compensable injury included the lumbar condition until July 28. The hearing officer concluded that, although Ayala failed to prove the compensable injury event was a producing cause of the lumbar condition, it was nevertheless compensable because Zenith failed to dispute compensability within sixty days after it received notice of Ayala's initial injury. The Division appeals panel affirmed, and Zenith sought judicial review.

On competing motions for summary judgment, the trial court held Zenith waived its right to contest compensability by not timely disputing the lumbar condition diagnosis in accordance with

[1] The diagnoses of lumbar radicular syndrome and lumbar spondylolisthesis will collectively be referred to as the "lumbar condition."

Labor Code section 409.021. Thus, the compensable injury extended to include the lumbar condition. The court of appeals affirmed. __ S.W.3d __. We reverse.

In *Lawton*, we answered the same issue presented today: "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." *Lawton*, 295 S.W.3d at 647. We held that section 409.021(c)'s sixty-day deadline[2] applies only to compensability disputes, not disputes over the extent of an injury.[3] *Id.* at 649-50. Instead, when a carrier disputes extent of injury, it "has up to forty-five days from the date it receives a complete medical bill to dispute whether that treatment was necessary." *Id.* at 650.

Ayala argues that *Lawton* is inapplicable because this is not an extent of injury dispute, but rather a compensability case. We disagree. As the Division explains:

> 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.

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[2] Labor Code section 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).

[3] In doing so, we relied on Administrative Rule 124.3(e) and the Division's own "reasoned justification" for the Rule. *See State Office of Risk Mgmt. v. Lawton*, 295 S.W.3d 646, 648-49 (Tex. 2009); *see also* 25 Tex. Reg. 2096, 2096 (2000) (noting that, as required by statute, "the [Division]'s reasoned justification for this rule is set out in this order"). Both state that Labor Code section 409.021 does not apply to disputes regarding extent of injury. *See* 28 TEX. ADMIN. CODE § 124.3(e); 25 Tex. Reg. at 2097. Rule 124.3(e) also sets separate deadlines for disputing the extent of the compensable injury. *See* 28 TEX. ADMIN. CODE § 124.3(e).

25 Tex. Reg. 2096, 2097 (2000) (*quoted in Lawton*, 295 S.W.3d at 649). Here, Zenith agreed that Ayala's initial injury, a back sprain/strain, was compensable; Zenith disputed only the subsequently added diagnoses. This mirrors the Division's conception of an extent of injury dispute as well as the facts of *Lawton*[4]:

> [A]n employee may have injured his arm and then several months later the doctor begins to treat the shoulder as well and the carrier does not believe that the shoulder is part of the compensable injury. In this situation, [a carrier is required] to . . . file the notice of dispute of extent of injury not later than the date that the carrier is required to either pay or deny the medical bill which included the treatment for the shoulder (45 days from the date the complete bill was received by the carrier).

25 Tex. Reg. at 2097. Thus, unlike compensability, extent of injury disputes arise when the carrier believes additional conditions are unrelated to the compensable injury. Because this is an extent of injury dispute, section 409.021(c)'s sixty-day deadline does not apply, and Zenith "has up to forty-five days from the date it receives a complete medical bill to dispute whether [the] treatment [for the lumbar condition] was necessary." *Lawton*, 295 S.W.3d at 650.

Ayala also asserts that this case is distinguishable from *Lawton* because, here, Zenith preauthorized the epidural steroid injection to treat Ayala. We disagree. Under Division rules, a "carrier shall approve or deny requests [for preauthorization] based solely upon the medical necessity of the health care required to treat the injury, regardless of: (1) unresolved issues of compensability, extent of or relatedness to the compensable injury; (2) the carrier's liability for the injury; or (3) the fact that the employee has reached maximum medical improvement." 28 TEX. ADMIN. CODE

[4] In *Lawton*, the carrier agreed that Lawton's injury, a left knee contusion and strain, was compensable, but disputed whether a later diagnosis of degenerative joint disease was included in the compensable injury. *Lawton*, 295 S.W.3d at 647, 649.

§ 134.600(h). Preauthorization does not, in and of itself, make the carrier liable. *See id.* § 134.600(d) ("The carrier is not liable . . . if there has been a final adjudication that the injury is not compensable or that the health care was provided for a condition unrelated to the compensable injury."). Instead, preauthorization merely precludes a carrier from later disputing the medical necessity of the treatment. *See* TEX. LAB. CODE § 413.014(e). A carrier, upon receipt of the bill for preauthorized treatment, may still argue that the condition treated is not related to the compensable injury. *See* 28 TEX. ADMIN. CODE § 134.600(d). As the Division explains:

> Preauthorization decisions are to be made entirely based upon medical necessity of the treatment of the condition proposed to be treated. Issues associated with extent of injury, compensability of the injury, or liability for the claim are separate from the issue of whether a given treatment or service is medically necessary. That is why approval of a preauthorization request does not make a carrier liable for payment if the carrier successfully challenges the extent of injury/compensability/liability issue.

25 Tex. Reg. at 2101. Thus, Zenith's preauthorization does not preclude Zenith from disputing extent of injury in this case.

Because this dispute involves extent of injury, rather than compensability, section 409.021(c)'s sixty-day deadline is inapplicable. Without hearing oral argument, we reverse the court of appeals' judgment and remand the case to the trial court for further proceedings. TEX. R. APP. P. 59.1, 60.2(d).

OPINION DELIVERED: June 11, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0317

IN RE ENSCO OFFSHORE INTERNATIONAL COMPANY, ENSCO INTERNATIONAL INCORPORATED AND ENSCO OFFSHORE COMPANY, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST OF CHILES OFFSHORE, INC., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

The plaintiff in this case filed suit in Dallas County against corporate owners of a drilling rig on which an Australian citizen employed by an Australian company was killed. At the time of the incident, the rig was in the territorial waters of Singapore, and the incident was investigated by Singaporean authorities. At issue in this mandamus proceeding is whether the trial court abused its discretion by failing to dismiss the case on forum non conveniens grounds. We hold that it did and conditionally grant relief.

Paul Merema was fatally injured while working aboard the ENSCO 104, a Liberian-flagged drilling rig docked at a shipyard facility in the territorial waters of Singapore. Paul was a citizen of Australia and was employed by Total Marine Services (TMS) of Western Australia. His employment contract with TMS was governed by the law of Western Australia. ENSCO Offshore International Inc. contracted with TMS for TMS to provide personnel for the drilling rig. The contract with TMS specified that the laws of Western Australia applied and all matters between the

parties were to be referred to arbitration in Perth, Western Australia. Paul's death was investigated by Singaporean authorities, including the Ministry of Manpower, the Police Coast Guard, the State Coroner, and the Ministry of Health. Singapore Test Services, located in Singapore, participated in analysis and testing of a valve assembly involved in the incident.

Paul's wife, Margaret, filed suit in Western Australia against TMS. She then filed suit individually and on behalf of Paul's estate (collectively, Merema) in Dallas County. In the Dallas suit, she named as defendants the owner of the ENSCO 104, ENSCO Offshore International Co., ENSCO Offshore Co., and its parent company, ENSCO International Inc. (collectively, ENSCO). All the defendants have corporate offices in Dallas. ENSCO filed a motion to dismiss for forum non conveniens, asserting that no claimed act of negligence occurred in Texas and requesting the trial court to dismiss the action in favor of the jurisdictions of Singapore or Australia. Merema responded that the negligent acts of ENSCO emanated from Dallas and that most of the statutory forum non conveniens factors supported keeping the suit in Texas. The trial court denied ENSCO's motion.

The court of appeals denied mandamus relief. ___ S.W.3d ___. ENSCO now seeks mandamus relief here, asserting the trial court abused its discretion because proper application of the forum non conveniens statute requires dismissal.

An appeal is not adequate when a motion to dismiss on forum non conveniens grounds is erroneously denied, so mandamus relief is available, if it is otherwise warranted. *In re Gen. Elec. Co.*, 271 S.W.3d 681, 685 (Tex. 2008). We review a trial court's refusal to dismiss on forum non conveniens grounds for abuse of discretion. *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 679 (Tex. 2007).

Factors a trial court must consider when ruling on a motion to dismiss for forum non conveniens are specified by statute:

> 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). The word "shall" in the statute "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." *In re Gen. Elec.*, 271 S.W.3d at 686. We will address the statutory factors in order.

ENSCO asserts that either Australia or Singapore provides an adequate forum as required by the first two factors. *See* TEX. CIV. PRAC. & REM. CODE § 71.051(b)(1)-(2). Merema does not claim that either of those forums is inadequate. Rather, she claims that ENSCO has not identified a *single* alternate forum and there is no single forum that provides a more practical venue than the one she chose. She claims ENSCO has amalgamated the forums of Singapore and Australia into one with statements such as "[m]ost of the key documents herein are located in Australia or Singapore," which obscures the problems with trying the case in either forum.

An alternate forum is one where the defendant is amenable to process. *In re Gen. Elec.*, 271 S.W.3d at 688 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981)). A forum is inadequate if the remedies it offers are so unsatisfactory they really comprise no remedy at all. *Id.* Merema does not disagree with ENSCO's assertions that the defendants are amenable to process in either Singapore or Australia, nor does she dispute that each provides adequate remedies. Rather, she argues, in substance, that ENSCO should have explained the trial procedures of a particular location to demonstrate it was an adequate alternate forum. We disagree because such a showing is not necessary. Comparative analyses of procedures in different forums is not generally appropriate in forum non conveniens analysis: "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.* (quoting *Piper Aircraft*, 454 U.S. at 251). Comparative analyses are relevant to a court's forum non conveniens decision only if a potential transfer would effectively result in no available remedy at all. *See id.* Merema does not contend that is the situation here.

Merema supports her position by citing to *In re Air Crash at Taipei Taiwan Multidistrict Litig.*, 153 F. App'x 993 (9th Cir. 2005). There, the Ninth Circuit reversed a trial court's dismissal of a case on forum non conveniens grounds because the trial court considered multiple alternate forums rather than comparing the chosen forum with a single alternative. *Id.* at 995-96. The citation is inapposite. Here, ENSCO separately detailed the causes of action and remedies available to Merema in both Singapore and Australia, listed the crew members of the ENSCO 104 at the time of the incident along with their nationalities, listed other potential witnesses and their locations, and noted the location of certain documentary and physical evidence. The common-law doctrine of forum non conveniens "presupposes *at least* two forums in which the defendant is amenable to process." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947) (emphasis added); *see also Yoroshii Invs. (Mauritius) Pte. Ltd. v. BP Int'l Ltd.*, 179 S.W.3d 639, 643 (Tex. App.—El Paso 2005, pet. denied); *Sarieddine v. Moussa*, 820 S.W.2d 837, 841 (Tex. App.—Dallas 1991, writ denied). Nothing in Section 71.051 indicates the Legislature contemplated the denial of forum non conveniens motions because multiple adequate alternate forums existed, or that a defendant should be required to focus on only one alternate forum to the exclusion of other forums. *See In re Pirelli*, 247 S.W.3d at 677 (noting the presumption that the Legislature enacts statutes with awareness of existing law and presuming the Legislature was aware of the *Gulf Oil* test). The first two statutory factors weigh in favor of granting ENSCO's motion.

The third factor under Section 71.051 is whether maintaining the claim in Texas would work a substantial injustice to the moving party. TEX. CIV. PRAC. & REM. CODE § 71.051(b)(3). ENSCO asserts that an analysis of the public and private interest factors demonstrates that maintaining the

claim in Texas will cause it substantial injustice. ENSCO argues, and we agree, as discussed below, that the lack of compulsory process in Texas for reaching the great majority of witnesses would be substantially unjust. *See In re Gen. Elec.*, 271 S.W.3d at 689-90. Next, ENSCO asserts a substantial injustice will result because it has a suit pending against TMS in Western Australia for indemnity under their contract.[1] ENSCO argues that TMS is not subject to the jurisdiction of the Texas trial court and, therefore, the Australian suit can neither be consolidated with this one nor can common issues be determined in Texas litigation. While it is possible that a defendant may seek indemnity or contribution from a foreign party after being found liable, it "would be far more convenient, however, to resolve all claims in one trial." *Piper Aircraft Co.*, 454 U.S. at 259. This factor weighs in favor of granting ENSCO's motion.

The fourth statutory factor is whether the alternate forum can exercise jurisdiction over all the defendants. TEX. CIV. PRAC. & REM. CODE § 71.051(b)(4). All the defendants have agreed to submit to jurisdiction in either Singapore or Australia, and Merema does not argue that either forum could not exercise jurisdiction over all of them. This factor also weighs in ENSCO's favor.

The fifth factor requires balancing public and private interest factors. *Id.* § 71.051(b)(5). A consideration in this balancing is the extent to which Paul's death resulted from acts or omissions that occurred in Texas. *Id.* Private interest considerations include ease of access to proof, availability and cost of compulsory process, and other practical problems that make trial easy, expeditious, and inexpensive. *In re Gen. Elec.*, 271 S.W.3d at 691 (citing *Gulf Oil*, 330 U.S. at 508).

[1] The suit also involves a claim by ENSCO for insurance coverage.

ENSCO points out that in this case relevant documents and potential witnesses are located around the world. For example, the investigating officials and employees of the shipyard are in Singapore. Paul's family, a psychologist who provided services after the incident, and TMS and its employees are located in Australia. The ENSCO 104 rig manager at the time of the incident is now in India. Of the twenty-nine men assigned to work on the ENSCO 104 at the time of the incident, twenty-one were TMS employees and all but two of the men on duty at the time of the incident were citizens of Australia or New Zealand, as were three of the four men who witnessed the incident. Merema argues that nine of the twenty-nine men assigned to the ENSCO 104 were United States citizens, including four Texas residents. However, the actual locations of most of those men were unknown. Only two were still employed by ENSCO. The last known address for one was in Mississippi. Even if some witnesses are located in the United States, the fact remains that compulsory process is unavailable for the vast majority of witnesses. *See* TEX. R. CIV. P. 176.3. Similarly, although Merema asserts that copies of documents located in Australia and Singapore can be shipped or sent by email, that fact does not cure the problems and difficulties posed by the lack of compulsory process to secure production of the documents and other evidence. *In re Gen. Elec.*, 271 S.W.3d at 691.

Aside from the fact that compulsory process is unavailable to compel the majority of witnesses to appear in Dallas County or to require production of documents, the practical problems that make trial easy, expeditious, and inexpensive must be considered. *Id.* (citing *Gulf Oil*, 330 U.S. at 508). The physical evidence is in storage in Singapore and onboard the ENSCO 104, which was operating off the shores of Malaysia when the trial court rendered its decision and off the shores of Australia when ENSCO filed its brief. This evidence is under ENSCO's control, but ENSCO

presented evidence that the cost of airfare from Singapore or Australia to Dallas was approximately five times the cost of airfare between Australia and Singapore. Travel time between Australia and Singapore was five hours compared to over twenty hours for travel between Australia or Singapore and Dallas. Merema argues that because witnesses are scattered around the globe, there will be inconvenience no matter where the suit is tried, and that is true. But clearly the great majority of witnesses and most of the evidence remain in Australia and Singapore. The cost, time, and scheduling difficulties to obtain evidence and present witness testimony would be far greater if the case were tried in Texas.

Another consideration in the fifth factor is the extent to which Paul's death resulted from acts or omissions that occurred in this state. TEX. CIV. PRAC. & REM. CODE § 71.051(b)(5). Merema asserts that she need not prove that Paul's death resulted from acts or omissions occurring in Texas by a preponderance of the evidence, but that she need only make a prima facie showing that it did so. She claims her burden was fulfilled by evidence that actions and inactions of ENSCO corporate management led in part to Paul's death. Merema relies on a statement in a report produced by TMS entitled "Human Factors Investigation into the fatality that occurred on board the jack-up rig *ENSCO 104* on 23 April 2005."[2] Under the "Findings" section was a subsection entitled "Personal and Team Safety" that stated,

> [S]afety—on an individual and work team level—was taken very seriously and professionally by personnel working on the rig. . . . Several persons commented that if safety system practices were not been [sic] performed on board, failure to comply with them was ultimately because of a lack of commitment from senior rig

[2] ENSCO objected that the report is unauthenticated, but it did not obtain a ruling on the objection. *See* TEX. R. APP. P. 33.1(a)(2).

> management and, possibly, ENSCO shore management. Several persons suggested that commercial imperative was perceived to be interfering with safety management.

We disagree with Merema's premise as to her burden of proof. The forum non conveniens statute does not place the burden of proof on either party. To the extent evidence is necessary to support a party's position, the trial court must base its decision on the greater weight of the evidence. *See In re Gen. Elec.*, 271 S.W.3d at 687. Here, Merema has not identified any corporate policy linked to Paul's death, and the report on which she relies states that *if* safety practices were not being performed, failure to comply was *possibly* due to a lack of commitment from ENSCO shore management. ENSCO presented uncontroverted evidence that persons addressed by the report—rig management and shore management—were employed by a separate corporation located in Singapore and land-based personnel were based in Singapore and Australia. Accordingly, the report is no evidence that Paul's death resulted from an act or omission that occurred in Texas.

The public interest factors to consider in determining the fifth factor include administrative difficulties related to court congestion, imposition of jury duty on citizens who have no relation to the litigation, local interest in having localized controversies decided at home, and trying the case in a forum that is at home with the law that governs the case. *Id.* at 691. Merema asserts that because this case involves the actions of Texas parties, the people of Texas have an interest in resolution of the issues. But as previously noted, Merema did not offer evidence that the ENSCO defendants' actions or omissions in Texas contributed to Paul's death. Nor did she identify any other Texans who have an interest in the case. The case involves an injury that happened in Singapore's territorial waters on a Liberian-flagged vessel to an Australian citizen employed by an Australian

company. As we said in *In re Pirelli Tire*, "[I]t is fundamentally unfair to burden the people of Texas with the cost of providing courts to hear cases that have no significant connection with the State." 247 S.W.3d at 676. Further, the fact that the trial court has jurisdiction over the defendants because their offices are in Dallas is a separate issue from whether the case should be dismissed on forum non conveniens grounds. *Id.* at 675.

Another consideration in determining the fifth statutory factor is whether Texas law will govern the case. *In re Gen. Elec.*, 271 S.W.3d at 691. ENSCO and Merema disagree regarding what law will govern. ENSCO asserts that Merema's claims are governed by the law of Australia or Singapore because those forums have the most significant relationship to the underlying incident. *See Hughes v. Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 205 (Tex. 2002). Merema counters that if the suit is maintained in Texas, the trial court will apply Texas law or the federal Death on the High Seas Act. *See* 46 U.S.C. § 30301. But Merema does not explain why Texas law would apply. The applicable law is determined in Texas by the Restatement's "most significant relationship" test. *Hughes*, 18 S.W.3d at 205 (Tex. 2000) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971)). The factors to consider in determining the applicable law for a tort case such as this are (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the residence, nationality, and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered. *Id.* at 205 n.1 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971)); *see also* TEX. CIV. PRAC. & REM. CODE § 71.031(c) (providing that in an action for the death caused by actions outside the state, the court shall apply the rules of substantive law that are "appropriate under the facts of the case"). There is

evidence of only one of these factors that points to Texas: the residence, nationality, and place of business of ENSCO. And if Merema's claim falls under the federal Death on the High Seas Act, a similar analysis applicable to maritime cases is required to determine whether foreign law applies. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 307-10 (1970); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 384 n.6 (5th Cir. 1983). Even assuming Texas law applies, however, all other public interest factors favor dismissal of the case. *See Piper Aircraft Co.*, 454 U.S. at 260. We conclude that the fifth statutory factor weighs in favor of granting ENSCO's motion.

We next consider the sixth factor: whether dismissal of this suit would result in unreasonable duplication or proliferation of litigation. TEX. CIV. PRAC. & REM. CODE § 71.051(b)(6). Merema does not argue that dismissal of this case will have such a result. And as ENSCO points out, if this case is dismissed, it may result in consolidation of this claim with other claims already filed in Australia, thus reducing the amount of litigation. This last factor also weighs in ENSCO's favor.

The trial court stated at the forum non conveniens hearing "[w]hile I do think all the factors weigh in favor of a different forum probably in Australia, I don't think that they weigh so heavily that I've got to dismiss this case." Merema asserts, citing several cases, that the trial court did not abuse its discretion because the trial court correctly found that it should only disturb a plaintiff's choice of forum if the balance of factors *strongly favors* the defendant, which they do not. *See Sarieddine*, 820 S.W.2d at 844 ("The doctrine of forum non conveniens should be exercised only in those cases where the balance of factors so strongly favors the defendant that, in the interest of justice, the case should be tried in another forum."); *see also Signature Mgmt. Team, LLC v. Quixtar, Inc.*, 281 S.W.3d 666, 675 (Tex. App.—Dallas 2009, pet. filed) ("Quixtar's burden was to show that

the *Gulf Oil* factors in their totality strongly favor dismissal."); *Adams v. ESC Med. Sys., Inc.*, 161 S.W.3d 49, 50 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("Unless the balance of factors strongly favors the defendant, the plaintiff's choice of forum should rarely be disturbed."). We disagree. The cases relied on by Merema were decided on common-law forum non conveniens grounds. The forum non conveniens statute does not contain similar requirements. *See* TEX. CIV. PRAC. & REM. CODE § 71.051. "The Legislature . . . 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." *In re Gen. Elec.*, 271 S.W.3d at 686. The statute's language simply does not require that the Section 71.051(b) factors "strongly" favor staying or dismissing the suit. Here, all the factors weigh in favor of Merema's claim being heard in a forum outside Texas, and the statute required that the trial court grant the motion and decline to exercise jurisdiction.[3]

We conclude that the trial court's denial of ENSCO's motion to dismiss the suit on forum non conveniens grounds was an abuse of discretion. Accordingly, we conditionally grant the petition for writ of mandamus. The trial court is directed to grant ENSCO's motion and dismiss the case. The writ will issue only if the trial court fails to do so.

OPINION DELIVERED: May 7, 2010

[3] We do not address whether the statute requires dismissing or staying the suit if the evidence proves only that some, as opposed to all, the Section 71.051(b) factors weigh in favor of the trial court's declining to exercise jurisdiction.

IN THE SUPREME COURT OF TEXAS

NO. 09-0343

IN THE MATTER OF R.D., A JUVENILE

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

PER CURIAM

In this case a jury found that R.D., a juvenile, engaged in delinquent conduct of aggravated robbery. R.D. filed a motion for new trial generally challenging the sufficiency of the evidence to support the jury's verdict, and complaining specifically of the deadly-weapon finding supporting the "aggravated" status of the offense. R.D.'s motion did not specifically challenge the evidentiary basis for the jury's rejection of his affirmative defense of duress, causing the court of appeals to conclude that the issue was waived on appeal. ___ S.W.3d ___, ___. Because the jury's delinquency finding subsumed its rejection of R.D.'s affirmative defense, however, we hold that R.D.'s new trial motion was sufficient to preserve error. Accordingly, we grant the petition and, without hearing oral argument, remand the case to the court of appeals for further review.

Accused of committing aggravated robbery, R.D. claimed that he acted under duress and raised the issue as an affirmative defense at trial. The jury was asked to decide whether R.D. had engaged in delinquent conduct by committing aggravated robbery, and if not, if R.D. had engaged in delinquent conduct by committing the lesser offense of robbery, the distinction being whether a

deadly weapon was used. The jury was instructed that the burden of proof for the affirmative defense rested upon R.D., and that if it believed R.D. committed the crime under duress the jury should find that he did not engage in delinquent conduct. The jury found that R.D. had engaged in delinquent conduct by committing aggravated robbery.

R.D. filed a motion for new trial contending the evidence presented by the State was legally and factually insufficient to support the jury's delinquency verdict. R.D. followed this general challenge with a specific challenge to the legal and factual sufficiency of the State's proof of the use of a deadly weapon. The trial court denied R.D.'s motion for new trial.

On appeal, R.D. challenged the legal and factual sufficiency of the evidence supporting the jury's deadly-weapon finding, but also the factual sufficiency of the evidence to support the jury's rejection of his affirmative defense. The appeal was transferred from the Fourth Judicial District Court of Appeals to the Eighth, which upheld the deadly-weapon finding. Applying the transferor court's precedent, the court of appeals held that R.D.'s evidentiary challenge to the jury's failure to find duress was not preserved because he did not specify this ground in his motion for new trial. Accordingly, the court of appeals affirmed.[1]

In a civil case, in order to challenge on appeal the factual sufficiency of the evidence to support a jury finding, the point must be raised in a motion for new trial. TEX. R. CIV. P. 324(b)(2). In *In re M.R.*, 858 S.W.2d 365, 366 (Tex. 1993) (per curiam opinion denying application for writ of error), we stated that, unlike the rule in criminal cases, in juvenile proceedings a motion for new trial

[1] The court noted that had it applied its own precedent, which acknowledged "the drift of juvenile law from its civil roots," *In re J.L.H.*, 58 S.W.3d 242, 246 (Tex. App.—El Paso 2001, no pet.), there would be no requirement of a new trial motion to preserve a factual sufficiency challenge on appeal. ___ S.W.3d at ___.

is necessary to preserve a factual sufficiency challenge.[2] Unlike in *In re M.R.*, however, R.D. did file a motion for new trial. The question is whether that motion was sufficient to encompass R.D.'s complaint on appeal that the jury's rejection of his affirmative defense had no evidentiary support. We conclude that it was.

The jury's single finding that "the respondent . . . did engage in delinquent conduct by committing aggravated robbery" subsumed its rejection of R.D.'s affirmative defense, which was not submitted as a separate question but as an instruction to the delinquency question. In his motion for new trial, R.D. made a general challenge to the legal and factual sufficiency of the evidence to support the jury's delinquency finding. That R.D. followed this general complaint with a more specific one aimed at the deadly-weapon instruction does not constitute a waiver in these circumstances.

Where practical, the rules of civil procedure are to be given a liberal construction in order to obtain a just, fair, equitable, and impartial adjudication of the rights of litigants under established principles of substantive law. TEX. R. CIV. P. 1. *See also Verburgt v. Dorner*, 959 S.W.2d 615, 616–17 (Tex. 1997) ("[W]e have instructed the courts of appeals to construe the Rules of Appellate Procedure reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule."). We conclude that R.D.'s general challenge to the sufficiency of the evidence to support the jury's delinquency finding met Rule 324's requirement for preserving his challenge to the jury's rejection of his affirmative defense.

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[2] Since our decision and R.D.'s trial in this case, the Legislature has eliminated the requirement of a new trial motion to preserve a factual sufficiency challenge on appeal in juvenile delinquency cases. TEX. FAM. CODE § 56.01(b-1). We make no comment about the continuing viability of *In re M.R.* in light of subsequent developments in the law.

Accordingly, pursuant to Rule 59.1 of the Texas Rules of Appellate Procedure, without hearing oral argument, we grant R.D.'s petition for review, reverse the court of appeals' judgment, and remand the case to that court for further proceedings.

OPINION DELIVERED: February 12, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0345

QUIXTAR INC., PETITIONER,

v.

SIGNATURE MANAGEMENT TEAM, LLC, D/B/A TEAM, RESPONDENT

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

PER CURIAM

JUSTICE HECHT and JUSTICE LEHRMANN did not participate in the decision.

In this case, the trial court dismissed a lawsuit filed in Collin County, Texas between two Michigan businesses based on common law forum non conveniens. The court of appeals reversed the dismissal, holding that the trial court abused its discretion. It agreed that the proposed forum, Michigan, was available and adequate for the lawsuit, but held that the defendant did not meet its burden to show that the private and public interest factors of the forum non conveniens analysis strongly weighed in favor of dismissal. The defendant appealed to this Court. Because the trial court did not abuse its discretion, we reverse the court of appeals' judgment.

This dispute arose between Quixtar, Inc. and Signature Management Team, LLC, d/b/a Team ("Team"). Quixtar is a Virginia corporation with a principal place of business in Michigan. Team

is a limited liability company organized in Nevada with a principal place of business in Michigan. Quixtar, a successor to Amway Corporation, is a multi-level marketing corporation that sells products through a network of individual business owners (IBOs). IBOs increase revenue by recruiting new IBOs for Quixtar, and Quixtar promulgates rules regulating IBO recruitment to ensure compliance with Federal Trade Commission regulations pertaining to multi-level marketing businesses.

Team is a "tools company" that sells marketing tools, self-help books, seminars, and motivational speaker appearances to IBOs to assist them in developing their businesses. Quixtar also owns a training system and sells similar tools to IBOs, making it a direct competitor with Team. Leading up to this dispute, Quixtar alleged that Team taught IBOs improper and potentially illegal business-building techniques that put Quixtar's entire business at risk. The entities met at Quixtar's headquarters in Michigan on August 9, 2007, to discuss Team's alleged noncompliance with Quixtar's rules and potential remedial measures. Quixtar alleges that Team threatened to file a "storm" of litigation initiated by Team-affiliated IBOs if Quixtar did not capitulate to certain demands, such as waiving non-compete provisions in its contract so that Team founders Orrin Woodward and Chris Brady could recruit IBOs for a separate business endeavor. When they did not resolve their disagreements, Quixtar terminated Woodward and Brady's IBO contracts and revoked Team's authorization to sell training materials. The same day, Team-affiliated IBOs filed a class-action lawsuit against Quixtar in California. Over the next several days, Quixtar sent e-mails to its IBOs. In the e-mails, Quixtar explained the terminations and warned certain Team-affiliated IBOs that their businesses would also be terminated if they continued using Team products. Team-

affiliated IBOs filed seventeen lawsuits, including seven in Michigan. Michigan courts repeatedly denied the injunctive relief requested by the IBOs, but eventually a court in Collin County, Texas issued a temporary restraining order against Quixtar to prevent Quixtar from initiating any adverse action against Team-affiliated IBOs.

Team initiated suit in Collin County, Texas on September 4, 2007, alleging that Quixtar abused its power by interpreting rules governing IBOs to restrain Team's trade and business with certain IBOs located in Collin County. It alleges that Quixtar's e-mail communications were part of its basis for commencing suit. Quixtar filed a motion to dismiss based on the common law forum non conveniens doctrine, arguing that the suit arose from a business dispute centered in Michigan that had no substantial connection to Texas. At the evidentiary hearing on Quixtar's motion to dismiss, the trial court heard testimony from three Team-affiliated IBOs and the General Counsel of Quixtar's parent company, Alticor. It granted the motion to dismiss.

The court of appeals held that the trial court abused its discretion by granting the forum non conveniens dismissal. It reasoned that "the plaintiff's choice of forum must be respected unless evidence shows the private-interest and public-interest factors *strongly* favor dismissal in favor of another forum." 281 S.W.3d 666, 674 (Tex. App.—Dallas 2009, pet. granted). Though the court agreed that Michigan was an available and adequate forum, it held that Quixtar's "evidentiary showing under the private-interest factors was weak" and that it "did not show that the public-interest factors, on the whole, strongly favor Michigan as a more appropriate forum for Team's lawsuit than Texas." *Id.*

Quixtar argues that the trial court did not abuse its discretion and that the court of appeals erred in reversing the forum non conveniens dismissal. It asserts that the court of appeals' analysis was flawed, imposing an excessive burden of proof on Quixtar because (1) a nonresident plaintiff's forum choice deserves substantially less deference than a resident plaintiff's, and (2) it improperly required Quixtar to prove that all of the public and private interest factors "strongly" favored dismissal. We address each contention.

The "*forum non conveniens* determination is committed to the sound discretion of the trial court." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). "It may be reversed only when there has been a clear abuse of discretion; where the court has considered all the relevant public and private interest factors, and where its balancing of these factors is reasonable, its discretion deserves substantial deference." *Id.* A trial court commits an abuse of discretion when it acts "without reference to any guiding rules and principles." *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). And the "mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion occurred." *Downer*, 701 S.W.2d at 242.

A defendant seeking forum non conveniens dismissal "ordinarily bears a heavy burden in opposing the plaintiff's chosen forum." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007). However, in *In re Pirelli Tire, L.L.C.*, this Court explained that the "forum-non-conveniens doctrine generally affords substantially less deference to a nonresident's forum choice." 247 S.W.3d 670, 675 (Tex. 2007) (plurality opinion) (citing *Reyno*, 454 U.S. at 255–56 (upholding dismissal of nonresident plaintiff's forum choice as reasonable—despite existence of an

important American interest to prevent faulty manufacturing—where evidence of private interest factors pointed in both directions and public interest factors weighed against the plaintiff's forum choice); *Owens Corning v. Carter*, 997 S.W.2d 560, 570 (Tex. 1999)); *see also Sinochem*, 549 U.S. at 430 (explaining that "the presumption in the plaintiff's favor applies with less force, for the assumption that the chosen forum is appropriate in such cases is less reasonable" (quotations omitted)). Obviously, this does not mean that a plaintiff's choice of forum deserves no deference. *Sinochem*, 549 U.S. at 430. But that a plaintiff is not a Texas resident speaks directly to a defendant's burden. *See id.*; *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 314 n.10 (5th Cir. 2008).

Team argues that we should not defer to *Pirelli*'s "less deference" language because *Pirelli* is a plurality opinion and only addressed Texas's forum non conveniens statute. But *Pirelli*'s significance should not be dismissed so easily. First, while it addressed Texas's forum non conveniens statute and not the common law doctrine, the statute has "deep roots in the common law." *Pirelli*, 247 S.W.3d at 675. The *Pirelli* plurality cites to *Reyno*, a common law forum non conveniens case, for the proposition that a nonresident plaintiff's forum choice deserves "substantially less deference." *Id.* (citing *Reyno*, 454 U.S. at 255–56). Also, the fact that *Pirelli* is a plurality opinion does not mean it is of no significance. A majority of the Court agreed that the public and private interest factors from the common law forum non conveniens analysis—known as the *Gulf Oil* factors—would merit dismissal on common law forum non conveniens grounds and that a nonresident plaintiff's forum choice does not require "the same balancing of interests" as a resident plaintiff's. *See id.* at 680 (Willett, J., concurring) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S.

501, 508 (1947)) (applying the former statute which only enumerated a balancing test for resident plaintiffs' forum choices). Therefore, *Pirelli* directly addresses issues in this case.

In addition to *Pirelli*, precedent from the United States Supreme Court supports the proposition that a defendant's "heavy burden" applies with "less force" when seeking a forum non conveniens dismissal to a nonresident plaintiff's forum choice. *See Sinochem*, 549 U.S. at 430; *Reyno*, 454 U.S. at 255–56; *see also Swift & Co. Packers v. Compania Colombiana del Caribe, S.A.*, 339 U.S. 684, 697 (1950) (distinguishing between the forum non conveniens analysis for a plaintiff who is a United States citizen and one who is foreign). Because Texas's forum non conveniens statute governs in most situations, we rarely address the common law doctrine. However, we regularly consider United States Supreme Court precedent in both our common law and statutory forum non conveniens cases. *See Pirelli*, 247 S.W.3d at 675, 677–79; *In re Smith Barney, Inc.*, 975 S.W.2d 593, 596 (Tex. 1998); *Exxon Corp. v. Choo*, 881 S.W.2d 301, 305 (Tex. 1994); *Flaiz v. Moore*, 359 S.W.2d 872, 874 (Tex. 1962).

Here, the court of appeals acknowledged *Pirelli*, but dismissed it as a plurality opinion and followed language from its opinion in *Sarieddine v. Moussa*, 820 S.W.2d 837, 840 (Tex. App.—Dallas 1991, writ denied). In that case, the court, relying on language from *Gulf Oil*, declared that courts should rarely disturb a plaintiff's forum choice "unless the balance is strongly in favor of the defendant." *Id.* (quoting *Gulf Oil*, 330 U.S. at 508). The quote from *Gulf Oil* is accurate, but the plurality opinion in *Pirelli* and numerous subsequent United States Supreme Court cases apply the "less deference" standard to nonresident plaintiffs' forum choices. *See, e.g.*, *Reyno*, 454 U.S. at 255–56; *Pirelli*, 247 S.W.3d at 675.

Team is not a Texas resident.[1] It is organized in Nevada with a principal place of business—like Quixtar—in Michigan. It claims a connection to Texas because Team-affiliated IBOs reside here, but only one of these IBOs testified to material facts of firsthand knowledge at the evidentiary hearing in the trial court. There are Team-affiliated IBOs all over the world—including in Michigan—that could supply substantially the same testimony. As a result, the presumption that Team filed in Texas as a matter of convenience applies with less force and deserves "substantially less deference" than it would if Team were a Texas resident. *See Pirelli*, 247 S.W.3d at 675; *see also Carter*, 997 S.W.2d at 582 (recognizing the Legislature's legitimate interest in preventing forum-shopping through retroactive application of an amendment to the forum non conveniens statute). There is a connection to Texas when one of the parties is a Texas resident and at least some justification for the burden to Texans of providing judicial resources for the dispute. There is also normally less concern about forum-shopping when a Texas plaintiff files suit in a Texas court. *See Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 373 (5th Cir. 1992). Therefore, Quixtar's burden of proof is less stringent than if Team were a Texas resident. And the court of appeals' reliance on *Sarieddine* erroneously influenced its entire forum non conveniens analysis by placing an excessive burden of proof on Quixtar.[2]

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[1] Team argues it should be considered a Texas resident because it is registered to do business and has numerous contacts here. However, Team was not registered to do business in Texas until *after* it filed suit against Quixtar in Collin County. Even so, Team's authority to do business in Texas does not govern residency. *See In re Smith Barney, Inc.*, 975 S.W.2d 593, 596 (Tex. 1998) ("Corporations' power to sue and be sued says little about their right to do so, and absolutely nothing about the restrictions of the *forum non conveniens* doctrine.").

[2] While we disagree with the court of appeals' reliance on the "strongly favors" standard from *Sarieddine* as applied to nonresident plaintiffs' forum choices, we express no opinion on the validity of the holding in that case.

Next, Quixtar alleges that the court of appeals further placed an excessive burden of persuasion on it, contrary to our opinion in *In re General Electric Co.*, by requiring it to prove that each of the *Gulf Oil* factors strongly favored dismissal. *See generally In re Gen. Elec. Co.*, 271 S.W.3d 681 (Tex. 2008). Team argues that the court of appeals did not place an extraordinary burden of proof on Quixtar, but that Quixtar was simply unable to meet its burden of proof to justify a forum non conveniens dismissal in the trial court. It also argues that *General Electric* does not apply because it is a statutory forum non conveniens case. We agree that *General Electric* does not offer much guidance because there is minimal discussion relevant to common law forum non conveniens. *See id.* We conclude that the court of appeals did improperly require Quixtar to prove that each *Gulf Oil* factor strongly favored dismissal, an extremely weighty burden given the circumstances of this case.

The "central focus of the *forum non conveniens* inquiry is convenience." *Reyno*, 454 U.S. at 249. The well-known *Gulf Oil* factors direct courts to consider both public and private interest considerations in forum non conveniens dismissals. *Gulf Oil*, 330 U.S. at 508–09. Private considerations include: (1) the "relative ease of access to sources of proof"; (2) the "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses"; (3) the "possibility of view of premises, if view would be appropriate to the action"; (4) the "enforceability of a judgment" once obtained; and (5) "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 508. Public considerations include: (1) "[a]dministrative difficulties . . . for courts when litigation is piled up in congested centers instead of being handled at its origin"; (2) the burden of "jury duty . . . that ought not to be imposed

upon the people of a community which has no relation to the litigation"; (3) "local interest in having localized controversies decided at home"; and (4) avoiding conflicts of law issues. *Id.* at 508–09.

In *Reyno*, the United States Supreme Court purposefully refused to "lay down a rigid rule to govern discretion" in these cases because "'[e]ach case turns on its facts.'" 454 U.S. at 249 (quoting *Williams v. Green Bay & W. R.R. Co.*, 326 U.S. 549, 557 (1946)). If "central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the flexibility that makes it so valuable." *Id.* at 249–50. In the same manner, requiring an "extensive investigation" to produce evidence for the dismissal hearing "would defeat the purpose" of the request for this type of dismissal altogether. *Id.* at 258 (explaining that it is not necessary for defendants to "submit affidavits identifying witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum"). Obviously, there needs to be enough information "to enable the District Court to balance the parties' interests." *Id.* at 258–59 (holding that an affidavit identifying witnesses the defendant planned to call if the trial was held in Scotland was sufficient proof to satisfy the defendants' forum non conveniens burden; the affidavits presented did not identify the substance of each proposed witnesses' testimony). And we do not require detailed quantification of costs. *See id.*; *see also Volkswagen*, 545 F.3d at 317 (dismissing the need to quantify travel expenses because of the "obvious conclusion" that travel distance from home means time away from work, food and lodging expenses, and similar costs) (quoting *In re Volkswagen AG*, 371 F.3d 201, 204–05 (5th Cir. 2004)).

Quixtar presented sufficient evidence for the trial court to determine that the private interest factors weighed in favor of dismissal. Both entities' principal places of business are in Michigan;

a key meeting leading up to this dispute occurred in Michigan; and the vast majority of evidence that would be produced and key witnesses that would testify at trial are located in Michigan. In contrast, Team argues that the case should proceed to trial in Collin County because Team-affiliated IBOs reside there whose testimony is material for trial. At the evidentiary hearing, Team presented evidence of three IBOs who testified that it would be inconvenient for them to travel to Michigan for trial, only one of which appeared to have material, firsthand knowledge of events leading up to Team filing this lawsuit.

Despite recognizing that Quixtar identified sixteen important witnesses residing in Michigan and that an "overwhelming majority" of records that it intended to use in the lawsuit were maintained in Michigan, the court of appeals determined the evidentiary showing was "weak." 281 S.W.3d at 673–74. It held that Quixtar did not identify witnesses unwilling to appear in Texas that could not be compelled by process to do so, that Quixtar did not *quantify* the additional expense for procuring attendance of its witnesses, and that the location of Quixtar's records was not "probative evidence" because it did not demonstrate the volume or how difficult it would be to transport them to Texas. *Id.*

However, parties do not need to quantify the extra costs of litigating in an undesirable forum in detail for a forum non conveniens dismissal. They only must provide enough information for the trial court to weigh the interests at hand. The court of appeals inappropriately disregarded Quixtar's evidence about the location of its witnesses and records. *Reyno*, 454 U.S. at 258–59. It is an "obvious conclusion" that costs will increase when witnesses travel great distances. *Volkswagen*, 545 F.3d at 317 (quoting *Volkswagen AG*, 371 F.3d at 205). Likewise, Quixtar could have but did

not need to quantify the expense or difficulty of transporting its records. We conclude that there was sufficient evidence before the trial court for it to determine that the private interest factors weighed in favor of dismissal.

The court of appeals also held that the public interest factors did not "on the whole, strongly favor Michigan as a more appropriate forum for Team's lawsuit than Texas." 281 S.W.3d at 674. It conceded: "Michigan has a greater interest in seeing that Team is compensated for any injuries"; "[a]rguably, it would be more fair to require Michigan courts and jurors to bear the time and expense of litigating a business dispute between two businesses that are essentially Michigan enterprises"; and "[t]o the extent the controversy has a center of gravity, that center appears to be in Michigan, where a key meeting between Team and Quixtar personnel took place and where Quixtar took the actions that have allegedly resulted in injury to Team." *Id.* But the court dismissed the relevance of these facts because both "Texas and Michigan have an interest in protecting their citizens from wrongful conduct by Quixtar." *Id.* It also apparently reasoned that Quixtar's failure to demonstrate any choice of law issues or docket congestion problems weighed against Michigan as a more favorable forum.

Ultimately, the court of appeals recognized the trial court's legitimate dismissal, but did not give the trial court's decision appropriate deference. There was sufficient evidence to uphold the dismissal, and the trial court did not abuse its discretion. The court of appeals mechanically re-weighed the *Gulf Oil* factors under the scope of an excessive burden of proof. But, forum non conveniens dismissals are within the sound discretion of the trial court and involve weighing various

factors that may be difficult to quantify. We decline to establish a formulaic application for a trial court's forum non conveniens determination.

The trial court's dismissal in this case was not an abuse of discretion in light of the evidence before it and Quixtar's burden of proof. For these reasons, and without hearing oral argument, we reverse the court of appeals' judgment and reinstate the trial court's dismissal. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: July 2, 2010.

IN THE SUPREME COURT OF TEXAS

NO. 09-0403

IN RE UNITED SCAFFOLDING, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this original proceeding we consider whether the trial court abused its discretion by disregarding a jury verdict and granting a new trial when the reason it gave for doing so was "in the interest of justice and fairness." Based on our decision in *In re Columbia Medical Center of Las Colinas*, 290 S.W.3d 204 (Tex. 2009), we hold that it did and conditionally grant relief in part.

James and Lisa Levine sued United Scaffolding, Inc. for damages because of injuries James suffered when he fell from scaffolding built by United. Following a jury trial, and based on the verdict, the trial court signed a judgment in favor of the Levines. The Levines filed a motion for new trial. They asserted that (1) the jury findings of no damages for physical pain and suffering, mental anguish, physical impairment, past medical care, and loss of earning capacity were against the great weight and preponderance of the evidence; (2) the damages awarded were manifestly too small; and (3) the trial court should grant a new trial in the interest of fairness and justice. The trial court granted the Levines' motion. It stated in its order that "[a]fter considering Plaintiffs['] . . . Motion for New trial, the court GRANTS the motion and orders [a] new trial in the interest of justice and fairness."

Asserting that the trial court abused its discretion in disregarding the jury verdict, United petitioned the court of appeals for writ of mandamus. A divided court denied relief. 287 S.W.3d 274. United now seeks mandamus relief here. It argues that the trial court abused its discretion by granting the Levines' motion when (1) the only reason given for granting the motion was "in the interest of justice and fairness," and (2) the jury verdict was supported by sufficient evidence.

After the court of appeals issued its opinion, we held that a trial court acts arbitrarily and abuses its discretion if it disregards a jury verdict and grants a new trial, but does not specifically set out its reasons. *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 212-13 (Tex. 2009). We also held that (1) stating the new trial is granted "in the interests of justice and fairness" is not a sufficiently specific reason, and (2) a relator challenging such an order does not have an adequate remedy by appeal. *Id.* at 206, 209-10, 213.

The Levines assert that this case is distinguishable from *Columbia* because the trial court in this case specifically considered and adopted the motion for new trial and the motion clearly identified the specific grounds warranting a new trial. We disagree that the trial court's order is as clear as the Levines argue it is. The order generally granted the motion, then specified one reason for granting it: in the interest of justice and fairness.

The Levines also make arguments advanced by the dissent in *Columbia*: (1) mandamus is not the proper vehicle to implement the change of requiring trial judges to specify reasons for granting a new trial, and (2) the benefits of a prompt retrial outweigh the detriments of interlocutory appellate review. *Id.* at 215-16, 219-20 (O'Neill, J., dissenting). Those arguments were addressed

and rejected in *Columbia*. *Id.* at 209-10, 214. We reject them again today for the reasons expressed in *Columbia*.

The Levines argue that the trial judge did not abuse his discretion because he followed the applicable law in effect at the time he issued the order granting a new trial. However, an erroneous legal conclusion is an abuse of discretion, even if it may not have been clearly erroneous when made. *See id.* at 213; *Huie v. DeShazo*, 922 S.W.2d 920, 927-28 (Tex. 1996) (rejecting a party's claim that a trial court could not have abused its discretion in resolving an issue of first impression because an "erroneous legal conclusion, even in an unsettled area of law, is an abuse of discretion").

Accordingly, based on our decision in *Columbia*, we hold that the trial court abused its discretion by failing to give a specific reason for granting the new trial, and that United does not have an adequate appellate remedy.

United also asserts that the trial court abused its discretion by granting the new trial motion because the grounds in the motion were based on jury findings and the jury's verdict was supported by sufficient evidence. But we do not presume the trial court granted the new trial on grounds asserted in the motion. *See Columbia*, 290 S.W.3d at 213. Because we do not know the reason the trial court granted the new trial, we will not grant relief other than directing the trial court to specify its reasons for granting the new trial.

Without hearing oral argument, we conditionally grant, in part, United's petition for writ of mandamus. *See* TEX. R. APP. P. 52.8(c). We direct the trial court to specify its reasons for disregarding the jury verdict and ordering a new trial. We deny United's petition seeking mandamus

directing the trial court to set aside its order granting a new trial. We are confident the trial court will comply, and the writ will issue only if it fails to do so.

OPINION DELIVERED: January 15, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0415

LEILA REGENIA BROWN HIDALGO, PETITIONER,

v.

ALVIN STEVE HIDALGO, RESPONDENT

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

PER CURIAM

Should a party who relies on a then-valid procedural argument in the court of appeals be able to assert substantive arguments if this Court invalidates the procedural argument while the case is pending? We answer yes.

Leila and Alvin Hidalgo were divorced in California in 2002, and the divorce decree required Alvin to obtain life insurance with Leila as beneficiary. Leila filed the California decree in Texas state court as a foreign judgment. *See* TEX. CIV. PRAC. & REM. CODE § 35.003. In 2005, Leila filed a motion to enforce the decree, claiming Alvin had failed to pay the insurance premiums. Alvin disputed her claim, contending he was now retired and no longer required to carry the policy.

This appeal concerns the interplay of three different trial court orders:

Order 1 (January 3, 2006). This order denied Leila's motion for enforcement of the divorce decree, stating Alvin was no longer required to maintain the insurance policy. Leila filed a motion for rehearing, asking the trial court to amend the order to state that Alvin must resume paying premiums if he returns to work before age 65.

Order 2 (April 4, 2006). This order, 91 days later, vacated Order 1 and held that Leila's motion for rehearing sought a substantive change to the first order and extended the trial court's plenary power to vacate it based on Texas Rule of Civil Procedure 329b. Rule 329b provides that a motion to modify a final order has the effect of extending the trial court's plenary power over that final order. Order 2 directed Alvin to pay all the policy premiums then due. This order effectively granted Leila a new trial. Alvin then filed a motion for new trial and a motion to confirm Order 1.

Order 3 (July 5, 2006). This order, 183 days after Order 1 (92 days after Order 2), set aside Order 2 and confirmed Order 1 in favor of Alvin as the final order. The court gave two reasons for setting aside Order 2: (1) Leila's motion for rehearing did not satisfy Rule 329b because it did not seek a substantive change to Order 1; and (2) even if the motion for rehearing did satisfy Rule 329b, there was no final judgment reflecting Order 2 that was issued before the expiration of the trial court's plenary power under Rule 329b.

Leila appealed on grounds that Order 3 was void under then-controlling *Porter v. Vick*, which held that a trial court may vacate or "ungrant" a new trial order only within 75 days of the date the judgment is signed, the period specified in Rule 329b(c) for ruling on a motion for new trial. 888 S.W.2d, 789, 789–90 (Tex. 1994). Leila also filed a petition for writ of mandamus. The court of appeals consolidated the appeal and the mandamus petition.

The court of appeals initially granted Leila mandamus relief. Relying on *Porter*, the court held that Order 3 favoring Alvin was void because it "was signed outside the time period within which a trial court may revive a prior judgment by vacating the order granting a new trial—seventy-five days from the date of the original judgment." However, after the court of appeals issued its opinion, we issued *In re Baylor Medical Center at Garland*, which held that "[w]hen a new trial is granted, the case stands on the trial court's docket 'the same as though no trial had been had.'" 280 S.W.3d 227, 230-31 (Tex. 2008) (quoting *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005)). Thus, a trial court has power to set aside an order granting a motion for new trial "'any time before a final judgment is entered.'" *Id.* at 231 (quoting *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993)).

In light of *Baylor Medical Center*, the court of appeals granted Alvin's motion for rehearing and held that Order 3 was not void after all. 279 S.W.3d 456, 458, 462. The court analyzed the three trial court orders described above and concluded that Order 1 was a final order and judgment, Order 2 "effectively granted a new trial," and Order 3 "itself constituted a final order subject to appeal." *Id.* at 460–62. The court of appeals determined that Order 3 was not void, although the court noted that "the trial court's reasons" for signing it "may have been incorrect." *Id.* at 462, 463.

Leila's initial briefs in the court of appeals focused on her argument that Order 3 was void because the trial court had lost jurisdiction to issue it; she did not attack Order 3 on substantive grounds. Further, the court of appeals indicated it would not consider substantive arguments because it considered them waived. *Id.* at 463. Leila's appeal to this Court requests that she now be allowed

to assert substantive arguments since, under *Baylor Medical Center*, Order 3 is no longer procedurally void.

This Court may remand the case to the court of appeals "for further proceedings in light of changes in the law." TEX. R. APP. P. 60.2(f). By similar logic, we have noted in the context of our authority to remand to the trial court that "we have discretion to remand for a new trial in the interest of justice, . . . [and] [t]he most compelling case for such a remand is where we overrule existing precedents on which the losing party relied at trial." *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 (Tex. 1992).

When Leila briefed her case to the court of appeals, she made a legally meritorious procedural argument that Order 3 was void as untimely. Further, the court of appeals at that time had no reason to reach the substantive merits of a jurisdictionally void order. Due to the timing of events, Leila is confronted with a trial court judgment that she believes is substantively defective, but she has not had the opportunity to have those arguments heard on appeal. In light of a change in the law and in the interest of justice, Leila should be allowed to argue to the court of appeals the substantive reasons she believes the trial court's judgment was erroneous.

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 remand to that court for further proceedings consistent with this opinion.

OPINION DELIVERED: May 28, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0426

IN RE LAIBE CORPORATION, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

Laibe Corporation seeks a writ of mandamus to enforce a contractual forum-selection clause. We conditionally grant the writ.

Laibe entered into a contract to sell a drilling rig to Jackson Drilling Services, L.P. A New Equipment Purchase Contract, prepared by Laibe and dated March 10, 2006, contains the following forum-selection clause:

> YOU AGREE THAT THE COURT OF THE STATE OF INDIANA FOR MARION COUNTY OR ANY FEDERAL DISTRICT COURT HAVING THE JURISDICTION IN THAT COUNTY SHALL HAVE EXCLUSIVE JURISDICTION FOR THE DETERMINATION OF ALL DISPUTES ARISING UNDER THIS CONTRACT. You agree and consent that we may serve you by registered or certified mail, which shall be sufficient to obtain jurisdiction. Nothing stated in this Contract is intended to prevent us from commencing any action in any court having proper jurisdiction.

Jackson Drilling had problems with the rig and sued Laibe in Wise County, Texas district court. Jackson Drilling alleged that the rig's hydraulic pump malfunctioned and that repair and

warranty work performed by Laibe was substandard. The petition sought a declaratory judgment and damages for deceptive trade practices, fraud, and breach of contract.

Laibe filed a motion to dismiss on grounds that the forum-selection clause compelled suit in Indiana. The trial court denied the motion after a hearing. Because Jackson Drilling had not filed a response to the motion to dismiss until the day of the hearing, Laibe filed a motion to reconsider providing additional evidence and argument. This motion was denied by an order signed on December 19, 2008, and filed on December 22, 2008.

On March 23, 2009, Laibe filed a mandamus petition in the court of appeals, which denied relief in a three-sentence memorandum opinion. Laibe then sought mandamus relief in this Court.

A writ of mandamus will issue if the trial court committed a clear abuse of discretion for which the relator has no adequate remedy at law. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). This Court has repeatedly granted mandamus relief to enforce forum-selection clauses. *In re ADM Investor Servs., Inc.*, ___ S.W.3d ___ (Tex. 2010) (orig. proceeding); *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672 (Tex. 2009) (orig. proceeding); *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228 (Tex. 2008) (orig. proceeding); *In re AutoNation, Inc.*, 228 S.W.3d 663 (Tex. 2007) (orig. proceeding); *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557 (Tex. 2004) (orig. proceeding); *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004) (orig. proceeding). We have granted mandamus relief in these cases "because a trial court that improperly refuses to enforce such a clause has clearly abused its discretion," *ADM Investor Servs.*, ___ S.W.3d at ___, and because "[t]here is no adequate remedy by appeal when a trial court refuses to enforce a forum-selection clause," *id.* at ___.

Forum-selection clauses are generally enforceable and presumptively valid. *Int'l Profit Assocs.*, 274 S.W.3d at 675, 680. A trial court abuses its discretion in refusing to enforce the clause unless the party opposing enforcement clearly shows "(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." *ADM Investor Servs.*, ___ S.W.3d at ___. "The burden of proof is heavy for the party challenging enforcement." *Id.*

Jackson Drilling argues that enforcement of the clause would be unreasonable and unjust because the sale of the drilling rig was the subject of a January 10, 2006 invoice that did not contain a forum-selection clause. The invoice in the record is unsigned, although it has a signature line. However, Doug Jackson, a Jackson Drilling manager/partner, testified at the hearing on the motion to dismiss that he signed a copy of the invoice. Jackson Drilling further points out that, pursuant to the terms of the invoice, it made a $75,000 deposit before the March 10, 2006 New Equipment Purchase Contract containing the forum-selection clause. The later agreement is signed by Doug Jackson twice, once on behalf of Jackson Drilling and once as an individual guarantor. Jackson testified that he could not remember signing the later contract, but answered "no" when asked whether he was "stating under oath that it is not your signature."

The later agreement containing the forum-selection clause also contains a standard merger clause stating that "[t]his Contract is the entire agreement" of the parties and "no other oral or written agreements, terms or promises" shall be binding. The merger clause thus indicates that the invoice on which Jackson Drilling relies is not the final and binding agreement of the parties. Even if, for

some reason, the merger clause is disregarded for purposes of Jackson Drilling's argument, a contract can consist of more than one document. Documents "pertaining to the same transaction may be read together," even if they are executed at different times and do not reference each other, and "courts may construe all the documents as if they were part of a single, unified instrument." *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 840 (Tex. 2000). Here, the two writings pertained to the same transaction. Jackson Drilling's own petition alleged that it purchased the rig "[o]n or about March 10, 2006," the date of the agreement containing the forum-selection clause.

Insofar as Jackson Drilling contends the later agreement added new terms, including the forum-selection clause, that modified a finalized and preexisting contract set out in the earlier invoice, this argument is inconsistent with the merger clause described above. Moreover, under the Uniform Commercial Code, an agreement modifying a contract for the sale of goods requires no new consideration to be binding. TEX. BUS. & COM. CODE § 2.209(a). Further, we have held that a forum-selection clause like the one at issue does not require mutuality of obligation so long as the contract as a whole provides consideration. *Lyon Fin. Servs.*, 257 S.W.3d at 233. Here, the contract as a whole did not lack for consideration; it was a routine sale of equipment between two business entities, with one party providing consideration in the form of goods and the other party providing monetary consideration.

Jackson Drilling argues that enforcing the forum-selection clause and requiring litigation in Indiana would be seriously inconvenient. Doug Jackson testified that the invoice was signed in Texas, the rig had problems here, and having to send personnel to Indiana would be disruptive to

Jackson Drilling's business. However, we will decline to enforce a forum-selection clause against a party only if the inconvenience it faces is so extreme as to effectively deny the party its day in court. *Id.* at 234.

In recognizing that forum-selection clauses are generally and presumptively enforceable, we have noted that "[b]y entering into an agreement with a forum-selection clause, the parties effectively represent to each other that the agreed forum is not so inconvenient that enforcing the clause will deprive either party of its day in court, whether for cost or other reasons." *Id.* Absent proof of "special and unusual circumstances," trial in another forum is not "'so gravely difficult and inconvenient'" as to warrant disregarding the contractually-specified forum. *Id.* (quoting *AIU Ins. Co.*, 148 S.W.3d at 113).

Jackson Drilling did not carry its heavy burden of clearly showing it would be deprived of its day in court. Doug Jackson gave very brief testimony that Jackson Drilling's daily operations would basically cease if it were required to pursue a lawsuit in Indiana, but "[i]f merely stating that financial and logistical difficulties will preclude litigation in another state suffices to avoid a forum-selection clause, the clauses are practically useless." *Id.* The testimony, lacking in specifics or elaboration as to the nature of Jackson Drilling's business or the witness's understanding of the burden of litigation in another forum, was conclusory and did not amount to a clear showing of special and unusual circumstances. We have held that "conclusory statements are insufficient to establish" the level of extreme inconvenience required to disregard the forum-selection clause. *ADM Investor Servs.*, ___ S.W.3d at ___.

Finally, Jackson Drilling contends that Laibe failed to pursue mandamus relief diligently. The trial court denied Laibe's motion to reconsider by order signed December 19, 2008 and filed on December 22, 2008. Laibe filed its mandamus petition in the court of appeals on March 23, 2009. Laibe claims, and Jackson Drilling does not dispute, that Laibe did not receive a copy of the trial court order denying the motion to reconsider until mid-January, 2009. Nevertheless, Laibe waited two months after notice of the denial of its motion to seek mandamus relief in the court of appeals. We do not find this delay fatal to Laibe's petition. A two-month delay in seeking mandamus relief is not necessarily unreasonable. *See Strickland v. Lake*, 357 S.W.2d 383, 384 (Tex. 1962) (orig. proceeding).

Issuance of mandamus relief "is largely controlled by equitable principles," and equity "'aids the diligent and not those who slumber on their rights.'" *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (quoting *Callahan v. Giles*, 155 S.W.2d 793, 795 (Tex. 1941)). To invoke the equitable doctrine of laches, the moving party ordinarily must show an unreasonable delay by the opposing party in asserting it rights, and also the moving party's good faith and detrimental change in position because of the delay. *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 80 (Tex. 1989). Jackson Drilling has not demonstrated a detrimental change in position between the time the motion for reconsideration was denied in the trial court and the filing of the mandamus petition in the court of appeals. *See In re E.I. du Pont de Nemours & Co.*, 92 S.W.3d 517, 524 (Tex. 2002) (orig. proceeding) (rejecting argument that unreasonable delay barred mandamus relief, in part because "plaintiffs have failed to show how the delay has prejudiced them in any way").

Accordingly, without hearing oral argument, *see* TEX. R. APP. P. 52.8(c), we conditionally grant mandamus relief and direct the trial court to grant Laibe's motion to dismiss. We are confident that the court will comply, and the writ will issue only if it does not.

OPINION DELIVERED: March 26, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0427

CITY OF DALLAS, PETITIONER,

v.

OLIVIA J. CARBAJAL, RESPONDENT

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

PER CURIAM

In this case, we determine whether a police report noting the perceived cause of an accident provides a governmental unit with actual notice of its fault in causing the accident. When a claimant fails to timely provide a governmental unit with formal notice of a claim, *see* TEX. CIV. PRAC. & REM. CODE § 101.101(a), the Texas Tort Claims Act requires the governmental unit to have "actual notice that . . . the claimant has received some injury," *id.* § 101.101(c). In *Texas Department of Criminal Justice v. Simons*, we clarified that merely investigating an accident does not provide a governmental unit with actual notice—that is, with subjective awareness of its fault. *See* 140 S.W.3d 338, 343–48 (Tex. 2004). Because the police report here was at most an initial response to the accident, we hold that the governmental unit, the City of Dallas, lacked actual notice. The provision of notice is a jurisdictional requirement in all suits against a governmental unit. TEX. GOV'T CODE

§ 311.034. Accordingly, we reverse the judgment of the court of appeals and render judgment dismissing the case for lack of subject matter jurisdiction.

Olivia Carbajal sued the City for injuries she sustained after driving onto an excavated road. A Dallas police officer who responded to the accident filed a written report describing the accident, in relevant part, as follows:

> Comp[lainant] said that she saw the barricades but none were blocking what she thought was a clear way to get on the freeway. Comp[lainant] said that before she knew it she had driven her veh[icle] into a gap on the street. [I] observed at the listed offense loc[ation] that there were no barricades blocking the gap in the road.

Summarizing the incident, the report states that Carbajal drove her "veh[icle] into [a] gap in [the] street [that] was not properly blocked." Approximately a year after the accident, Carbajal filed this suit against the City. It is undisputed that Carbajal did not provide formal notice as required by § 101.101(a). Carbajal contends, however, that the police report provided the City with subjective awareness of the claim, thereby establishing actual notice under § 101.101(c). Arguing that the report did not provide actual notice, the City filed a plea to the jurisdiction. The trial court denied the plea, and the court of appeals affirmed. 278 S.W.3d 802.

A plea to the jurisdiction challenges a trial court's subject matter jurisdiction. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). Whether a court has subject matter jurisdiction is a question of law that we review de novo. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

In *Cathey v. Booth*, we held that governmental entities have actual notice when they have "knowledge of (1) a death, injury, or property damage; (2) the governmental unit's alleged fault

producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved." 900 S.W.2d 339, 341 (Tex. 1995) (per curiam). In *Simons*, we clarified the meaning of the second requirement:

> What we intended in *Cathey* by the second requirement . . . was that a governmental unit have knowledge that amounts to the same notice to which it is entitled by section 101.101(a). That includes subjective awareness of its fault, as ultimately alleged by the claimant, in producing or contributing to the claimed injury. . . . It is not enough that a governmental unit should have investigated an incident . . . , or that it did investigate, perhaps as part of routine safety procedures, or that it should have known from the investigation it conducted that it might have been at fault. If a governmental unit is not subjectively aware of its fault, it does not have the same incentive to gather information that the statute is designed to provide, even when it would not be unreasonable to believe that the governmental unit was at fault.

140 S.W.3d at 347–48. In this passage, and several others, we made clear that merely investigating an accident is insufficient to provide actual notice. *See, e.g.*, *id.* at 347 ("*Cathey* cannot fairly be read to suggest that a governmental unit has actual notice of a claim if it could or even should have learned of its possible fault by investigating the incident."); *id.* at 348 ("[A] governmental unit cannot acquire actual notice merely by conducting an investigation, or even by obtaining information that would reasonably suggest its culpability. The governmental unit must have actual, subjective awareness of its fault in the matter.").

Although both parties agree that the road was not properly blocked, the report here did not provide the City with subjective awareness of fault because it did not even imply, let alone expressly state, that the City was at fault.[1] The report only describes what apparently caused the accident (missing barricades). It does not say who failed to erect or maintain the barricades. Carbajal ignores

[1] We do not answer whether the City would have had actual notice if the report had expressly stated that the City was at fault.

the possibility that a private contractor or another governmental entity (such as the county or state) could have been responsible for the road's condition. Indeed, after investigating the accident, the City determined that the Texas Department of Transportation was at fault. Simply put, the police report here is no more than a routine safety investigation, which is insufficient to provide actual notice. *See Simons*, 140 S.W.3d at 347–48.

By holding that the officer's "perception of the cause of the accident" sufficed to provide actual notice, 278 S.W.3d at 806, the court of appeals overlooked the policy underlying actual notice: "'to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial,'" *Simons*, 140 S.W.3d at 347 (quoting *Cathey*, 900 S.W.2d at 341). When a police report does not indicate that the governmental unit was at fault, the governmental unit has little, if any, incentive to investigate its potential liability because it is unaware that liability is even at issue.

Because the police report here did not provide actual notice, we grant the petition for review and, without hearing oral argument, TEX. R. APP. P. 59.1, reverse the court of appeals' judgment and render judgment dismissing the case for lack of subject matter jurisdiction.

OPINION DELIVERED: May 7, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0531

IN RE J.H.G., A CHILD

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

PER CURIAM

In this parental-rights termination case, the mother failed to include in her statement of points for appeal her complaint that the trial court unlawfully extended the statutory deadline for dismissing the case. Although issues not included in a statement of points are waived, TEX FAM. CODE § 263.405(i),[1] the court of appeals sustained the mother's challenge and dismissed the suit, holding that the mother's complaint concerned the trial court's subject matter jurisdiction to enter a final order rather than the specific terms of the order and thus could not be waived. 290 S.W.3d 400, 403. We disagree, and reverse and remand the case to the court of appeals for consideration of the mother's legal and factual sufficiency challenges.

On March 19, 2007, the Texas Department of Family & Protective Services (TDFPS) obtained temporary orders of possession of J.H.G. The case was set to be dismissed on March 24,

[1] Section 263.405 was amended in 2007. *See* Act of May 17, 2007, 80th Leg., R.S., ch. 526, § 6, 2007 Tex. Gen. Laws 929. The amendments went into effect on June 16, 2007, and only apply to suits filed on or after that date. *Id*. at 929–930. All citations to section 263.405 and its sub-parts are to the earlier version of the statute. *See* Act of May 27, 2005, 79th Leg., R.S., ch. 176, § 1, 2005 Tex. Gen. Laws 332 (amended 2007) (current version at TEX. FAM. CODE § 263.405).

2008, pursuant to section 263.401(a) of the Family Code, which requires dismissal unless the court has rendered a final order or granted an extension (if the trial court finds that certain circumstances exist) within one year of appointing TDFPS as managing conservator. TEX. FAM. CODE § 263.401(a).[2]

TDFPS's initial goal was reunification with the mother. In December 2007, however, after the mother failed to comply with several court-ordered requirements, TDFPS sought to terminate the mother's parental rights and filed a motion to extend the March 24, 2008, dismissal date. The mother objected and a hearing was held on February 27, 2008, after which the trial court granted TDFPS a three–month extension. Trial on the merits commenced on June 2, 2008, approximately two months after the initial deadline. The mother again objected to the trial court's refusal to dismiss the proceedings, and she reurged her objection before presenting her case. The trial court again denied her motions and refused to dismiss the case. The jury found that the mother failed to comply with the terms of her court-ordered service plan and that termination was in J.H.G.'s best interest. The trial court rendered judgment terminating the mother's parental rights.

The mother timely filed a statement of points with the trial court contesting the legal and factual sufficiency of the evidence, but she did not challenge the trial court's extension of the statutory deadline. The Family Code requires that any party seeking an appeal of a final order must file with the trial court a statement of points of error on which it intends to appeal. TEX FAM. CODE

[2] As with section 263.405, section 263.401 was amended in 2007. *See* Act of May 27, 2007, 80th Leg., R.S., ch. 866, § 2, 2007 Tex. Gen. Laws 1837, 1838. The 2007 amendments only apply to suits filed on or after July 15, 2007. *Id*. All citations to section 263.401 and its subparts are to the earlier version of the statute. *See* Act of May 29, 2005, 79th Leg., R.S., ch. 268, § 1.40, 2005 Tex. Gen. Laws 621, 636 (amended 2007) (current version at TEX. FAM. CODE § 263.401).

§ 263.405(b)(2). The statement of points must be filed within fifteen days of entry of the final order. *Id*. The court of appeals may not address an issue that is not included in a timely filed statement of points. TEX FAM. CODE § 263.405(i). Although the mother did not include the trial court's failure to dismiss in her points for appeal, the court of appeals held that the issue was not waived because it bore on the trial court's subject matter jurisdiction. 290 S.W.3d at 403. This holding is directly contrary to our decision in *In re Department of Family and Protective Services*, in which we held that the section 263.401(a) dismissal date is procedural, not jurisdictional. 273 S.W.3d 637, 642 (Tex. 2009). As such, the mother's failure to challenge the trial court's extension of the statutory deadline in her statement of points waived the issue on appeal.

Accordingly, we reverse the court of appeals' judgment and remand the case to that court for consideration of the remaining issues.

OPINION DELIVERED: January 22, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0557

IN RE LISA LASER USA, INC. AND LISA LASER PRODUCTS, OHG., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this mandamus petition we are asked to review a trial court's refusal to enforce a forum-selection clause designating a California forum for any lawsuits "arising out of" a distribution agreement. The clause was in an exhibit to the agreement, signed by all the parties, but the exhibit specifically referenced only one of the two defendants sued. We hold that the trial court abused its discretion in failing to enforce the clause, and we conditionally grant the petition.

Relator Lisa Laser Products, oHG[1] ("Lisa Germany") is a German partnership that manufactures lasers for use in various medical fields. Lisa Laser USA, Inc., ("Lisa USA") is the registered assumed named of a California corporation affiliated with Lisa Germany (collectively, "Lisa Laser"). Lisa Germany manufactures medical lasers, and Lisa USA is the distributor of those

[1] oHG is short for "offene Handelsgesellschaft" which literally translates to "open trading company." LANGENSCHEIDT'S GERMAN·ENGLISH, ENGLISH·GERMAN DICTIONARY 112, 165 (E. Klatt & G. Golze eds., 1962); MODERN DICTIONARY OF INTERNATIONAL LEGAL TERMS 27 (Little, Brown & Co. 1993) (1992). It is the German equivalent of a general partnership. *E.g.*, Norbert Meister & Gunner Schuster, *Classifying Foreign Entities Investing in Germany*, 2 INT'L TAX REV., July/Aug. 1991, at 42, 42.

products within the United States. In 2005, Lisa USA signed a distribution agreement with Real Party in Interest HealthTronics, Inc., a Georgia corporation headquartered in Austin, Texas. In 2007, the agreement was superseded by an Amended and Restated Distribution Agreement (the Distribution Agreement or Agreement) that included Lisa USA and HealthTronics, the original contracting parties, and added Lisa Germany as a party. The President of Lisa USA, the CEO of Lisa Germany, and the Senior Vice-President for Medical Products of HealthTronics signed it.

The Distribution Agreement gave HealthTronics exclusive U.S. distribution rights for particular Lisa Laser medical devices. It also provided HealthTronics with rights of first refusal to distribute new, related products that Lisa Laser may produce, on condition that HealthTronics fulfill yearly purchase quotas and comply with other requirements. The Distribution Agreement also contained eight separately attached Exhibits, labeled A through H. Exhibit F is Lisa Laser's "Standard Terms and Conditions." Its preamble states:

> The following standard terms and conditions of sale apply to sales by Seller [Lisa Laser USA, Inc.] to HealthTronics, Inc. . . . pursuant to the Distribution Agreement between the parties, a copy of which is attached hereto and incorporated herein by this reference, except as specifically modified in the Distribution Agreement.

Exhibit F also includes the following forum-selection clause, in Paragraph 16:

> **APPLICABLE LAW; JURISDICTION AND VENUE**
> This agreement will be governed by the laws of the State of California. The California state [or federal] courts of Alameda County, California . . . will have exclusive jurisdiction and venue over any dispute arising out of this agreement, and [HealthTronics] hereby consents to the jurisdiction of such courts.

Exhibit F is mentioned in the body of the Distribution Agreement in Section 4, titled "Terms of Purchase of Products By Customer." Relevant here, under the subhead "Terms of Purchase Orders" in Section 4, Exhibit F is incorporated:

> To the extent consistent with the terms set forth in this Agreement, Lisa Laser USA['s] standard terms and conditions, set forth as Exhibit F hereto, shall be applicable to the shipment of any Product to [HealthTronics]. [HealthTronics]'s purchase orders submitted to Lisa Laser USA from time to time with respect to Products to be purchased hereunder shall be governed by the terms of this Agreement, and nothing contained in any such purchase order shall in any way modify such terms of purchase or add any additional terms or conditions.

In September 2008, Lisa Laser notified HealthTronics that it was in default for failing to use its best efforts to market and sell the products to which it had exclusivity. HealthTronics alleged that it was abiding by the minimum purchase requirements during the contract period, but that Lisa Laser had refused to provide information about new products, failed to offer a right of first refusal to distribute new products, and began to directly market new products in the United States. HealthTronics then filed suit in district court in Travis County, Texas against both Lisa USA and Lisa Germany for breach of contract and tortious interference with contract (related to confidentiality and non-solicitation agreements between HealthTronics and its former employees) and sought monetary damages and injunctive relief.

In the trial court, Lisa Laser filed a motion to dismiss for improper forum on the basis of the forum-selection clause in Exhibit F. The trial court denied the motion. Lisa Laser then sought mandamus relief and an emergency stay at the court of appeals. After originally granting the requested stay, the court of appeals denied the petition for writ of mandamus. ___ S.W.3d ___. Following the denial, Lisa Laser petitioned this Court for relief.

Mandamus relief is available when a trial court clearly abuses its discretion and relief on appeal after a final judgment is inadequate. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004).[2] A trial court abuses its discretion when it fails to properly interpret or apply a forum-selection clause. *In re Laibe Corp.*, ___ S.W.3d ___ (Tex. 2010). Further, an appellate remedy is inadequate when a trial court improperly refuses to enforce a forum-selection clause because allowing the trial to go forward will "vitiate and render illusory the subject matter of an appeal"—i.e., trial in the proper forum. *In re AIU Ins. Co.*, 148 S.W.3d 109, 115 (Tex. 2004) (quoting *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 269, 272 (Tex. 1992)); *accord In re Laibe Corp.*, ___ S.W.3d at ___. Accordingly, we have repeatedly held that mandamus relief is available to enforce an unambiguous forum-selection clause in a contract. *See, e.g.*, *id.; In re AIU Ins. Co.*, 148 S.W.3d at 15–19; *In re AutoNation, Inc.*, 228 S.W.3d at 665; *In re Int'l Profit Assocs. I*, 274 S.W.3d at 674; *In re Int'l Profit Assocs. II*, 286 S.W.3d at 922; *In re ADM Investor Servs., Inc.*, ___ S.W.3d ___ (Tex. 2010). In general, forum-selection clauses should be given full effect, and subjecting a party to trial in a forum other than the contractually chosen one amounts to "'clear harassment' . . .

[2] Before this Court for the first time on appeal, Lisa Laser argues that California law applies to determine whether the forum-selection clause is applicable and whether mandamus relief is available to correct the trial court's error, as the parties chose California law in the Distribution Agreement. This Court has applied Texas law in the mandamus cases in which the parties seek to enforce a forum-selection clause, even if the contract also contains a choice-of-law clause selecting the application of another state's substantive law. *See, e.g.*, *In re AIU Ins. Co.*, 148 S.W.3d 109, 111 (Tex. 2004) (applying Texas law in a mandamus action enforce a forum-selection clause in a contract that also included a choice-of-law provision designating New York law); *In re Automoted Collection Techs., Inc.*, 156 S.W.3d 557, 558 (Tex. 2004) (same, Pennsylvania law); *In re AutoNation, Inc.*, 228 S.W.3d 663, 665 (Tex. 2007) (same, Florida law); *In re Lyon Fin. Servs.*, 257 S.W.3d 228, 230–31 (Tex. 2008) (same, Pennsylvania law); *In re Int'l Profit Assocs., Inc.* (*"Int'l Profit Assocs. I"*), 274 S.W.3d 672, 674 (Tex. 2009) (same, Illinois law); *In re Int'l Profit Assocs., Inc.* (*"Int'l Profit Assocs. II"*), 286 S.W.3d 921, 922 (Tex. 2009) (same, Illinois law). Further, the determination of whether mandamus relief is available is a matter of procedure. The law of the forum state applies to procedural questions. *Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 387 & n.17 (Tex. 2008). Accordingly, we apply Texas law in determining whether mandamus relief is available in this case.

injecting inefficiency by enabling forum-shopping, wasting judicial resources, delaying adjudication on the merits, and skewing settlement dynamics . . . ." *In re AutoNation*, 228 S.W.3d at 667–68 (quoting *In re AIU Ins. Co.*, 148 S.W.3d at 117).[3]

In this case, HealthTronics argues that the forum-selection clause does not apply to the Texas lawsuit. First, it argues that because the clause was contained only in Exhibit F, it applies only to claims specifically related to "sales by Seller . . . to HealthTronics," and not to any other claims based on the parties' relationships (such as breach of contract for failure to provide rights of first refusal or tortiously interfering with HealthTronics's contracts with its employees). Second, HealthTronics argues that the 2007 modification of the limiting language in the preamble indicates the parties' intent to limit the forum-selection clause only to disputes over sales transactions. Because all of HealthTronics's claims are directed at protecting its rights for the marketing and sale of the new lasers "to third parties" and protecting its confidential information, HealthTronics contends the claims in the Texas lawsuit are outside the scope of the clause and the Court should enforce the language of the Agreement as written and bargained for. Finally, HealthTronics argues because the plain language of the preamble to Exhibit F indicates that the exhibit applies only to sales by "Seller" [Lisa USA] to HealthTronics, the forum-selection clause does not apply to its

[3] Notwithstanding Lisa Laser's invocation of California law, the parties do not allege that there are any material differences between California and Texas law when it comes to interpretation and enforcement of forum-selection clauses. In California, as in Texas, (a) the denial of a motion to dismiss or to stay pursuant to a valid forum-selection clause may be the basis for mandamus relief; (b) a mandatory forum-selection clause is to be enforced unless it is unreasonable; and (c) the plaintiff must shoulder a "heavy burden" to prove unreasonableness, and mere inconvenience and additional expense is insufficient. *See, e.g.*, *Net2Phone, Inc. v. Superior Court*,135 Cal. Rptr. 2d 149, 154 (Cal. App. 2003); *Olinick v. BMG Entm't*, 42 Cal. Rptr. 3d 268, 273 (Cal. App. 2006); *Smith, Valentino & Smith, Inc. v. Superior Court*, 551 P.2d 1206, 1208–09 (Cal. 1976).

claims against Lisa Germany, a signatory to the Distribution Agreement but an entity that was specifically omitted from the terms in Exhibit F.

In this case, HealthTronics does not argue that the forum-selection clause is unenforceable, but that it only applies to part of the contract—sales transactions between it and Lisa USA. In examining whether claims brought by the plaintiff were within the scope of the clauses, this Court held that a reviewing court should engage in a "common-sense examination of the claims and the forum-selection clause to determine if the clause covers the claims." *Int'l Profit Assocs. I*, 274 S.W.3d at 677 (citing *Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 444 (5th Cir. 2008); *In re Laibe Corp.*, ___ S.W.3d at ___. In *International Profit Associates I*, the Court borrowed from its arbitration jurisprudence to determine whether a forum-selection clause included in contracts to provide business consulting services would apply to a tort suit. 274 S.W.3d at 674. In that case, the plaintiff the consulting company and its employee for negligently providing services, fraud, and breach of duty of good faith after the consulting company's employee allegedly embezzled large sums of money from the client. The Court held that "whether claims seek a direct benefit from a contract turns on the substance of the claim, not artful pleading . . . . [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 677 (citing *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131–32 (Tex. 2005)). Using that rationale, the Court held that the tort claims arose from the contractual relationship of the parties. *Id.*

Although *In re International Profit Associates I* discussed a tort/contract dichotomy, rather than the scope of contractual coverage, its reasoning applies in this case. HealthTronics alleges that

Lisa Laser failed to inform it of new products and failed to offer it a right of first refusal to distribute new products in the United States. Lisa Laser's obligation, if any, to do so only arises from the Distribution Agreement, in which Lisa Laser agreed to sell and HealthTronics to buy urological lasers pursuant to certain terms. Those terms are set out both in the body of the Distribution Agreement as well as in the Exhibits.

HealthTronics's textual argument—that the forum-selection clause applies only to sales "By Seller to HealthTronics" and that Section 4 of the Distribution Agreement incorporates the standard terms and conditions as "applicable to the shipment of any Product to the Distributor"—is unavailing. The Distribution Agreement and the Standard Terms and Conditions in Exhibit F are not separate, or even separable, agreements. Exhibit F does not contain price or quantity terms. *Cf.* TEX. BUS. & COM. CODE § 2.201 (setting basic terms for enforceable contracts for the sale of goods with a value over $500); *Miller v. Vaughn & Taylor Const. Co.*, 345 S.W.2d 852, 853 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.) ("A contract is not sufficiently certain to be enforced if it fails to specify the quantity of the goods to be sold."). Nor does it mention any particular product to be distributed. It is nothing more than the standard terms of purchase that would normally accompany any commercial purchase order. Likewise, the Distribution Agreement, while setting out the rough outline of the parties' obligations, is also incomplete. It requires and incorporates the additional terms from the exhibits to fully elucidate the parties' agreement. The exhibits are consecutively paginated following the body of the Distribution Agreement. The Distribution Agreement and the Exhibits were intended to be one document. And even if the exhibits have some independent significance, as this Court recognized in *In re Laibe*, "[a] contract can consist of more

than one document [and d]ocuments pertaining to the same transaction may be read together." *In re Laibe Corp.*, ___ S.W.3d at ___. This is a prime example of a single transaction governed by a document with multiple subparts, referencing each other, and substantially incomplete without each other, but together comprising the Agreement.

Because neither document could be considered "this Agreement" by itself, the common sense approach is to read the two documents as multiple documents describing a singular transaction, with the forum-selection clause applying to all claims arising out of the Distribution Agreement. *Int'l Profit Assocs. I*, 274 S.W.3d at 677; *see also In re Laibe*, ___ S.W.3d ___; *Neal v. Hardee's Food Sys., Inc.*, 912 F.2d 34 (5th Cir. 1990). Further, the forum-selection clause itself describes a scope broader that the mere sales transactions between Lisa USA and HealthTronics. It states that California shall be the forum "over *any* dispute arising out of this agreement," not merely any dispute arising out of *any particular sale*.

HealthTronics cites to two Texas court of appeals cases in support of its position that the forum-selection clause should not apply to its claims—*Apollo Property Partners LLC v. Diamond Houston I, L.P.*, No. 14-07-00528-CV, 2008 WL 3017549, 2008 Tex. App. LEXIS 5884 (Tex. App.—Houston [14th Dist.] Aug. 5, 2008, no pet.) and *IKON Office Solutions, Inc. v. Eifert*, 2 S.W.3d 688 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Both are distinguishable. *Apollo Property Partners* is inapposite because the forum-selection clause at issue did not clearly mandate an Illinois forum; rather, it merely prevented either party from raising venue or personal jurisdiction arguments if an action were filed in Illinois. 2008 WL 3017549 *2–3. *IKON Office Solutions* is distinguishable because the portion of the sale agreement containing the arbitration clause (an

employment agreement) was an independent, integrated agreement, and because the arbitration provision did not broadly require arbitration of all disputes between the parties. "[T]he narrow arbitration clause in this case cover[ed] only disputes *related to the termination of employment*." *IKON Office Solutions*, 2 S.W.3d at 696 (emphasis added). Because the fraudulent inducement claims at issue in the case were not related to the termination of the individual's employment, the dispute was outside the scope of the arbitration clause.

HealthTronics also argues that a change from the original 2005 distribution agreement evidences the parties' intent for the forum-selection clause to apply only to sales transaction disputes between HealthTronics and Lisa USA. The preamble to Exhibit F in the 2005 distribution agreement stated that the standard terms and conditions "apply except as specifically modified in the Distribution Agreement between the parties . . . ." The preamble in the amended, 2007 Distribution Agreement, which is effective for this dispute, states that the terms apply "to sales by [Lisa USA] to HealthTronics, Inc. pursuant to the Distribution Agreement between the parties." This amendment does not limit the forum-selection clause (which continues to state that the clause applies to "any disputes" between the parties) but merely describes the "standard terms and conditions." This amendment is reasonable, considering that Lisa Germany was not a party to the 2005 agreement, but is a party to the 2007 Distribution Agreement, and the amendment was necessary to identify the buyer and the seller.

HealthTronics's claims arise out of the Agreement rather than other general obligations imposed by law. That is, but for the Agreement, HealthTronics would have no basis to complain that Lisa Germany failed to offer the right of first refusal to HealthTronics to distribute new products,

failed to provide HealthTronics information about new products, allowed other distributors to sell products for which HealthTronics was supposed to be the exclusive distributor, and wrongfully terminated the contract. *See In re Int'l Profit Assocs. I*, 274 S.W.3d at 678. Accordingly, the trial court erred in refusing to enforce the clause in the Texas lawsuit.

Next, HealthTronics contends that even if the forum-selection clause applies to its claims against Lisa USA, it does not apply to claims against Lisa Germany, because the plain language of the preamble makes Exhibit F applicable only to "sales by Seller [Lisa USA] to HealthTronics, Inc. . . . pursuant to the Distribution Agreement." As discussed above, Exhibit F is the default terms and conditions to the sales and distribution contract between Lisa Laser and HealthTronics. Because no sales actually occur between Lisa Germany and HealthTronics, it is not surprising that Lisa Germany is not mentioned in Exhibit F.

HealthTronics's claims against Lisa Germany are for breaches of the right of first refusal and exclusivity clauses in the Distribution Agreement. Lisa Germany was a signatory to the Distribution Agreement, which incorporated Exhibit F, and HealthTronics seeks to enforce obligations of the contract in this lawsuit. A plaintiff "cannot both have his contract and defeat it too." *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005). In other words, HealthTronics cannot claim that Lisa Germany has obligations to HealthTronics under the Distribution Agreement and simultaneously claim that the forum-selection clause does not apply to those claims. *See also Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) (holding, in the context of an arbitration agreement, that "a signatory to that agreement cannot, . . . 'have it both ways': it cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed

by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory").

Accordingly, reading the forum-selection clause in Exhibit F in context of the whole Agreement, considering that Lisa Germany was a signatory to the Distribution Agreement, that the forum-selection clause applies to "any dispute arising out of this agreement," and that HealthTronics seeks to hold Lisa Germany responsible for obligations under the Distribution Agreement, we conclude that all disputes arising out of the Distribution Agreement against either or both defendants are to be litigated in Alameda County, California.

The forum-selection clause at issue in this case governs the forum for the dispute between HealthTronics and Lisa Laser, and the trial court abused its discretion in failing to dismiss the case based on the clause. For these reasons, and without hearing oral argument, TEX. R. APP. P. 52.8(c), we conditionally grant Lisa Laser's petition for writ of mandamus and direct the trial court to vacate its order and grant Lisa Laser's motion to dismiss. We are confident the trial court will comply, and the writ will issue only if it fails to do so.

OPINION DELIVERED: April 16, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0733

IN RE COLUMBIA MEDICAL CENTER OF LAS COLINAS
D/B/A LAS COLINAS MEDICAL CENTER, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this mandamus case, we must decide whether a trial court abused its discretion by refusing to reduce a punitive damages award where such damages were statutorily capped as measured against an economic damages award. We hold that it did. In a previous appeal of this same underlying case, we rendered a judgment that reduced the amount of economic damages awarded. *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 257 (Tex. 2008). Although our judgment did not also expressly order a reduction of the award of punitive damages, it is what the statute requires. *See* TEX. CIV. PRAC. & REM. CODE § 41.008(b). Accordingly, we conditionally grant the writ of mandamus.

In the underlying suit, the widow and sons of Robert Hogue, Jr. won a jury verdict on their medical malpractice claims against Columbia Medical Center. The trial court and court of appeals awarded them economic and punitive damages. *Id.* (capping any punitive damages award at (1) two times any amount of economic damages plus (2) an amount equal to any noneconomic damages not

exceeding $750,000). On appeal, we reversed the judgment of the court of appeals in part, vacating a portion of the economic damages award—loss of inheritance damages—for want of legally sufficient evidence, while affirming the rest of the judgment. *Columbia Med. Ctr.*, 271 S.W.3d at 257. Our judgment read in relevant part:

> 1) The portion of the court of appeals' judgment awarding loss of inheritance damages is reversed and judgment is rendered that the respondents take nothing on that claim;
>
> 2) The remaining portions of the court of appeals' judgment are affirmed; and
>
> 3) Petitioner shall bear the costs incurred in this Court and in the court of appeals.

After our mandate issued, Columbia attempted to tender payment to the Hogues, subtracting the loss of inheritance damages amount, and reducing the punitive damages amount proportionately. When the Hogues refused this payment, Columbia moved the trial court to enter a modified final judgment that would effectuate our mandate by reducing the economic damages award appropriately, as well as by reducing the punitive damages award to twice the amount of the economic damages award we affirmed, plus interest. The trial court denied the motion after a hearing, leaving intact the court of appeals' punitive damages award, which had been measured against an economic damages award that included loss of inheritance damages. As a result, the amount of punitive damages awarded by the final judgment exceeds the statutory cap.

Columbia petitioned this Court for mandamus relief. We have jurisdiction to issue writs of mandamus to enforce our orders. *See Lee v. Downey*, 842 S.W.2d 646, 648 (Tex. 1992) (observing that a party may seek a writ of mandamus if a trial court fails to issue judgment in accordance with

this Court's mandate); *Gammel Statesman Publ'g Co. v. Ben C. Jones & Co.*, 206 S.W. 931, 932–33 (Tex. Comm'n App. 1918, holding approved, judgm't adopted) ("[This Court's] jurisdiction continues until the case is fully determined by the court and its judgment is completely executed by the court below.").

A writ of mandamus will issue when a trial court clearly abuses its discretion and there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004). A trial court abuses its discretion when it fails to analyze or apply the law correctly. *In re Poly-America, L.P.*, 262 S.W.3d 337, 346–47 (Tex. 2008).

Punitive damages awards that are statutorily capped are required to be recalculated when the actual damages against which they are measured are reduced on appeal. *See, e.g.*, *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 861 (Tex. 1999) (vacating mental anguish damages because of legally insufficient evidence and reforming the judgment to reflect recalculated Deceptive Trade Practices Act damages at three times economic damages); *Gen. Chem. Corp. v. de la Lastra*, 852 S.W.2d 916, 924 (Tex. 1993) (remanding for a recalculation of the punitive damages cap because wrongful death damages must be excluded); *see also Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 760–61 (Tex. App.—Houston [14th Dist.] 1998, no pet.) ("Because the award for . . . mental anguish is vacated, the punitive damage cap and prejudgment interest must be recalculated."). Indeed, the Hogues do not dispute that an order expressly requiring a reduction of the punitive damages award would have been proper. The question presented here, though, is whether our judgment had that effect.

Although our judgment did not expressly address the amount of punitive damages, the statute capping punitive damages as measured against economic damages requires a reduction in punitive damages as a matter of law. *See Gen. Chem. Corp*, 852 S.W.2d at 924. We hold that, regardless of whether an appellate court judgment expressly commands it, trial courts must give effect to statutory caps on damages when the parties raise the issue. Accordingly, to give full effect to our judgment vacating a portion of economic damages, the trial court was required to reduce the punitive damages award in compliance with the statutory cap. By failing to do so, the trial court abused its discretion. *See In re Poly-America*, 262 S.W.3d at 346–47. Because this issue arises in connection with a final judgment following an appeal to this Court, we conclude that Columbia now has no other adequate remedy by appeal. For these reasons, and without hearing oral argument, *see* TEX. R. APP. P. 52.8(c), we grant the petition for writ of mandamus and direct the trial court to vacate its order denying Columbia's motion to modify the judgment, and to enter a final judgment making an appropriate reduction of the punitive damages award. We trust the trial court will comply, and the writ will issue only if it fails to do so.

OPINION DELIVERED: March 12, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0734

ZINC NACIONAL, S.A., PETITIONER,

v.

BOUCHÉ TRUCKING, INC., RESPONDENT

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

PER CURIAM

In this negligence case, we must decide whether a non-resident defendant had minimum contacts with Texas for purposes of establishing specific jurisdiction by using a third-party trucking service to transport its goods through Texas to an out-of-state customer. We conclude that it did not. Accordingly, we reverse the court of appeals' judgment, 296 S.W.3d 763, and remand to that court for consideration of respondent's alternative jurisdictional argument.

Zinc Nacional, S.A., is a Mexican company that primarily manufactures zinc sulfate and zinc oxide. It has 260 customers worldwide, thirty in the United States and three or four in Texas. It also receives raw materials from suppliers in Texas. A few years ago, Zinc began manufacturing grayback paper for use in drywall manufacturing. It has only three customers for its grayback paper, two in Mexico and one — American Gypsum — in New Mexico. Zinc is not a Texas resident and

maintains no offices in Texas. It has no employees, agents, or representatives in Texas, nor does it advertise or market its paper product here. Zinc contracts with a Mexican company, C.H. Robinson de Mexico, for transportation of its products throughout Mexico and the United States.

Zinc focuses on selling its paper product to drywall-manufacturing plants located in New Mexico, Nevada, and Florida. American Gypsum in New Mexico has been a customer of Zinc's paper product for the past seven years. Zinc ships two to three loads to American Gypsum a week. In December 1999, Zinc loaded eight rolls of grayback paper onto a C.H. Robinson trailer in Monterrey, Mexico, pursuant to a purchase order from American Gypsum. C.H. Robinson trucked the load from Monterrey, Mexico, to Laredo, Texas. The purchase order specified that the shipping terms were "F.O.B. Mid-Bridge Laredo." The shipment was then picked up in Laredo by Bouché Trucking, Inc., a Texas corporation that had been subcontracted by C.H. Robinson to transport the product to New Mexico.[1]

During transport the rolls shifted, causing the trailer rig to overturn in Texas and injure the driver, Jorge Arrellano. Arrellano sued Bouché, which then filed a third-party petition against Zinc seeking indemnity and contribution because Zinc employees loaded the paper rolls onto the trailer. Zinc filed a special appearance challenging personal jurisdiction, arguing that Texas courts could exercise neither specific nor general jurisdiction over it. *See* TEX. R. CIV. P. 120a. The trial court denied Zinc's special appearance. The court of appeals affirmed, concluding that Zinc's decision to use a shipper it knew would transport its goods through Texas on Texas roads to a customer in New

[1] There is some dispute as to whether title was actually transferred in Texas or Mexico. However, the question of where the transfer took place is irrelevant to our analysis.

Mexico constituted purposeful availment of Texas benefits, thus establishing minimum contacts for purposes of specific jurisdiction. 296 S.W.3d at 769. Because it concluded specific jurisdiction was proper, the court of appeals did not consider Bouché's alternative argument that general jurisdiction was proper as well. *Id.* at 768.

Whether a court has personal jurisdiction over a nonresident defendant is a question of law, which we review de novo. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). The Texas long-arm statute's broad "doing business" language authorizes personal jurisdiction over a nonresident defendant "as far as the federal constitutional requirements of due process will allow." *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991); TEX. CIV. PRAC. & REM. CODE § 17.042(1). To establish personal jurisdiction, the defendant must have established minimum contacts with the forum state, and the assertion of jurisdiction must comport with "traditional notions of fair play and substantial justice." *Marchand*, 83 S.W.3d at 795 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The minimum-contacts analysis requires "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

"Personal jurisdiction exists if the nonresident defendant's minimum contacts give rise to either specific jurisdiction or general jurisdiction." *Marchand*, 83 S.W.3d at 795. When specific jurisdiction is asserted, the minimum contacts analysis focuses "on the 'relationship among the

defendant, the forum, and the litigation.'" *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d. 569, 578–76 (Tex. 2007) (quoting *Guardian Royal* 815 S.W.2d at 228).

Both this Court and the United States Supreme Court have held that the mere fact that goods have traveled into a state, without more, does not establish the minimum contacts necessary to subject a manufacturer to personal jurisdiction within that state. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980); *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 112 (1987); *Michiana*, 168 S.W.3d at 788. The fact that a seller knows his goods will end up in the forum state does not support jurisdiction when the seller made no attempt to market its goods there. *Michiana*, 168 S.W.3d at 787. The exercise of jurisdiction over a merchant requires that the merchant actually direct sales *to* the forum state, not *through* it. *See Asahi*, 480 U.S. at 112 ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State. . . ."). Accordingly, a merchant's decision to ship its goods with a third-party shipper that will travel through Texas to a recipient outside of Texas does not, by itself, constitute purposeful availment.

Here, there is no evidence that Zinc has attempted to serve the market in Texas. It has no offices, employees, agents, or representatives in Texas, nor does it advertise or market its paper products here. As such, Zinc lacks the minimum contacts with Texas necessary to establish specific jurisdiction. Although Zinc does have three or four customers for its other products in Texas, and does receive some raw materials from Texas, these facts are unrelated to the accident in this case and

are thus irrelevant to the question of specific jurisdiction. However, they may have some bearing on the existence of general jurisdiction, an issue the court of appeals did not consider.

For the foregoing reasons, we grant the petition for review and, without hearing oral argument, TEX. R. APP. P. 59.1, reverse the court of appeals' judgment and remand to that court for it to consider respondent's general jurisdiction argument.

OPINION DELIVERED: April 9, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0772

TEXAS HEALTH INSURANCE RISK POOL, PETITIONER,

v.

SHARON B. SIGMUNDIK, BENJAMIN J. SIGMUNDIK AND ZACHARY P. SIGMUNDIK, AS THE SOLE AND LEGAL HEIRS AND BENEFICIARIES OF THOMAS M. SIGMUNDIK, DECEASED, AND/OR OF THE ESTATE OF THOMAS M. SIGMUNDIK, DECEASED; OTTO L. MONECKE AND VIRGINIA L. MONECKE, RESPONDENTS

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

PER CURIAM

This health-insurance subrogation case turns on two rudimentary principles:

1. A trial court abuses its discretion when it invokes the equitable "made whole" doctrine to circumvent a party's contractual right to subrogation.

2. A trial court may not cut a party out of a settlement where the settlement purports to resolve that party's claim, and the party participated in the proceedings and requested an allocation.

As the court of appeals' decision runs counter to both these principles, we reverse its judgment and remand to the trial court for further proceedings consistent with this opinion.

* * *

Thomas Sigmundik was injured in an oilfield explosion and spent 52 days in the hospital before succumbing to his extensive injuries. His insurer, the Texas Health Insurance Risk Pool, paid $336,874.71 in medical expenses resulting from the accident.[1]

After Sigmundik's death, his wife filed a negligence action on behalf of herself, her two minor sons, and Sigmundik's estate. The Risk Pool intervened, arguing it was "subrogated to the rights of Mr. Sigmundik and his estate" based on this express subrogation provision in Sigmundik's health-insurance policy:

> We will be subrogated to all rights of recovery which any person may have against another party for all benefits paid by the Pool which were incurred by the Insured Person as a result of the negligence or misconduct of another party. Our right to repayment shall be a lien against any recovery by the Insured Person whether it be by judgment, settlement, or otherwise.

The negligence suit settled for $800,000. Mrs. Sigmundik signed on behalf of all settling plaintiffs (herself, her two children, and the estate), but the settlement agreement did not specify how the funds would be allocated. The trial court held a bench trial to allocate the settlement and awarded the entire $800,000 to the Sigmundik family, finding it had not been "made whole" by the settlement. The trial court concluded that equitable principles apply to the Risk Pool's subrogation claim and that where "a subrogation claim[] works an injustice, it shall not be allowed." For support, it cited our decision in *Ortiz v. Great Southern Fire and Casualty Insurance Co.*, 597 S.W.2d 342, 343-44 (Tex. 1980), which held an insurer may be denied *equitable* subrogation when the injured parties are not "made whole"—that is, fully compensated. Noting the Risk Pool's solid financial

[1] The Risk Pool is a quasi-governmental entity that exists to provide affordable insurance to Texans who have pre-existing conditions or other high-risk conditions that might prevent them from obtaining insurance otherwise. *See* TEX. INS. CODE §§ 1506.101, .152.

position, the trial court found that allowing subrogation "would work a financial hardship" on Sigmundik's family, but disallowing subrogation "would not work a financial hardship" on the Risk Pool. The trial court thus allocated everything to Sigmundik's widow and two children and nothing to the estate (and consequently nothing to the Risk Pool, which as subrogee contractually stood in Sigmundik's shoes). The court of appeals affirmed. ___ S.W.3d ___.

Subrogation comes in three varieties: equitable, contractual, and statutory. Shortly before the court of appeals issued its decision in this case, we issued *Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007), which held that the "made whole" doctrine does not apply where, as here, "the parties' agreed contract provides a clear and specific right of subrogation." *Id.* at 651. As we indicated in *Fortis Benefits*, equitable doctrines conform to contractual and statutory mandates, not vice versa. *Id*. at 648. We further clarified 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." *Id.* at 650.

Fortis Benefits eliminated the basis for the trial court's judgment in this case, as *Ortiz* dealt with equitable subrogation, not, as here, contractual subrogation. Nonetheless, the court of appeals affirmed the trial court's judgment, appearing to rely in part on the "made whole" doctrine but without expressly claiming to. ___ S.W.3d at ___ (holding that the trial court did not abuse its discretion since there were not enough settlement funds to compensate Sigmundik's wife and sons, and thus, in the words of Sigmundik's wife, "there is nothing left for [the estate]" (alteration in original)).

Under *Fortis Benefits*, the "made whole" doctrine is inapplicable in this case. The Risk Pool has a contract-based lien on any recovery by Sigmundik's estate, and the amount of repayment sought, $336,874.71, was not contested. The rub is this: the contractual "lien against any recovery" means nothing if there is no recovery by the insured—that is, if the estate receives no part of the settlement. Thus, if the settling parties are the three Sigmundik family members and Thomas Sigmundik's estate, any amount allocated to Thomas Sigmundik would not go to his wife and children but to the Risk Pool as subrogee. Here, the trial court avoided the Risk Pool's subrogation right by directing all the settlement funds to the family and none to the estate.

It was improper to cut the Risk Pool out of a settlement to which it, through the estate, has a valid claim, just as it would be an error to cut out any other estate creditor or recipient in this situation. As in all cases tried to the bench, the trial court was authorized to decide disputed issues of fact and law, *see* TEX. R. CIV. P. 262, however, a trial court abuses its discretion by failing to follow guiding rules and principles. *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 856 (Tex. 2009). Here, the trial court could not cut the estate completely out of the settlement just because the estate's main beneficiary is an insurance company or, more to the point, because the trial court believed the surviving family needed the money more than the insurer. This is especially true where beneficiaries and representatives are trying to remove others with an interest in the estate, notwithstanding fiduciary and other obligations owed by those asserting control of the estate. *See, e.g.*, TEX. PROB. CODE § 37 (providing that if someone dies intestate, his estate vests immediately in his heirs at law, but "shall still be liable and subject in their hands to the payment of the debts of

the intestate . . . ."). In this context, the "made whole" doctrine has no application; it was not a valid basis for the judgment.

The Sigmundiks' other argument in support of the judgment is likewise erroneous. The court of appeals found that the Risk Pool failed to carry its burden of establishing that settlement funds should be allocated to the estate. ___ S.W.3d ___. However, the Risk Pool provided such evidence. The Risk Pool requested the full amount of the medical expenses, $336,874.71, beginning with its first petition in intervention. The Risk Pool provided extensive medical records and testimony to support both the expenses it requested and the damages suffered by Sigmundik; that evidence was uncontroverted. Even Sigmundik's wife testified that his injuries—for which the Risk Pool could seek recovery—amounted to "[e]xceedingly more than" one million dollars. In short, there was evidence that the damages to Sigmundik exceeded the amount of the $800,000 settlement. There can be no doubt that all of the parties here—Sigmundik's wife and children, but also Sigmundik himself (and thus his estate)—suffered substantial injuries. Trial-court discretion is not boundless and cannot insulate a decision to allocate none of the $800,000 settlement to Sigmundik when the court knew the facts surrounding his severe burns and trauma, his suffering and numerous surgeries, and his death 52 days later.

The Sigmundiks also argue that the Risk Pool lacked standing to bring its claim via the estate. However, the Risk Pool asserts it is entitled to a distribution of the settlement funds since its contract gives it a lien on any judgment recovered by the estate; it does not claim to be bringing an action on behalf of the estate. Moreover, the Sigmundiks asserted *their* claims "as the sole and legal heirs and beneficiaries of Thomas M. Sigmundik, deceased and/or of the Estate of Thomas M.

Sigmundik, deceased." We have held that heirs in a survival action may sue on behalf of the decedent's estate if they allege there is no administration pending and none is necessary, which was done here. *See Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 850-51 (Tex. 2005); *Shepherd v. Ledford*, 962 S.W.2d 28, 31-32 (Tex. 1998). The Risk Pool seeks only to intervene in that action, and has standing to do so. Even if there had been a problem with the Risk Pool's capacity, the Sigmundiks did not challenge the Risk Pool's capacity to intervene in the survival action, so that argument has been waived. TEX. R. CIV. P. 93; *Austin Nursing Ctr.*, 171 S.W.3d at 849 (holding that "a challenge to a party's capacity must be raised by a verified pleading in the trial court").

As we noted in *Fortis Benefits*, "contract rights generally arise from contract language; they do not derive their validity from principles of equity but directly from the parties' agreement." 234 S.W.3d at 647. Here, the trial court acknowledged the subrogation provision, quoted it in full, and then denied any distribution of funds based upon the provision. While the trial court was free to exercise some discretion in dividing the settlement funds, it abused its discretion by awarding the Risk Pool nothing. The "made whole" doctrine has no application in this case. Accordingly, in light of our *Fortis Benefits* decision and without hearing oral argument in this case, we grant the petition for review, reverse the court of appeals' judgment, and remand to the trial court to determine what portion of the settlement funds should be allocated to the estate. *See* TEX. R. APP. P. 59.1.

OPINION DELIVERED: May 28, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-0786

IN RE ODYSSEY HEALTHCARE, INC. AND GEORGE PORTILLO, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

In this negligence case, we must decide whether the trial court abused its discretion by refusing to grant the relator's motion to compel arbitration. We conclude that it did. Here, the real party in interest failed to prove a valid defense against enforcement of her agreement to arbitrate disputes with her employer. Accordingly, we conclude the trial court abused its discretion in failing to compel arbitration, and we conditionally grant the writ of mandamus.

Guadalupe Morales worked in El Paso for Odyssey Healthcare, Inc., which provides hospice care. Morales alleges that she was injured at work when she tripped on an uneven step at a patient's home. She sued Odyssey and her supervisor, George Portillo, for negligence.

Odyssey is a non-subscriber and, in lieu of workers' compensation insurance, it provided its workers with an "Occupational Injury Benefit Plan." Morales enrolled in this plan as a condition of her employment. Upon being sued, Odyssey moved to compel arbitration, relying on the arbitration clause contained in the plan.

The agreement between Morales and Odyssey provides in relevant part:

- All claims or disputes described below [including injury caused by negligence] that cannot otherwise be resolved between the Company and you are subject to **final and binding** arbitration. **This binding arbitration is the only method for resolving any such claim or dispute.** (emphasis in original)

- The Company is engaged in transactions involving interstate commerce . . . and your employment involves such commerce. The Federal Arbitration Act will govern the interpretation, enforcement, and proceedings under this arbitration requirement.

- Unless otherwise agreed to in writing by the parties, the arbitrator selected by the parties . . . shall be selected from a panel of arbitrators located in Dallas County, Texas.

- Adequate consideration for this arbitration requirement is represented by, among other things, your eligibility for (and not necessarily any receipt of) benefits under this Plan and the fact that it is mutually binding on both the Company and you.

- [T]he Company reserves the right to amend, modify, or terminate the Plan at any time; provided, however, that no such amendment or termination will alter the arbitration provisions incorporated into this booklet with respect to, or reduce the amount of any benefit payable to or with respect to you under the Plan in connection with, an Injury occurring prior to the date of such amendment or termination. In addition, any such amendment or termination of the arbitration provisions incorporated into this booklet shall not be effective until at least 14 days after written notice has been provided to you.

After a hearing, the trial court denied Odyssey's motion to compel arbitration. The court found that the arbitration provision forcing Morales to arbitrate in Dallas was unconscionable.[1] The

[1] The trial court also found unconscionable a provision in the agreement that employees must "allow an authorized representative of the Company to go with you to appointments with health care providers." However, in considering an arbitration clause, unconscionability "must specifically relate to the [arbitration clause] itself, not the contract as a whole, if [unconscionability is] to defeat arbitration." *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001). Therefore, we express no opinion as to this determination of unconscionability, as it does not relate to whether to enforce the arbitration clause at issue.

court of appeals denied Odyssey's petition for writ of mandamus. ___ S.W.3d ___ (Tex. App.—El Paso 2009).

Mandamus will issue if the relator establishes a clear abuse of discretion for which there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004). A trial court that refuses to compel arbitration under a valid and enforceable arbitration agreement has clearly abused its discretion. *See In re Halliburton Co.*, 80 S.W.3d 566, 573 (Tex. 2002). A party seeking to compel arbitration must establish the existence of a valid arbitration agreement between the parties. *Cantella Co. v. Goodwin*, 924 S.W.2d 943, 945 (Tex. 1996) (orig. proceeding) (per curiam). The party seeking to avoid arbitration then bears the burden of proving its defenses against enforcing an otherwise valid arbitration provision. *FirstMerit Bank*, 52 S.W.3d at 756. Morales does not dispute that her claims are covered by the agreement and subject to arbitration if the arbitration clause is valid and enforceable.

Morales asserts several grounds for why the arbitration clause here is invalid and unenforceable, including substantive unconscionability, a non-waiver provision of the Texas Workers' Compensation Act, a Tenth Amendment violation by the Federal Arbitration Act, and illusory promises or lack of mutual consideration. We address these arguments in turn.

First, we conclude that Morales failed to establish that the arbitration clause is unconscionable. Substantive unconscionability refers to whether the arbitration provision ensures preservation of the substantive rights and remedies of a litigant. *Halliburton*, 80 S.W.3d at 572. Morales contends the arbitration clause is unconscionable because it will force her to arbitrate in Dallas, and she will incur substantial expense by having to produce witnesses in Dallas. Testimony

from an Odyssey representative showed that Odyssey intended to arbitrate all employee claims covered by this agreement in Dallas, and it had never agreed to arbitrate any claims elsewhere. Regardless, when a party contests arbitration due to substantial expense, that party bears the burden of proving the likelihood of incurring such costs, and must provide some specific information concerning those future costs. *See FirstMerit Bank*, 52 S.W.3d at 756 ("[T]here is no doubt that *some* specific information of future costs is required."). Here, the record fails to show any specific information or evidence about what costs Morales would likely incur. Her conclusory assertions about costs relating to witnesses and medical experts are thus "legally insufficient evidence that [Morales] would be denied access to arbitration based on excessive costs." *Id.* at 757. Moreover, nothing in the agreement requires the arbitration to occur in Dallas. The agreement simply provides that (absent agreement otherwise) the arbitrator must be selected from a Dallas panel of arbitrators. Finally, even if the arbitrator were to conduct arbitration in Dallas, and even if this would cause Morales to incur substantial expense, the arbitrator may still "assess whether the cost provision in this case will hinder effective vindication of [the employee's] statutory rights and, if so, . . . modify the contract's terms accordingly." *In re Poly-America, L.P.*, 262 S.W.3d 337, 357 (Tex. 2008).

Next, Morales is incorrect that a certain non-waiver provision of the Texas Workers' Compensation Act defeats the arbitration provision. Texas Labor Code section 406.033(e), which applies to non-subscribers such as Odyssey, states: "A cause of action described in Subsection (a) may not be waived by an employee before the employee's injury or death. Any agreement by an employee to waive a cause of action or any right described in Subsection (a) before the employee's

injury or death is void and unenforceable."[2] However, we have held that section 406.033(e) does not render an arbitration agreement void. *In re Golden Peanut Co., LLC*, 298 S.W.3d 629, 631 (Tex. 2009) (per curiam) ("[A]n agreement to arbitrate is a waiver of neither a cause of action nor the rights provided under section 406.033(a), but rather an agreement that those claims should be tried in a specific forum. Accordingly, section 406.033(e) does not render the arbitration agreement void." (internal citations omitted)).

Third, we conclude that the Federal Arbitration Act does not violate the Tenth Amendment by encroaching on a state power to enact and regulate its own workers' compensation system. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Tenth Amendment is a limitation "upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to . . . regulate commerce." *Nat'l League of Cities v. Usery*, 426 U.S. 833, 842 (1976). The United States Supreme Court has stated that there are three requirements to show that a statute violates the Tenth Amendment: (1) a showing that the challenged statute regulates the states as states; (2) the federal regulation must address matters that are indisputable attributes of state sovereignty; and (3) it must be apparent that the states' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional government functions. *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 287–88 (1981). Even if all three are met, "[t]here are situations in which

[2] Texas Labor Code section 406.033(a) refers to causes of action against a non-subscriber employer "to recover damages for personal injuries or death sustained by an employee in the course and scope of the employment."

the nature of the federal interest advanced may be such that it justifies state submission." *Id.* at 288 n.29.

We have recognized that a state has a Tenth Amendment power to enact and regulate its own workers' compensation system, protecting workers' claims against employers. *Ruiz v. Miller Curtain Co., Inc.*, 702 S.W.2d 183, 185 (Tex. 1985). However, we have also held that statutory claims under the Texas Workers' Compensation Act are arbitrable. *See Poly-America*, 262 S.W.3d at 352 ("An arbitration agreement covering statutory claims [including workers' compensation claims] is valid so long as the arbitration agreement does not waive substantive rights and remedies of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights." (internal citation omitted)). Thus, we conclude that compliance with the Federal Arbitration Act would not "directly impair [Texas's] ability to structure integral operations in areas of traditional government functions," *Hodel*, 452 U.S. at 288 (internal quotation omitted).

Finally, Morales is incorrect that the arbitration provision lacks consideration and is illusory for lack of mutual obligation. Mutual promises to submit all employment disputes to arbitration is sufficient consideration for such agreements. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 228 (Tex. 2003). Such mutual obligations existed here. Moreover, an arbitration clause is not illusory unless one party can avoid its promise to arbitrate by amending the provision or terminating it altogether. *Halliburton*, 80 S.W. 3d at 570. In *Halliburton*, we considered a very similar arbitration clause, which provided that "no amendment shall apply to a Dispute of which the Sponsor [Halliburton] had actual notice on the date of amendment," and that "termination shall not be effective until 10 days after reasonable notice of termination is given to Employees or as to Disputes

which arose prior to the date of termination." *Id.* at 569–70. Here, too, the agreement provided that "no such amendment or termination [by Odyssey] will alter the arbitration provisions incorporated into this booklet with respect to, or reduce the amount of any benefit payable to . . . you under the Plan in connection with, an Injury occurring prior to the date of such amendment or termination," and that "any such amendment or termination of the arbitration provisions incorporated into this booklet shall not be effective until at least 14 days after written notice has been provided to you." Thus, because of these limitations on Odyssey's right to amend or terminate the agreement, the arbitration agreement did not contain an illusory promise by Odyssey.

For these reasons, we conclude that the arbitration clause at issue was valid and enforceable, and the trial court abused its discretion by failing to grant Odyssey's motion to compel arbitration. Mandamus relief is appropriate because Odyssey has no adequate remedy by appeal. *See id.* at 573. Therefore, without hearing oral argument, TEX R. APP. P. 52.8(c), we conditionally grant the writ of mandamus and direct the trial court to vacate its prior order and grant Odyssey's motion to compel arbitration. We are confident the trial court will comply, and the writ will issue only if it fails to do so.

OPINION DELIVERED: May 7, 2010

IN THE SUPREME COURT OF TEXAS

NO. 09-1014

IN RE PERVEZ DAREDIA, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

JUSTICE LEHRMANN did not participate in the decision.

American Express Centurion Bank and American Express Bank, FSB ("American Express") sued Pervez Daredia and Map Wireless, Inc. to recover $769,789.91 due on three credit card accounts. Daredia answered, but Map Wireless did not, and American Express moved the court "to award . . . the relief requested . . . by signing and entering the attached DEFAULT JUDGMENT." That judgment, drafted by American Express's counsel, recited Map Wireless's default and awarded damages and attorney fees against Map Wireless. The last two sentences of the judgment stated: "All relief not expressly granted herein is denied. This judgment disposes of all parties and all claims in this cause of action and is therefore FINAL." The trial court signed the judgment, and no one appealed. More than fifteen months later,[1] American Express moved for judgment nunc pro tunc to correct what it called "typographical errors on behalf of the attorney in charge", who "should have

[1] In the interim, the only actions taken in the case by American Express were to substitute counsel and to serve on Daredia "Judgment Creditor's Interrogatories in Aid of Judgment". Daredia immediately responded that he had been discharged by the judgment, which was final. Six months later, American Express moved for judgment nunc pro tunc.

used the word 'Interlocutory' in both the motion and judgment", so that the case could proceed against Daredia. Daredia responded that the judgment was final and that the court had lost plenary power over it thirty days after it was signed. *See* TEX. R. CIV. P. 329b. But the court granted the motion, and the court of appeals denied Daredia mandamus relief. ___ S.W.3d ___ (Tex. App.–Fort Worth (2009)) (mem. op.).

The court of appeals concluded that the judgment "is ambiguous on its face" because it "fails to address any of American Express's claims against Daredia, yet it contains language that clearly and unequivocally indicates that it is a final judgment." *Id*. at ___. Given this ambiguity, the court held that "the judgment was interlocutory", it "did not resolve American Express's claims against Daredia", and therefore "the trial court retains jurisdiction over this case." *Id*. The court relied on our decision in *Lehmann v. Har-Con Corp.,* 39 S.W.3d 191, 205 (Tex. 2001), but *Lehmann* is to the contrary. There we explained that

> the language of an order or judgment *can* make it final, even though it should have been interlocutory, if that language expressly disposes of all claims and all parties. It is not enough, of course, that the order or judgment merely use the word "final". The intent to finally dispose of the case must be unequivocally expressed in the words of the order itself. But if that intent is clear from the order, then the order is final and appealable, even though the record does not provide an adequate basis for rendition of judgment.

Id. at 200. We held that "the inclusion of a Mother Hubbard clause—by which we mean the statement, 'all relief not granted is denied', or essentially those words—does not indicate that a judgment rendered without a conventional trial is final for purposes of appeal." *Id*. at 203-204. But we suggested that "[a] statement like, 'This judgment finally disposes of all parties and all claims

and is appealable', would leave no doubt about the court's intention" to finally dispose of the case. *Id*. at 206. And we cautioned that

> if the language of the order is clear and unequivocal, it must be given effect despite any other indications that one or more parties did not intend for the judgment to be final. An express adjudication of all parties and claims in a case is not interlocutory merely because the record does not afford a legal basis for the adjudication. In those circumstances, the order must be appealed and reversed.

Id.

We agree with the court of appeals that the language of the judgment in this case clearly and unequivocally indicates that it is intended to be final. The use of the word "final" in the last sentence is slightly less clear than "appealable", the example offered in *Lehmann*. A judgment might possibly be said to be "final" as to only some claims or parties, while it would not be "appealable" unless it disposed of all. But the language of this judgment is clear enough. The court of appeals' holding that the failure to mention Daredia creates an ambiguity that makes the judgment interlocutory is contradicted by *Lehmann*.

American Express argues that, in *Lehmann*'s words, "[t]o determine whether an order disposes of all pending claims and parties, it may of course be necessary for the appellate court to look to the record in the case", *id*. at 205-206, and here the record clearly shows that a default judgment against Daredia, whose answer was on file, would have been improper. Further, American Express argues, the trial court itself recognized that the judgment was not intended to affect the claim against Daredia because it corrected (by initialed strikeouts) two typographical errors in the judgment as follows:

> IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that said Defendant, ~~and~~ Map Wireless, Inc., is indebted to the Plaintiff, American Express Centurion Bank and American Express Bank, FSB, and that the Plaintiff is entitled to recover from the Defendant, ~~and~~ Map Wireless, Inc., the principal amount sued for, accrued interest, reasonable attorney fees, and all court costs.

The plain implication of these changes, American Express argues, is that the judgment was intended only to affect Map Wireless. The trial court simply erred in failing to strike the last two sentences.

But the lack of any basis for rendering judgment against Daredia did not preclude dismissing him from the case. Even if dismissal was inadvertent, as American Express insists, it was nonetheless unequivocal, and therefore effective. American Express complains that the trial court never made a substantive disposition of its claims against Daredia, but dismissal is not a ruling on the merits. We conclude that the judgment by its clear terms disposed of all claims and parties and was therefore final.

Even so, American Express contends that the dismissal of its claim against Daredia was a clerical error, not a judicial one, which could still be corrected after the judgment became final. But only errors made in entering a judgment are clerical; an error in rendition is judicial. *Escobar v. Escobar,* 711 S.W.2d 230, 231 (Tex. 1986). "[P]rovisions alleged to have been inserted by mistake of the attorney nevertheless become a part of the court's judgment and therefore are judicial errors when thus rendered in writing by the court." *Dikeman v. Snell*, 490 S.W.2d 183, 185-186 (Tex. 1973). By American Express's own admission, that fairly characterizes what occurred in this case.

American Express also argues that the error was clerical because a trial court has a ministerial duty to grant no more relief than a party requests, at least by way of dismissal or nonsuit, and if it does so, a party is entitled to correction nunc pro tunc. *See In re Bridges*, 28 S.W.3d 191, 194-195

(Tex. App.–Fort Worth 2000) (orig. proceeding). *But see Travelers Ins. Co. v. Joachim*, ___ S.W.3d ___, ___ (Tex. 2010) (holding that a dismissal with prejudice after nonsuit, while erroneous, is not void); *In re ROC Pretrial*, 75 S.W.3d 15, 17-18 (Tex. App.–San Antonio 2001, no pet.) (holding that the necessary import of *Abu-Ahmad v. Shadowbrook Apts.*, 783 S.W.2d 210 (Tex. 1990) (per curiam), is that an order dismissing more parties than the plaintiff nonsuited is not void). Even if American Express's argument were correct, and we are not sure it is, it finds no application in this case. The relief American Express requested in its motion for default judgment was that the trial court would sign the judgment attached to the motion, and that is what the trial court did. The error, if there was one, was in the request for and rendition of judgment and thus could not be corrected nunc pro tunc after the trial court lost plenary jurisdiction.

American Express complains that the judgment, if not corrected, will give Daredia a windfall, but being given the relief an opponent requests can hardly be considered a windfall. Further, had American Express acted promptly in pursuing its claim against Daredia, before and after suit, counsel's error in allowing the claim to be dismissed could have been rectified, either by timely moving to reinstate the case, or perhaps by refiling the lawsuit. *See Christensen v. Chase Bank USA, N.A.*, 304 S.W.3d 548, 554 (Tex. App.–Dallas 2009, pet. filed) (a general denial of relief is without prejudice). *But see Alvarado v. Magic Valley Elec. Co-op, Inc.*, 784 S.W.2d 729, 733 (Tex. App.–San Antonio 1990, writ denied) (a general denial of relief is a decision on the merits).

We conclude that the trial court clearly abused its discretion in setting aside a judgment after its plenary power expired. Daredia has no adequate remedy at law. *See In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998) (per curiam) (granting mandamus relief to set aside an order granting a motion

for new trial filed after the trial court's plenary power had expired); *see also In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136-137 (Tex. 2004). Accordingly, without hearing oral argument, we conditionally grant Daredia's petition for mandamus and direct the trial court to vacate its order dated February 24, 2009, granting American Express's motion for judgment nunc pro tunc and vacating the default judgment dated July 2, 2007. TEX. R. APP. P. 52.8(c). We are confident that the trial court will promptly comply; our writ will issue only if it does not.

OPINION DELIVERED: July 2, 2010